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CASES REPORTED

Vols. 57–59 P.

P.

	Vol.	Page
Abrahams v. Los Angeles Traction Co.	57	216
Ackley v. Fishbeck	57	207
Adams; Bowering v.	59	134
Adams; Donnelly v.	59	208
Adams; Peck v.	59	1112
Adams' Estate, In re	57	569
Agnew; Peck v.	59	125
Alameda County v. Crocker	57	766
Alferitz v. Borgwardt	58	460
Alhambra Addition Water Co.; Mayberry v.	58	68
Allen; Clark v.	57	985
Allison v. Board of Education of City of San Bernardino School Dist.	57	673
Altschul; Westall v.	58	458
American Ins. Co.; Whitney v.	59	897
Anderson v. Anderson	57	81
Anderson; Demartini v.	59	207
Angus; Fair v.	57	385
Antonelle; Cadenasso v.	59	765
Arcata & M. R. R. Co.; Burk v.	57	1065
Archer v. Freeman	57	474
Armstrong's Estate, In re	58	183
Arnett; People v.	59	204
Asher v. Yorba	58	137
Ashton v. Golden Gate Lumber Co.	58	1
Ashton v. Heydenfeldt	59	759
Atwood's Estate, In re	59	770
Azusa Irr. Co.; Vineland Irr. Dist. v.	58	1057
Babcock; Rohrer v.	58	537
Baker; Ferris v.	59	937
Baker v. Southern California R. Co.	58	1055
Baker v. Varney	59	778
Baldwin; Knowles v.	57	988
Baldwin v. State	59	1112
Baldwin v. Superior Court	58	185
Ballard; City of Santa Ana v.	59	133
Ballou; Lilienthal v.	57	897
Bane v. Peerman	57	885
Bank of Commerce of San Francisco v. Scofield	58	451
Bank of Lake; Johnson v.	57	664
Bank of Lemoore; Powell v.	58	83
Bank of Orland v. Dodson	59	584
Bank of Woodland v. Oberhaus	57	1070
Barbour v. Flick	59	122
Barclay v. Blackinton	59	834
Barker; Harvey v.	58	692
Barnett; Santa Rosa Nat. Bank v.	58	85
Barnhart v. Edwards	57	1004
Barrett; Savings Bank v.	58	914

	P. Vol.	Page
Barthe v. Rogers	59	310
Bates v. Escot	59	943
Bathgate v. Irvine	58	442
Baxter v. Gilbert	58	129
Baxter v. Gilbert	58	374
Bayley v. Employers' Liability Assur. Corp. of London, England	58	7
Beattie v. Crewdson	57	463
Beatty; Keech v.	59	837
Beck v. Pasadena Lake Vineyard Land & Water Co.	59	387
Bedell v. Scott	59	210
Bell; Blackburn v.	57	775
Bell; Southern Pac. R. Co. v.	58	1116
Bell; Staacke v.	57	1012
Bell's Estate, In re	58	153
Bemmerly v. Woodward	57	561
Bennallack v. Richards	58	65
Benson v. Bunting	59	991
Bergen v. Frisbie	57	784
Bergevin v. Curtz	59	312
Bergin; Williams v.	57	1072
Berka v. Woodward	57	777
Bieler; Franz v.	58	466
Bigelow; Macomber v.	58	312
Bingham; Hennessey v.	58	200
Birch v. Phelan	59	209
Bishop v. McKillican	57	76
Blackburn v. Bell	57	775
Blackinton; Barclay v.	59	834
Blackman; People v.	59	573
Blair v. Squire	59	211
Blankenship v. Whaley	57	79
Blythe v. Hinckley	59	787
Board of Education of City of Los Angeles; Vernon School Dist. v.	58	175
Board of Education of City of Petaluma; Swafford v.	59	900
Board of Education of City of San Bernardino School Dist.; Allison v.	57	673
Board of Election Com'rs of City and County of San Francisco; Martin v.	58	932
Board of Health of City and County of San Francisco; Patton v.	59	702
Board of Sup'rs of City and County of San Francisco; Brown v.	57	82
Bogue; Kramm v.	59	394
Borgwardt; Alferitz v.	58	460
Borgwardt; Hammond v.	59	121
Boston & S. R. Fruit Co.; Security Loan & Trust Co. of Southern California v.	58	941
Boston & S. R. Fruit Co.; Security Loan & Trust Co. of Southern California v.	59	296
Bowering v. Adams	59	134
Boyd v. Heron	58	64
Boyd v. Southern California R. Co.	58	1046
Bradbury v. McHenry	57	999
Bringham v. Knox	59	198
Brittan v. Oakland Bank of Savings	57	84
Broderick; City and County of San Francisco v.	57	887
Broderick; City and County of San Francisco v.	57	1098
Broderick; City Imp. Co. v.	57	776
Brooks; California Bank v.	59	302
Brouse v. Law	59	384
Brown v. Board of Sup'rs of City and County of San Francisco	57	82
Brown; Gilliam v.	58	466

	P. Vol.	P. Page
Brown v. McKay	57	1001
Brown v. Rouse	58	267
Browne v. Sweet	59	774
Buckley v. Mohr	58	261
Buckner; Troxler v.	58	691
Budd; McKenzie v.	58	199
Bunting; Benson v.	59	991
Burk v. Arcata & M. R. R. Co.	57	1065
Burr; Kellogg v.	58	306
Burr; McCray v.	58	203
Butler; Estrella Vineyard Co. v.	57	980
Buttrick; Odell v.	59	133
Byrne v. Hoag	58	688
Byrne v. Hudson	59	597
Cadenasso v. Antonelle	59	765
California Bank v. Brooks	59	302
California Bridge & Construction Co.; Hanley v.	59	577
California Lustral Co.; Johnson v.	59	595
California Mortg. & Sav. Bank v. Hampton	57	1073
California Nav. & Imp. Co. v. Union Transp. Co.	58	936
California Savings & Loan Soc. v. Culver	59	292
California Street Cable R. Co.; Lombardi v.	57	66
Calkins v. Equitable Building & Loan Ass'n of the United States	59	30
Campan v. Molle	57	208
Campbell v. Drais	57	994
Campbell; Gately v.	57	567
Campbell; People v.	59	593
Cannedy; Ruggles v.	59	827
Carlisle; Miller v.	59	785
Carlisle; Miller v.	59	1112
Carpenter v. Nutter	59	301
Carr; Compton v.	59	29
Casebeer; Williams v.	58	1116
Casebeer; Williams v.	58	380
Casey v. Leggett	58	264
Castro; People v.	58	133
Cauhape v. Security Sav. Bank	59	589
Central Pac. R. Co. v. McCann	58	1045
Chapman v. Hughes	58	298
Chapman v. Hughes	58	916
Childs; People v.	59	768
Chilstrom v. Eppinger	59	696
Church; Hart v.	58	910
Church; Hart v.	59	296
Churchill v. Flournoy	59	791
City and County of San Francisco v. Broderick	57	887
City and County of San Francisco v. Broderick	57	1098
City and County of San Francisco v. Dunham	58	1115
City and County of San Francisco; Holladay v.	57	146
City and County of San Francisco; Lampe v.	57	461
City and County of San Francisco; Lampe v.	57	1001
City and County of San Francisco v. Sharp	58	173
City and County of San Francisco v. Sharp	58	1115
City and County of San Francisco; Sweeney v.	57	1098
City Imp. Co. v. Broderick	57	776
City of Alameda; Cohen v.	57	377
City of Los Angeles; Hellman v.	58	10
City of Los Angeles v. Kysor	58	90

	Vol.	Page
City of Los Angeles v. Los Angeles City Water Co.	57	216
City of Los Angeles v. Los Angeles City Water Co.	57	571
City of Los Angeles v. Los Angeles City Water Co., two cases	57	210
City of Los Angeles; McKeeby v.	58	263
City of Los Angeles; Niles v.	58	190
City of Los Angeles v. Pomeroy	57	585
City of Los Angeles v. Pomeroy	58	69
City of Los Angeles; Thompson v.	57	1015
City of Oakland; Gill v.	57	150
City of San Diego; Higgins v.	58	700
City of San Diego; Higgins v.	59	209
City of San Luis Obispo v. Fitzgerald	58	699
City of Santa Ana v. Ballard	59	133
City of Santa Rosa; Mock v.	58	826
City of Tulare v. Hevren	58	530
Clark v. Allen	57	985
Clark; Crusoe v.	59	700
Clark; Davis v.	58	542
Clark; People v.	57	986
Clarke, Ex parte	58	546
Clarke, In re	58	22
Clarke v. Mohr	58	176
Clarke v. Mohr	59	825
Clarke v. Police Life & Health Ins. Board	59	994
Clune v. Quitzow	57	886
Coffee v. Haynes	57	482
Cohen v. City of Alameda	57	377
Cole; People v.	59	984
Colgan; Leake v.	58	69
Colusa County v. Glenn County	57	477
Commercial Bank of Santa Ana v. Pritchard	59	130
Commercial & Savings Bank of San Jose; Ryland v.	59	989
Compodonico v. Griffith	59	988
Compton v. Carr	59	29
Condee v. Gyger	59	26
Connick v. Hill	59	832
Cook; Doeg v.	58	707
Cooper v. Gordon	57	1006
Cooper; Williams v.	57	577
Costa v. Silva	59	695
County Bank of San Luis Obispo v. Greenberg	59	139
County of San Luis Obispo; Sussman v.	59	24
Court Com'rs, In re	57	1098
Cowdery v. McChesney	57	221
Cowdery v. McChesney	58	62
Craig; Kyle v.	57	791
Crandall; People v.	57	785
Crawford v. Trans-Atlantic Fire Ins. Co.	58	177
Crewdson; Beattie v.	57	463
Crocker; Alameda County v.	57	766
Crocker Estate Co.; Knowles v.	57	998
Crooks' Estate, In re	58	89
Crusoe v. Clark	59	700
Crystal Springs Land & Water Co. v. City of Los Angeles	57	210
Cull v. San Francisco & Fresno Land Co.	57	456
Culver; California Savings & Loan Soc. v.	59	292
Cuneo; Ede v.	58	538
Curtin v. Superior Court of City and County of San Francisco	58	1115

	Vol.	Page
Curtz; Bergevin v.	59	312
Cushing v. Pires	57	572
Darrough v. Herbert Kraft Company Bank	57	983
Davis v. Clark	58	542
Davis v. Hurgren	57	684
Davis v. Pacific Telephone & Telegraph Co.	57	764
Davis v. Pacific Telephone & Telegraph Co.	59	698
Davis v. Post	57	901
Dawson v. Hill	57	1098
Day v. Gunning	58	172
Day v. Gunning	59	196
De Carlo; People v.	57	383
De Greayer v. Fidelity & Casualty Co. of New York	58	390
De Groot v. Peters	57	209
Demartini v. Anderson	59	207
Den; Yndart v.	57	761
Denigan v. Hibernia Savings & Loan Soc.	59	389
Denigan v. San Francisco Sav. Union	59	390
Dennis v. First Nat. Bank of Seattle	59	777
Deuel; Stephenson v.	58	258
Dingley v. McDonald	57	574
Diss; Richardson v.	59	197
Dodge; San Joaquin Valley Bank v.	57	687
Dodson; Bank of Orland v.	59	584
Doeg v. Cook	58	707
Donnelly v. Adams	59	208
Donnelly's Estate, In re	58	61
Doolin v. Omnibus Cable Co.	57	774
Douglas; Wolfskill v.	59	987
Dow v. Swain	58	271
Doyle v. Republic Life Ins. Co.	57	667
Doyle & Son's Estate, In re	59	993
Drais; Campbell v.	57	994
Dranga v. Rowe	59	944
Drew; Newport Wharf & Lumber Co. v.	58	187
Dunham; City and County of San Francisco v.	58	1115
Dunn; Mesenburg v.	57	887
Eastlick; Wright v.	58	87
East Riverside Irr. Dist. v. Holcomb	58	817
Ede v. Cuneo	58	538
Edelman v. McDonell	58	528
Edwards; Barnhart v.	57	1004
Edwards; Fenton v.	58	320
Eikerenkotter's Estate, In re	58	370
Elder v. Grunsky	59	300
Elizalde; Porter v.	57	899
Ellis v. Rademacher	58	178
Employers' Liability Assur. Corp. of London, England; Bayley v.	58	7
Englehart-Davidson Mercantile Co.; Reid v.	58	1063
Eppinger; Chilstrom v.	59	696
Equitable Building & Loan Ass'n of the United States; Calkins v.	59	30
Eschen; Gray v.	57	664
Escot; Bates v.	59	943
Eslabe; People v.	59	577
Estrella Vineyard Co. v. Butler	57	980
Exton; Irwin v.	58	257
Fair v. Angus	57	385
Falvella; Jones v.	58	311

P.

	Vol.	Page
Farley; People v.	57	571
Fast v. Steele	59	585
Fay's Estate, In re	58	936
Fenton v. Edwards	58	320
Ferrea v. Tubbs	58	308
Ferris v. Baker	59	937
Fidelity Mut. Life Ass'n of Philadelphia, Pa.; Methvin v.	58	387
Fidelity & Casualty Co. of New York; De Greayer v.	58	390
Finger; More v.	58	322
First Nat. Bank of Seattle; Dennis v.	59	777
Fishbeck; Ackley v.	57	207
Fisk v. Mitchell	57	149
Fitzgerald; City of San Luis Obispo v.	58	699
Fletcher-Ryer Co.; Ryer v.	58	908
Flick; Barbour v.	59	122
Flournoy; Churchill v.	59	791
Forster; Wittfield v.	57	219
Foster; Riego v.	57	896
Fox v. Mackay	57	670
Fox v. Mackay	57	672
Fox v. Sutton	59	939
Fragley v. Phelan	58	923
Franz v. Bieler	58	466
Freeman; Archer v.	57	474
Freeman; Placer County Bank v.	58	388
Freeman v. Seitz	58	690
Freese; Hibernia Savings & Loan Soc. v.	59	769
French v. McCarthy	58	154
Frenna v. Sunnyside Land Co.	57	302
Fresno Canal & Irrigation Co.; Fresno Milling Co. v.	59	140
Fresno Loan & Savings Bank; Lanz v.	58	63
Fresno Milling Co. v. Fresno Canal & Irrigation Co.	59	140
Frisbie; Bergen v.	57	784
Fuhrig; People v.	59	693
F. W. Kreling's Sons Co.; Reid v.	57	773
Garcia; People v.	59	576
Gardner v. Jones	59	126
Gardner; Wormouth v.	58	20
Gately v. Campbell	57	567
Gates; Thomas v.	58	315
George v. Los Angeles R. Co.	58	819
Gilbert; Baxter v.	58	129
Gilbert; Baxter v.	58	374
Gill v. City of Oakland	57	150
Gilliam v. Brown	58	466
Gillon v. Northern Assur. Co. of London & Aberdeen	59	901
Girvin v. Simon	59	945
Gleason; People v.	59	592
Glenn County; Colusa County v.	57	477
Glueck v. Scheld	57	1003
Golden; Lothrop v.	57	394
Golden Gate Lumber Co.; Ashton v.	58	1
Goodall v. Jack	59	575
Goodwin; Scheerer v.	57	789
Goodyear Min. Co.; Johnson v.	57	383
Goodyear Min. Co.; Johnson v.	59	304
Gordon; Cooper v.	57	1006
Granger v. Richards	59	118

	P.	
	Vol.	Page
Graves v. Hebbron	58	12
Gray v. Eschen	57	664
Gray; Hayne v.	58	15
Gray; Orlandi v.	58	15
Gray v. Richardson	57	385
Greenawalt v. Mueller	59	137
Greenberg; County Bank of San Luis Obispo v.	59	139
Griffin; Hillman v.	59	194
Griffin; Hillman v.	59	696
Griffin; Peiser v.	57	690
Griffith; Compodonico v.	59	988
Griffiths v. Lewin	58	205
Griffith's Estate, In re	59	988
Grimbley v. Harrold	57	558
Grundel v. Union Iron Works	59	826
Grunsky; Elder v.	59	300
Gunning; Day v.	58	172
Gunning; Day v.	59	196
Gyger; Condee v.	59	26
Haas; Meyer v.	58	1042
Hamilton v. Smith	58	130
Hammond v. Borgwardt	59	121
Hampton; California Mortg. & Sav. Bank v.	57	1073
Hanley v. California Bridge & Construction Co.	59	577
Hargrove; Houser & Haines Mfg. Co. v.	59	947
Harrington v. Home Life Ins. Co.	58	180
Harrington v. Paterson	57	476
Harris; People v.	57	780
Harrold; Grimbley v.	57	558
Harry; Ludwig v.	58	858
Hart v. Church	58	910
Hart v. Church	59	296
Hartwell; Ramish v.	58	920
Harvey v. Barker	58	692
Harvey v. Quevas	58	1115
Hawkins; People v.	59	697
Hawkins; Smith v.	59	295
Hayden; White v.	59	118
Hayden; White v.	59	1113
Hayes; McGee v.	59	767
Hayne v. Gray	58	15
Haynes; Coffee v.	57	482
Hays v. Plummer	58	447
Hazen v. Nicholls	58	816
Hebbron; Graves v.	58	12
Hedrick's Estate, In re	59	590
Hellman v. City of Los Angeles	58	10
Henne v. Los Angeles County	59	780
Hennessey v. Bingham	58	200
Herbert Kraft Company Bank; Darrough v.	57	983
Hermann; Stackpole v.	58	935
Heron; Boyd v.	58	64
Hettick; People v.	58	918
Hevren; City of Tulare v.	58	530
Hevren v. Reed	58	536
Heydenfeldt; Ashton v.	59	759
Heydenfeldt's Estate, In re	59	839
Hibernia Savings & Loan Soc.; Denigan v.	59	389

P.

	Vol.	Page
Hibernia Savings & Loan Soc. v. Freese	59	769
Higgins v. City of San Diego	58	700
Higgins v. City of San Diego	59	209
Higgins v. Manson	58	907
Hill; Connick v.	59	832
Hill; Dawson v.	57	1098
Hill; People v.	57	669
Hillman v. Griffin	59	194
Hillman v. Griffin	59	696
Hinckley; Blythe v.	59	787
Hines v. Miller	59	142
Hite v. Hite	57	227
Hoag; Byrne v.	58	688
Hodgkin; Mackenzie v.	59	36
Hodgkin v. Williams	59	36
Hoffman; Moore v.	57	769
Hoffman; People v.	58	856
Holcomb; East Riverside Irr. Dist. v.	58	817
Holladay v. City and County of San Francisco	57	146
Holland v. McDade	58	9
Hollenbeak v. McCoy	59	201
Hollywood Cemetery Ass'n; Los Angeles County v.	57	153
Holmes; People v.	58	917
Home Life Ins. Co.; Harrington v.	58	180
Hornung v. McCarthy	58	303
Horton v. Jack	58	1051
Houghton v. Tibbets	58	318
Hoult v. Ramsbottom	59	587
Houser & Haines Mfg. Co. v. Hargrove	59	947
Hubbard v. University Bank of Los Angeles	58	297
Hudson; Byrne v.	59	597
Huellmantel v. Huellmantel	57	582
Huelsman's Estate, In re	59	776
Hughes; Chapman v.	58	298
Hughes; Chapman v.	58	916
Hurgren; Davis v.	57	684
Hurley; People v.	58	814
Hutchinson v. Hutchinson	57	674
Irvine; Bathgate v.	58	442
Irwin v. Exton	58	257
Iverson; Silveria v.	57	996
Ivett; Merced Bank v.	59	393
Jack; Goodall v.	59	575
Jack; Horton v.	58	1051
Jack v. Sinsheimer	58	130
Jack; Southern Pac. R. Co. v.	57	388
Jacks; Swain v.	57	989
James' Estate, In re	57	578
James' Estate, In re	57	1008
Jastro; Mack v.	58	372
Jefferds; People v.	58	704
Johnson v. Bank of Lake	57	664
Johnson v. California Lustral Co.	59	595
Johnson v. Goodyear Min. Co.	57	383
Johnson v. Goodyear Min. Co.	59	304
Johnson; Lasar v.	58	161
Johnson; Mendocino County v.	58	5
Johnson v. Reed	57	680

	P.	
	Vol.	Page
Johnson; Reed v.	59	986
Johnson; Sullivan v.	59	583
Jones v. Falvella	58	311
Jones; Gardner v.	59	126
Jordan v. Myres	58	1061
Jordan; Wood v.	57	997
Jordan; Wood v.	57	998
Justice's Court of City of Stockton; Simon v.	59	296
Karnes; Wheeler v.	57	893
Kasson's Estate, In re	59	950
Keech v. Beatty	59	837
Kellogg v. Burr	58	306
Kenney v. Parks	57	772
King; Maurer v.	59	290
King; People v.	58	19
Kingery; Yoakam v.	58	324
Knapp, Ex parte	59	315
Knight v. Whitmore	57	891
Knowles v. Baldwin	57	988
Knowles v. Crocker Estate Co.	57	998
Knox; Bringham v.	59	198
Kozminsky v. Williams	58	310
Kraft Company Bank; Darrough v.	57	983
Kramm v. Bogue	59	394
Kreling's Sons Co.; Reid v.	57	773
Kuhn v. Smith	58	204
Kyle v. Craig	57	791
Kyle; Sherwood v.	58	270
Kysor; City of Los Angeles v.	58	90
Lake Shore Cattle Co. v. Modoc Land & Live-Stock Co.	59	206
La Marche v. New York Life Ins. Co.	58	1053
Lampe v. City and County of San Francisco	57	461
Lampe v. City and County of San Francisco	57	1001
Landis v. Woodman	58	857
Lanz v. Fresno Loan & Savings Bank	58	63
La Purisima Gold-Min. Co.; Saunders v.	57	656
Lasar v. Johnson	58	161
Lassen County Land & Cattle Co.; Porter v.	59	563
Law; Brouse v.	59	384
Leake v. Colgan	58	69
Leffingwell; Leonis v.	58	940
Leffingwell; Leonis' Estate v.	58	940
Leggett; Casey v.	58	264
Lennon; Moran v.	59	941
Leonis v. Leffingwell	58	940
Leonis' Estate v. Leffingwell	58	940
Lewin; Griffiths v.	58	205
Lewis; People v.	57	470
Lewis; People v.	59	830
Lilienthal v. Ballou	57	897
Lindy v. McChesney	59	950
Liverpool & L. & G. Ins. Co. v. Southern Pac. Co.	58	55
Lodi High-School Dist. of San Joaquin County; People v.	57	660
Lombardi v. California Street Cable R. Co.	57	66
London & S. F. Bank v. Parrott	58	164
Long; Otto v.	59	895
Lorenz's Estate, In re	57	381
Los Angeles City Water Co. v. City of Los Angeles	57	210

	Vol.	Page
Los Angeles City Water Co.; City of Los Angeles v.	57	216
Los Angeles City Water Co.; City of Los Angeles v.	57	571
Los Angeles City Water Co.; Crystal Springs Land & Water Co. v.	57	210
Los Angeles City Water Co. v. Superior Court of Los Angeles County	57	216
Los Angeles County; Henne v.	59	780
Los Angeles County v. Hollywood Cemetery Ass'n	57	153
Los Angeles County v. Spencer	59	202
Los Angeles County v. Spencer	59	385
Los Angeles Holiness Band v. Spires	58	1049
Los Angeles R. Co.; George v.	58	819
Los Angeles Traction Co.; Abrahams v.	57	216
Lothrop v. Golden	57	394
Lowe; Rigby v.	58	153
Ludwig v. Harry	58	858
Lynch; McGuire v.	59	27
Lynch v. Pearson	57	676
Lyndon; San Jose Water Co. v.	57	481
Lyon v. Robertson	59	990
McCann; Central Pac. R. Co. v.	58	1045
McCarthy; French v.	58	154
McCarthy; Hornung v.	58	303
McChesney; Cowdery v.	57	221
McChesney; Cowdery v.	58	62
McChesney; Lindy v.	59	950
McClatchy v. Sperry	58	529
Macomber v. Bigelow	58	312
McConoughey v. Torrance	57	81
McCoy; Hollenbeak v.	59	201
McCray v. Burr	58	203
McDade; Holland v.	58	9
McDermott's Estate, In re	59	783
McDonald; Dingley v.	57	574
McDonald v. Peters	58	1065
McDonell; Edelman v.	58	528
McDuffie; Nolan v.	58	4
McGee v. Hayes	59	767
McGuire v. Lynch	59	27
McHenry; Bradbury v.	57	999
McIntyre; People v.	59	779
Mack v. Jastro	58	372
McKay; Brown v.	57	1001
Mackay; Fox v.	57	670
Mackay; Fox v.	57	672
McKay v. McKay	57	677
McKee Stair-Building Co. v. Martin	58	1044
McKeeby v. City of Los Angeles	58	263
McKenna, Ex parte	58	916
McKenzie v. Budd	58	199
Mackenzie v. Hodgkin	59	36
McKenzie; Sunkler v.	59	982
McKillican; Bishop v.	57	76
McLennan v. Wilcox	58	305
McMahon; People v.	57	224
McMullin v. McMullin	57	1098
Madera Fruit & Land Co.; Pacific Bank v.	57	462
Mann v. O'Sullivan	58	375
Manson; Higgins v.	58	907
Marchall's Estate, In re	58	449

	Vol.	Page
Marre's Estate, In re	59	385
Martin v. Board of Election Com'rs of City and County of San Francisco	58	932
Martin; McKee Stair Building Co. v.	58	1044
Matthews; People v.	58	371
Maurer v. King	59	290
Maxson v. Superior Court of Madera County	57	379
Mayberry v. Alhambra Addition Water Co.	58	68
Mayers; Phelps v.	58	1048
Mead v. State	59	1112
Mealy, In re	59	313
Mendocino County v. Johnson	58	5
Merced Academy Ass'n; Walter v.	59	136
Merced Bank v. Ivett	59	393
Merchants' Ad-Sign Co. v. Sterling	57	468
Mesenburg v. Dunn	57	887
Methvin v. Fidelity Mut. Life Ass'n of Philadelphia, Pa.	58	387
Mettler; Perkins v.	58	384
Meyer v. Haas	58	1042
Meyer; Sweeney v.	57	479
Meyer v. Widber	58	532
Miller v. Carlisle	59	785
Miller v. Carlisle	59	1112
Miller; Hines v.	59	142
Miller; Patch v.	57	986
Miller; People v.	57	770
Miller; Smeltzer v.	57	668
Miller; Watson v.	58	135
Miner; Windsor v.	57	386
Mitchell; Fisk v.	57	149
Mitchell's Estate, In re	58	549
Mock v. City of Santa Rosa	58	826
Modoc Land & Live-Stock Co.; Lake Shore Cattle Co. v.	59	206
Mohr; Buckley v.	58	261
Mohr; Clarke v.	58	176
Mohr; Clarke v.	59	825
Molina; People v.	59	34
Molle; Campan v.	57	208
Montgomery v. Rauer	57	894
Mooney; People v.	59	761
Moore v. Hoffman	57	769
Moran v. Lennon	59	941
More v. Finger	58	322
More v. More	59	823
Mowbray; Pacific Pav. Co. v.	59	205
Mueller; Greenawalt v.	59	137
Myres; Jordan v.	58	1061
Naud; Stewart v.	58	186
Neber; People v.	58	133
Nellis v. Pacific Bank	59	830
Newhall v. Sherman	57	387
Newman's Estate, In re	57	686
Newport Wharf & Lumber Co. v. Drew	58	187
New York Life Ins. Co.; La Marche v.	58	1053
New York Life Ins. Co.; Westerfeld v.	58	92
Nickey v. Stearns Ranchos Co.	58	459
Nicholls; Hazen v.	58	816
Nicholson v. Tarpey	57	457
Niles v. City of Los Angeles	58	190

	Vol.	Page
Nolan v. McDuffie	58	4
Northern Assur. Co. of London & Aberdeen; Gillon v.	59	901
Nugent; Wilson v.	57	1008
Nutter; Carpenter v.	59	301
Oakland Bank of Savings; Brittan v.	57	84
Oakland, S. L. & H. Electric R. Co.; Siemsen v.	59	1113
Oberhaus; Bank of Woodland v.	57	1070
O'Brien v. O'Brien	57	225
Odell v. Buttrick	59	133
Oliveria; People v.	59	772
Omnibus Cable Co.; Doolin v.	57	774
Orlandi v. Gray	58	15
O'Sullivan; Mann v.	58	375
Otto v. Long	59	895
Owen v. Pomona Land & Water Co.	57	71
Pacific Bank v. Madera Fruit & Land Co.	57	462
Pacific Bank; Nellis v.	59	830
Pacific Pav. Co. v. Mowbray	59	205
Pacific Telephone & Telegraph Co.; Davis v.	57	764
Pacific Telephone & Telegraph Co.; Davis v.	59	698
Packer's Estate, In re	58	59
Palmtag; Snibley v.	59	200
Parks; Kenney v.	57	772
Parrott; London & S. F. Bank v.	58	164
Pasadena Lake Vineyard Land & Water Co.; Beck v.	59	387
Patch v. Miller	57	986
Paterson; Harrington v.	57	476
Patton v. Board of Health of City and County of San Francisco	59	702
Pearson; Lynch v.	57	676
Pearsons' Estate, In re	57	1015
Peck v. Adams	59	1112
Peck v. Agnew	59	125
Peerman; Bane v.	57	885
Peiser v. Griffin	57	690
People v. Arnett	59	204
People v. Blackman	59	573
People v. Campbell	59	593
People v. Castro	58	133
People v. Childs	59	768
People v. Clark	57	986
People v. Cole	59	984
People v. Crandall	57	785
People v. De Carlo	57	383
People v. Eslabe	59	577
People v. Farley	57	571
People v. Fuhrig	59	693
People v. Garcia	59	576
People v. Gleason	59	592
People v. Harris	57	780
People v. Hawkins	59	697
People v. Hettick	58	918
People v. Hill	57	669
People v. Hoffman	58	856
People v. Holmes	58	917
People v. Hurley	58	814
People v. Jefferds	58	704
People v. King	58	19
People v. Lewis	57	470

P.

	Vol.	Page
People v. Lewis	59	830
People v. Lodi High-School Dist. of San Joaquin County	57	660
People v. McIntyre	59	779
People v. McMahon	57	224
People v. Matthews	58	371
People v. Miller	57	770
People v. Molina	59	34
People v. Mooney	59	761
People v. Neber	58	133
People v. Oliveria	59	772
People v. Perris Irr. Dist.	58	907
People v. Picetti	57	156
People v. Piggott	59	31
People v. Plyer	58	904
People v. Quinn	59	987
People v. Schoedde	58	859
People v. Shaver	59	784
People v. Shea	57	885
People v. Soap	59	771
People v. Solomon	58	55
People v. Spencer	59	1112
People v. Stegenberg	59	942
People v. Terrill	59	836
People v. Union Building & Loan Ass'n of Sacramento	58	822
People v. Union Building & Loan Ass'n of Sacramento, two cases	59	692
People v. Valliere	59	295
People v. Vereneseneckockockhoff	58	156
People v. Watson	57	1071
People v. Westlake	57	465
People v. Westlake	58	454
People v. Williams	59	581
People v. Williams	59	1112
People v. Winters	57	1067
People v. Woodruff	58	854
Perkins v. Mettler	58	384
Perris Irr. Dist.; People v.	58	907
Peters; De Groot v.	57	209
Peters; McDonald v.	58	1065
Phelan; Birch v.	59	209
Phelan; Fragley v.	58	923
Phelps v. Mayers	58	1048
Picetti; People v.	57	156
Piggott; People v.	59	31
Pires; Cushing v.	57	572
Placer County Bank v. Freeman	58	388
Plummer; Hays v.	58	447
Plyer; People v.	58	904
Police Life & Health Ins. Board; Clarke v.	59	994
Pomeroy; City of Los Angeles v.	57	585
Pomeroy; City of Los Angeles v.	58	69
Pomona Land & Water Co.; Owen v.	57	71
Porter v. Elizalde	57	896
Porter v. Lassen County Land & Cattle Co.	59	563
Post; Davis v.	57	901
Potter v. Randolph	58	905
Powell v. Bank of Lemoore	58	83
Pritchard; Commercial Bank of Santa Ana v.	59	130
Quevas; Harvey v.	58	1115

	Vol.	Page
Quinn; People v.	59	987
Quitzow; Clune v.	57	886
Rademacher; Ellis v.	58	178
Ramish v. Hartwell	58	920
Ramsbottom; Hoult v.	59	587
Randolph; Potter v.	58	905
Rathgeb's Estate, In re	57	1010
Rauer; Montgomery v.	57	894
Redington; Roche v.	57	890
Redlands Hotel Ass'n v. Richards	58	152
Reed; Hevren v.	58	536
Reed; Johnson v.	57	680
Reed v. Johnson	59	986
Reed v. Smith	58	139
Reid v. Englehart-Davidson Mercantile Co.	58	1063
Reid v. F. W. Kreling's Sons' Co.	57	773
Reis v. State	59	298
Republic Life Ins. Co.; Doyle v.	57	667
Richards; Bennallack v.	58	65
Richards; Granger v.	59	118
Richards; Redlands Hotel Ass'n v.	58	152
Richardson v. Diss	59	197
Richardson; Gray v.	57	385
Rickert, Ex parte	58	549
Riego v. Foster	57	896
Riehl; Williams v.	59	762
Rigby v. Lowe	58	153
Riverside County; San Diego County v.	58	81
Robertson; Lyon v.	59	990
Roche v. Redington	57	890
Rogers; Barthe v.	59	310
Rogers v. Superior Court of Riverside County	58	452
Rohrer v. Babcock	58	537
Rossi; Wolters v.	57	73
Rossi; Wolters v.	59	143
Rouse; Brown v.	58	267
Rowe; Dranga v.	59	944
Ruggles v. Cannedy	59	827
Runyon's Estate, In re	57	783
Ryer v. Fletcher-Ryer Co.	58	908
Ryland v. Commercial & Savings Bank of San Jose	59	989
Sacramento County v. Southern Pac. Co.	59	568
Sacramento County v. Southern Pac. R. Co.	59	825
Saltzman v. Sunset Telephone & Telegraph Co.	58	169
San Bernardino Nat. Bank; South San Bernardino Land & Improvement Co. v.	59	699
San Diego County v. Riverside County	58	81
San Diego County; Vail v.	58	392
San Francisco Sav. Union; Denigan v.	59	390
San Francisco & Fresno Land Co.; Cull v.	57	456
San Joaquin Valley Bank v. Dodge	57	687
San Jose Land & Water Co.; San Jose Ranch Co. v.	58	824
San Jose Ranch Co. v. San Jose Land & Water Co.	58	824
San Jose Water Co. v. Lyndon	57	481
Santa Cruz Bank of Savings & Loan v. Taylor	57	987
Santa Rosa Nat. Bank v. Barnett	58	85
Sargent; Welch v.	59	319
Saunders v. La Purisima Gold-Min. Co.	57	656

	Vol.	Page
Savings Bank v. Barrett	58	914
Scheerer v. Goodwin	57	789
Scheld; Glueck v.	57	1003
Schoedde; People v.	58	859
Scofield; Bank of Commerce of San Francisco v.	58	451
Scott; Bedell v.	59	210
Scott's Estate, In re	57	654
Scott's Estate, In re	59	1112
Security Loan & Trust Co. of Southern California v. Boston & S. R. Fruit Co., four cases	58	941
Security Loan & Trust Co. of Southern California v. Boston & S. R. Fruit Co.	59	296
Security Sav. Bank; Cauhape v.	59	589
Seitz; Freeman v.	58	690
Seitz; Yore v.	57	886
Selna v. Selna	58	16
Sharp; City and County of San Francisco v.	58	173
Sharp; City and County of San Francisco v.	58	1115
Shaver; People v.	59	784
Shea; People v.	57	885
Sheehan v. Sullivan	58	1115
Sheehan v. Sullivan	58	543
Sherman; Newhall v.	57	387
Sherwood v. Kyle	58	270
Siemsen v. Oakland, S. L. & H. Electric R. Co.	59	1113
Silva; Costa v.	59	695
Silvany's Estate, In re	59	571
Silveria v. Iverson	57	996
Simon; Girvin v.	59	945
Simon v. Justice's Court of City of Stockton	59	293
Singleton; Stanton v.	59	146
Sinsheimer; Jack v.	58	130
Smeltzer v. Miller	57	668
Smith; Hamilton v.	58	130
Smith v. Hawkins	59	295
Smith; Kuhn v.	58	204
Smith; Reed v.	58	139
Smith v. Smith	57	573
Snibley v. Palmtag	59	200
Soap; People v.	59	771
Solomon; People v.	58	55
Sonoma County v. Stofen	57	681
Southern California R. Co.; Baker v.	58	1055
Southern California R. Co.; Boyd v.	58	1046
Southern California R. Co. v. Superior Court of San Diego County	59	789
Southern Pac. R. Co. v. Bell	58	1116
Southern Pac. R. Co. v. Jack	57	388
Southern Pac. Co.; Liverpool & L. & G. Ins. Co. v.	58	55
Southern Pac. Co.; Sacramento County v.	59	568
Southern Pac. Co.; Vizelich v.	59	129
Southern Pac. R. Co.; Sacramento County v.	59	825
Southern Pac. R. Co. v. Wood	57	388
South San Bernardino Land & Improvement Co. v. San Bernardino Nat. Bank	59	699
Spencer; Los Angeles County v.	59	202
Spencer; Los Angeles County v.	59	385
Spencer; People v.	59	1112
Sperry; McClatchy v.	58	529

	Vol.	Page
Spires; Los Angeles Holiness Band v.	58	1049
Springer v. Springer	58	1060
Squire; Blair v.	59	211
Staacke v. Bell	57	1012
Stackpole v. Hermann	58	935
Stanford's Estate, In re	58	462
Stanton v. Singleton	59	146
State; Baldwin v.	59	1112
State; Mead v.	59	1112
State; Reis v.	59	298
Stearns Ranchos Co.; Nickey v.	58	459
Stearns Ranchos Co.; Tuffree v.	57	69
Steele; Fast v.	59	585
Steele's Estate, In re	57	564
Stegenberg; People v.	59	942
Stephenson v. Deuel	58	258
Sterling; Merchants' Ad-Sign Co. v.	57	468
Stevens v. Truman	59	397
Stewart v. Naud	58	186
Stofen; Sonoma County v.	57	681
Straut, In re	58	62
Sue; Tibbet v.	58	160
Sullivan v. Johnson	59	583
Sullivan; Sheehan v.	58	543
Sullivan; Sheehan v.	58	1115
Sunkler v. McKenzie	59	982
Sunnyside Land Co.; Frenna v.	57	302
Sunset Telephone & Telegraph Co.; Saltzman v.	58	169
Superior Court; Baldwin v.	58	185
Superior Court of City and County of San Francisco; Curtin v.	58	1115
Superior Court of City and County of San Francisco; White v.	58	450
Superior Court of Los Angeles County; Los Angeles City Water Co. v.	57	216
Superior Court of Madera County; Maxson v.	57	379
Superior Court of Riverside County; Rogers v.	58	452
Superior Court of San Diego County; Southern California R. Co. v.	59	789
Sussman v. County of San Luis Obispo	59	24
Sutton; Fox v.	59	939
Swafford v. Board of Education of City of Petaluma	59	900
Swain; Dow v.	58	271
Swain v. Jacks	57	989
Sweasey v. Sweasey	58	456
Sweeney v. City and County of San Francisco	57	1098
Sweeney v. Meyer	57	479
Sweet; Browne v.	59	774
Sweet; Whitehead v.	58	376
Taft v. Tarpey	58	24
Tarpey; Nicholson v.	57	457
Tarpey; Taft v.	58	24
Taylor; Santa Cruz Bank of Savings & Loan v.	57	987
Taylor's Estate, In re	58	454
Terrill; People v.	59	836
Thomas v. Gates	58	315
Thompson v. City of Los Angeles	57	1015
Tibbet v. Sue	58	160
Tibbets; Houghton v.	58	318
Torrance; McConoughey v.	57	81
Trans-Atlantic Fire Ins. Co.; Crawford v.	58	177
Troxler v. Buckner	58	691

	P.	
	Vol.	Page
Truman, Ex parte	57	223
Truman; Stevens v.	59	397
Tubbs; Ferrea v.	58	308
Tuffree v. Stearns Ranchos Co.	57	69
Union Building & Loan Ass'n of Sacramento; People v.	58	822
Union Building & Loan Ass'n of Sacramento; People v.	59	692
Union Iron Works; Grundel v.	59	826
Union Transp. Co.; California Nav. & Imp. Co. v.	58	936
University Bank of Los Angeles; Hubbard v.	58	297
Upham's Estate, In re	59	315
Vail v. San Diego County	58	392
Valliere; People v.	59	295
Varney; Baker v.	59	778
Vereneseneckockockhoff; People v.	58	156
Vernon School Dist. v. Board of Education of City of Los Angeles	58	175
Vineland Irr. Dist. v. Azusa Irr. Co.	58	1057
Vizelich v. Southern Pac. Co.	59	129
Walker's Estate, In re	57	991
Walker's Estate, In re	57	993
Waller v. Weston	57	892
Walter v. Merced Academy Ass'n	59	136
Ward, In re	59	894
Watson v. Miller	58	135
Watson; People v.	57	1071
Welch v. Sargent	59	319
Westall v. Altschul	58	458
Westerfeld v. New York Life Ins. Co.	58	92
Westlake; People v.	57	465
Westlake; People v.	58	454
Weston; Waller v.	57	892
Whaley; Blankenship v.	57	79
Wheeler v. Karnes	57	893
White v. Hayden	59	118
White v. Hayden	59	1113
White v. Superior Court of City and County of San Francisco	58	450
Whitehead v. Sweet	58	376
Whitmore; Knight v.	57	891
Whitney v. American Ins. Co.	59	897
Widber; Meyer v.	58	532
Wilcox; McLennan v.	58	305
Williams v. Bergin	57	1072
Williams v. Casebeer	58	380
Williams v. Casebeer	58	1116
Williams v. Cooper	57	577
Williams; Hodgkin v.	59	36
Williams; Kozminsky v.	58	310
Williams; People v.	59	581
Williams; People v.	59	1112
Williams v. Riehl	59	762
Wilson v. Nugent	57	1008
Windsor v. Miner	57	386
Winters; People v.	57	1067
Wittfield v. Forster	57	219
Wolfskill v. Douglas	59	987
Wolters v. Rossi	57	73
Wolters v. Rossi	59	143
Wood v. Jordan	57	997
Wood v. Jordan	57	998

	P.	
	Vol.	Page
Wood; Southern Pac. R. Co. v.	57	388
Woodman; Landis v.	58	857
Woodruff; People v.	58	854
Woodward; Bemmerly v.	57	561
Woodward; Berka v.	57	777
Wormouth v. Gardner	58	20
Wright v. Eastlick	58	87
Yoakam v. Kingery	58	324
Yorba; Asher v.	58	137
Yore v. Seitz	57	886
Yndart v. Den	57	761

CALIFORNIA REPORTER

57 PACIFIC REPORTER

124 Cal. 311

LOMBARDI v. CALIFORNIA STREET CABLE R. CO. (S. F. 977.)

(Supreme Court of California. April 14, 1899.)

JURORS—COMPETENCY—ACTUAL BIAS—REVIEW—NEGLIGENCE—PERSONAL INJURIES—DAMAGES—LOSS OF PROFITS.

1. Error in disallowing a challenge for bias to a juror is prejudicial, where he was thereupon peremptorily challenged, and the party challenging him, thereafter, by reason of the exhaustion of its peremptory challenges, was compelled to accept jurors whom he otherwise would have challenged peremptorily.

2. A juror, on his voir dire, answered that he knew one of the parties, and had dealt with him for years; that, if compelled to serve, he would go according to the evidence, and be impartial, but that he would not like to have to bring in a verdict against him; that, if the evidence was equally balanced, he would give him the benefit of the doubt, and (the damages being unliquidated), if the party recovered, and there was any dispute as to the amount, he would go for the largest sum. *Held*, that the juror was disqualified, under Code Civ. Proc. § 602, subd. 7, making the existence of a state of mind evincing bias or enmity for or against either party, in a juror, a ground for challenge.

3. Under an allegation, in a complaint for personal injuries, that plaintiff was a restaurant keeper, and did the cooking, and that by reason of the accident he had been compelled to hire another cook, to his damage in a stated sum, evidence of the estimated profits of plaintiff's business during the time the injuries incapacitated him from working was inadmissible on the question of damages.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Jeanne Lombardi, executrix of the will of Cherubino Lombardi against the California Street Cable Railroad Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Henley & Costello, for appellant. J. B. Mhoon and Osgood Putnam, for respondent.

HAYNES, C. This action was prosecuted in the court below to recover from the defendant, a corporation, damages for personal injuries alleged to have been caused by its negligence. The plaintiff recovered judgment in the sum of $1,500, and defendant appeals therefrom, and also from an order denying its motion for a new trial. After the appeal was perfected, said Cherubino Lombardi died, testate; and Jeanne Lombardi, the duly-qualified executrix of his will, was thereafter, by an order of this court, substituted as plaintiff and respondent herein.

Appellant contends for reversal: "(1) Because the court should have sustained defendant's challenge of the juror Harris Schemanski for cause; that, because of the refusal of the court to sustain said challenge, defendant was obliged to challenge said juror peremptorily; that all its peremptory challenges were exhausted before the jury was completed, and thereby defendant was compelled to accept jurors whom it would have otherwise challenged peremptorily." Counsel for appellant present the question in two ways, being in doubt as to the proper practice. They first set out in their statement on motion for a new trial the examination of the juror, the ruling of the court denying their challenge, and an exception thereto, and specify said ruling as an error of law; and they also, in support of their motion for a new trial, presented an affidavit of one of them setting out the examination of the juror in full, the ruling of the court, an exception thereto, and stating facts tending to show that appellant was injured thereby, as above stated.

As to the question of practice, it need only be said that the mode of presenting the question must depend upon circumstances. If the facts appear without contradiction, or in such form that but one conclusion can legally be drawn, it involves purely a question of law; otherwise, whether the juror is or is not qualified is a question of fact. Hence the circumstances of each case must determine the manner in which the question should be presented upon appeal. But it does not necessarily follow that, because the court erred either as to the law or the fact, the judgment or order denying a new trial should be reversed because a challenge for cause was improperly disallowed, since the constitution, while guarantying the right to an impartial jury, does not guaranty the right to any particular jury or juror. Asevado v. Orr, 100 Cal. 293, 301, 34 Pac. 777. If, therefore, it should appear, for example, that the court erroneously refused to sustain a challenge for cause, and the complaining party was thereby compelled to challenge the juror peremptorily, and it should be made to appear that a jury was secured without exhausting his peremptory challenges, he could not say that by the erroneous ruling he was compelled to submit his case to a jury that was not wholly impartial. In this case the affidavit of counsel shows that all his peremptory challenges were exhausted before the panel was filled, and that the defendant would have exercised other peremptory challenges, if they had not been exhausted; and these facts stand unquestioned. If, therefore, the court erred in refusing defendant's challenge to the juror Schemanski, the judgment and order should be reversed. People v. Brown, 72 Cal. 392, 14 Pac. 90.

The challenge was made under subdivision 7 of section 602, Code Civ. Proc. That section provides: "Challenges for cause may be taken on one or more of the following grounds: * * * (7) The existence of a state of mind in the juror evincing enmity against or bias to or against either party." The juror, after being questioned as to residence, etc., was asked: "Do you know any reason why you cannot give a fair and impartial trial in this case? A. No, sir,"—and, in reply to a question by defendant's counsel as to whether he ever had any litigation with these railroad companies, answered: "No, sir. I want to state that I know the plaintiff and his family. If that makes any difference, I won't try the case. I had some dealings with the Lombardis for years." In reply to further questions, he testified that he knew them very well for many years; that, "if there was any benefit, I would give him the benefit, I suppose." And again: "Well, I could give a fair trial; only, as I say, I know the parties on the other side, and I would not like to sit on this case. Q. You would not like to have to give a verdict against them? A. Well, I would not like to have to do it. If there is anything in their favor, I would give them the benefit, I suppose. Q. We want to know just why you want to be excused. A. If I sit on a case, I don't want to know either of the parties; I want to be impartial on both sides. Q. But still you could be impartial? A. Well, if I am sworn in, I would have to go according to the evidence. Q. Would you do it? A. Yes, sir; if I was sworn in. Q. And, if you was sworn as a juror, would you go according to the evidence and the instructions of the court? A. Yes, sir. Q. And without prejudice? A. Certainly. I know his family. By counsel for defendant: Q. Suppose the evidence is evenly balanced; do you think you would then find in favor of your friend? A. I suppose so. Q. You feel, then, do you, in sitting as a juror, that you might not be able to do entire justice? A. That is what I mean; yes, sir; if it was equally balanced I would give him the benefit of it." The juror further testified, in substance, that he did not mean he would give the plaintiff a verdict if he did not show that he had a cause of action, but, if it was equal, if there was any benefit to be given he would do it; that he was very well acquainted with the plaintiff and his family, in a business way and personally, "and he has dealt with us for years." The juror was then asked: "Could you hear all the evidence, and weigh it carefully and justly? A. Yes, sir; I could, most certainly." The juror, after repeating that his long acquaintance with the plaintiff might induce him to find in his favor, was asked by defendant's counsel: "Q. You feel, then, do you, that, owing to your long intimacy with the plaintiff, that it might interfere with the proper discharge of your duties as a juror? Is that the proposition? A. Yes, sir. It requires nine for a verdict. If four would be for five thousand dollars, and four would be for twenty-five hundred, if the verdict would be for the plaintiff I would go to the biggest verdict. If there would be no verdict for him, I would go according to the evidence of the court. Therefore I would rather be excused. Q. You would give the plaintiff the benefit of the doubt, would you? A. Yes, sir; if he was entitled to damages." In reply to questions by the court, he said that, if the testimony was evenly balanced, he would decide for the plaintiff; and, if the testimony was against the plaintiff, he would go against him. Does this examination show "the existence of a state of mind in the juror evincing" a bias in favor of the plaintiff? If so, is this ground of challenge removed or overcome by the statement of the juror that, if the evidence was against the plaintiff, he would go against him, that "he would go according to the evidence of the court," and the other similar statements? That the juror was candid, honest, and sincere in all his statements is beyond question; and any such man, if compelled to serve as a juror, would, to the best of his ability, decide according to the evidence and the instructions of the court. When pressed with questions of that character, he could only reply as he did. If he had said, "No; I will decide for my friend, whatever may be the evidence," he would have shown himself to be a man who would not even try to do right. It may be that some men may be just and impartial towards an enemy, or even remove from their minds and memory and heart all the leanings, inclinations, and desires that so naturally draw them to the side of a friend. But the statute makes no exceptions. It does not add the qualification, "But if the juror will swear that he can impartially try the case notwithstanding his bias toward his friend, or his prejudice against his enemy, the challenge shall be disallowed." It is apparent that such an addition to the statute would make a material change; but can the court, by any line of examination it may see proper to permit, thus change it? Doubts that a juror may entertain as to the weight, effect, or credibility of the evidence are not to be resolved by the ties or persuading influence of friendship, but by the declared and impartial rules of the law. That the juror doubted his ability to impartially consider the evidence and determine which party should prevail is abundantly shown. But, if the jury should find that the plaintiff was entitled to recover, still another question remained,—the amount of compensation to which he should be entitled.

Upon this question he announced that he "would go to the biggest verdict." Suppose the defendant had conceded its liability, and the sole question for the jury was to ascertain the amount of damages the defendant should pay; would this juror have been accepted by the court, even in the absence of a challenge? or, if challenged, would the court have hesitated to sustain it? Yet the defendant was as much entitled to an impartial jury upon this branch of the case as the other, and should not be compelled to submit its case to a juror who, before he heard the evidence, declared that, if the plaintiff should be entitled to recover, he "would go to the biggest verdict."

Respondent contends, however, that the evidence heard upon the trial of this challenge was conflicting, and that, therefore, the finding of the court cannot be disturbed. The only evidence heard upon the trial of the challenge was the testimony of the juror. As to whether the juror was biased in favor of the plaintiff, there was not even the shadow of a conflict or contradiction; and the only controversy was as to whether, notwithstanding his bias, he could impartially try the case,—a matter about which the juror could only express an opinion, and which could not be affected by its expression. The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guarantied by the constitution. Upon this proposition all the authorities agree. As was said by Sir Edward Coke (1 Coke, 157b) in discussing the right of trial by jury, under the head of "Propter affectum," "For all which the rule of law is that he must stand indifferent as he stands unsworn." The rule excluding jurors for actual bias in civil cases must not be confounded with the rule stated in section 1076 of the Penal Code in relation to opinions founded or based "upon public rumor, statements in public journals, or common notoriety," and which permits the acceptance of the juror "provided it appears to the court upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." This is the only important statutory exception to the common-law rule excluding jurors upon the ground of actual bias, and was enacted because of apparent necessity.

Appellant contends that the court erred in admitting certain evidence as to the profits plaintiff was realizing from his business at the time of the accident, and in giving to the jury certain instructions on that subject. The complaint, after alleging the cause and manner of the accident, and the character of the injuries received, alleged that thereby he had suffered damage in the sum of $10,000. The complaint then proceeded as follows: "(7) That plaintiff has been for a period of three months confined and sick, owing to said injuries, and has been compelled to employ nurses and physicians during all of said time, and up to the date hereof, to his damage in the sum of six hundred dollars. (8) That plaintiff has been unable to attend to his business on account of said injury, and has been compelled thereby to hire said business and work done during all of the time since said accident, to his damage in the sum of two hundred and thirty dollars, and will be compelled to hire said work done in the future,"—and prays judgment for $10,830. The accident occurred on March 31, 1895. It appeared from the testimony of the plaintiff, without objection, that at the date of the accident he was engaged in the restaurant business on Pine street, between Montgomery and Kearny streets, with his partner, Jules Semeria, each having an equal share in the business; that plaintiff was the chief cook, and that Semeria attended to the other part of the business; that after the accident he could not work, because he could not use his arm. The plaintiff was then asked by his counsel: "What was the income you were making from your business in March, 1895?" Defendant objected on the ground that it was not an element of damage, and therefore immaterial and irrelevant. The objection was overruled, and an exception reserved. The witness answered, "About two hundred dollars per month," and explained that that was his share of the profits after all expenses were paid. Jules Semeria, plaintiff's partner, called by plaintiff, was asked, in chief: "Can you state what the net proceeds of this business were, on the average, for some months prior to this accident?" Defendant objected that the question was immaterial and irrelevant, and not authorized by any allegation in the complaint. The court overruled the objection and defendant excepted. The witness answered that it was, on an average, $400 per month. These rulings were erroneous. Waiving the question whether, in some possible case, the profits of the plaintiff's business may be shown to be an element in the computation of damages in actions of this character, when properly pleaded, it must be clear, as a general proposition, that such profits cannot be looked to in estimating the plaintiff's damages. A business such as that conducted by the plaintiff and his partner includes capital as well as the services of other people, as shown by the evidence, and may be conducted without the personal attention or services of either or both of the owners. The complaint alleged that plaintiff was compelled to hire another to take his place and do his work, and alleged his damage because thereof to be $230; and that covered all the time from the date of the accident to the filing of his complaint. What he paid represented the value of his time. There is no allegation that the business suffered, or was otherwise less profitable, because of his inability to do the work he had formerly done. The authorities are not agreed as to the extent to which the evidence may go, in the absence of allegations as to special damages sustained by the plaintiff; but I know of no exception to the rule that where the plaintiff has specially alleged a particular damage resulting from the injury, and the amount of such damage, he is concluded by his allegation, and, having alleged the value of his time as the basis of estimating his pecuniary loss, he cannot give evidence of the net profits resulting from the business in which he was engaged. There are many cases in which it has been held that, without a special averment, the plaintiff may show that he was incapacitated from attending to "his business," or "his ordinary business," but that such evidence was admissible because it tended to show the serious character of the injury, and not for the purpose of showing special damage. Neither in Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, nor in Curtiss v. Railroad Co., 20 Barb. 282, cited in the former case, did the instructions commented upon touch upon the question of the loss of profits or the extent of profits resulting from plaintiff's business; nor was that question discussed by the court in either case, although "loss of time" was considered. In Silsby v. Car Co., 95 Mich. 209, 54 N. W. 761, it was claimed that the court below "erred in permitting the plaintiff to show, as an element of damage, that he had been obliged to close his shop, and further to show what the profits of his shop had been in the past." It was held that this was error. The court said: "The declaration did not count specially upon this alleged loss of profits, and the case falls within Joslin v. Ice Co., 50 Mich. 516, 15 N. W. 887. Furthermore, the loss of profits in conducting a business involving the labor of others is not a necessary consequence of personal injury to the plaintiff. The extent of his recovery upon this ground would be what his services were worth in the conduct of such a business as he was engaged in," citing 3 Suth. Dam. 268; Marks v. Railroad Co., 14 Daly, 61; Masterton v. Village of Mt. Vernon, 58 N. Y. 391; Johnson v. Railway Co., 52 Hun, 111, 4 N. Y. Supp. 848; Bierbach v. Rubber Co., 54 Wis. 208, 11 N. W. 559. Neither in the offer or admission of this evidence, nor in the instructions to the jury, was there any limitation upon the effect of this evidence; and we must therefore assume that it was considered by the jury in estimating the damages awarded to the plaintiff.

In this connection we would refer to instruction No. 15, in which the jury were told that in estimating the damages to be assessed, while they could not take into account the wealth or poverty of the plaintiff, they could take into account the character and extent of the business in which he was engaged, together with the incapacity caused by the injury to transact such business. Under the allegations of special damage set out in the complaint this instruction was misleading and erroneous, for reasons hereinbefore stated.

Some other exceptions to rulings upon questions of evidence were reserved by the defendant, but as they do not go to any vital point, and may not be presented upon another trial, they need not be specially noticed. I advise that the judgment and order appealed from be reversed.

We concur: GRAY, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

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124 Cal. 306

TUFFREE et ux. v. STEARNS RANCHOS CO. (L. A. 387.)

(Supreme Court of California. April 14, 1899.)

ABATEMENT—TRANSFER OF INTEREST—DEATH—APPEAL—REVIEW.

1. Code Civ. Proc. § 385, provides that an action does not abate by the death of a party, or by the transfer of an interest therein, and that in the case of a transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted. *Held* that, where a person to whom one of several defendants in an action to quiet title has transferred his interest, though he has actual knowledge of the suit, does not have himself made a defendant until after an appeal from a judgment has been decided on the merits and the case remitted for entry of judgment in accordance with such decision, he is bound by the judgment so entered, and cannot have it amended as to his interest on the ground that his vendor having died after the judgment appealed from was rendered, but before notice of appeal was served, due service of such notice having been accepted by a firm of attorneys for all defendants, the supreme court obtained no jurisdiction as to the interest that had been transferred.

2. Where a judgment has been entered in the lower court in accordance with directions in a mandate of the supreme court, a purchaser of the land involved, who has been substituted as defendant, may appeal from the judgment, and by bill of exceptions bring before the court the merits of the appeal.

In bank.

Action by J. K. Tuffree and wife against Moses Hopkins and others to quiet title. The Stearns Ranchos Company, having been substituted as defendant, appeals from an order refusing to amend a judgment entered in pursuance of a decision on a former appeal (41 Pac. 806, 108 Cal. 670) from said judgment, from an order refusing to correct certain file marks, and also from an order denying a new trial. Affirmed.

For opinion in department, see 54 Pac. 826.

GAROUTTE, J. Moses Hopkins, claiming to own an interest in a tract of land, was joined with others as a party defendant in an action to quiet title. Bicknell & White appeared as attorneys for all the defendants. During the litigation, and five years prior to judgment, Hopkins transferred his interest in the property to the Stearns Ranchos Company. After judgment, and prior to an appeal therefrom by plaintiffs, Hopkins died. Thereafter Bicknell & White accepted notice of appeal in behalf of all the defendants, and the case was heard and decided in this court upon its merits. Upon the return of the remittitur to the lower court a judgment was entered in accordance with the directions therein contained. Whereupon the Stearns Ranchos Company, by E. W. McGraw, its attorney, having had itself substituted as a party defendant, moved to amend the judgment as to the interest represented under the name of Moses Hopkins, upon the ground that this court failed to obtain jurisdiction over the Hopkins interest in the realty by reason of the fact of his death at the time the notice of appeal was served upon Bicknell & White. No substitution of any party defendant in lieu of Hopkins was ever made until the substitution of the Ranchos Company, as stated. The present appeal is now prosecuted from the order of the trial court refusing to amend the judgment as prayed for. The Northam interest in the real estate involved in this litigation stands generally in the same position as the Hopkins interest, at least as far as the law involved is concerned; and we refrain from setting out the facts as to that interest for this reason.

Section 385 of the Code of Civil Procedure reads: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. * * * In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." This provision of the law was construed in Walker v. Felt, 54 Cal. 386, where the court said: "Section 385 of the Code of Civil Procedure provides that in case of any transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Under that section it was the right of the successors in interest in this case to prosecute this action in one of these forms. The party who had transferred his interest devested himself of any power to control the action. He could not dismiss it, because his successors had a right to have it continued. The validity of the order of dismissal in this case rests solely upon the consent of the original plaintiff, given ten years after he had transferred his interest in the action. As he had no right to interfere with the action, the court, on being advised of that, should have vacated the order based upon it." In Malone v. Mining Co., 93 Cal. 384, 28 Pac. 1063, this court said: "Under this section, if property is conveyed during the pendency of litigation in regard to it, the grantee may thereafter continue to prosecute or defend the case in the name of his grantor, or may cause himself to be substituted in his place." In Plummer v. Brown, 64 Cal. 430, 1 Pac. 704, it is declared: "After transferring his entire interest in the subject of the controversy, the defendant was only nominally a party to the action. The real parties in interest were his grantees. The entry of his default affected them, not him."

It is quite apparent from these authorities that the statute contemplates the prosecution or defense of the action by the transferee of the interest sold; and he may prosecuute or defend in his own name by obtaining an order of substitution, or he may prosecute or defend in the name of the original party. That the legislature has the power to say that an action may be prosecuted or defended in the name of one not the real party in interest, we have no doubt. Hopkins, at the time of his death, having no interest in the property, his executor or administrator was not a proper party to be substituted as defendant. It therefore follows that the action either should have continued in his name, or his vendee should have been substituted. Yet the statute and the cases cited plainly say that the vendee has the right to exercise the option of substitution, or continue the litigation in the name of the original party. If the original party is a mere nominal party, and the vendee is the real party in interest,—if the nominal party has no right to conduct the litigation upon any particular lines as against the wishes of the real party in interest; if the real party in interest, the vendee, has the control of the litigation, and this is decided by the cases cited from the reports of this state,—then it would seem to be wholly immaterial whether the original party to the action lives or dies. For the purposes of the litigation he is a mere dummy anyhow,—a John Doe alias; at least, this must be true aside from any question of costs, and, as to those matters, certainly the real defendant has no reason to complain. Possibly the opposing party, for reasons readily perceptible, might be desirous of having the real party in interest substituted as a party to the record; but if such party is willing to have matters stand statu quo, and the real party in interest is content to have matters proceed upon the old lines, we see no legal bar to the practice. The real plaintiff or defendant simply uses the name of another in the further prosecution or defense of the action. The Stearns Ranchos Company, the vendee of Hopkins, knew all about the pending litigation. A lis pendens was filed. Actual notice of the litigation was before it. By affidavit it is admitted that it had "casual notice" of the appeal to this court. The attorney of the company was E. W. McGraw, who was also a director of the corporation. He is now the attorney representing the corporation defendant upon this appeal. Prior to the first judgment in the trial court he assisted in the taking of depositions to be used upon that trial, representing some of the defendants. He filed a petition for rehearing in this court, signing himself as counsel for the defendants. The Ranchos Company was the owner of the interests of all the defendants before the final judgment was rendered in the trial court, and it is quite apparent that it knew all about this litigation from start to finish, at least as to all material and substantial matters. Under these conditions, this conduct upon the part of the Ranchos Company can only mean that it defended this action in the name of Hopkins from the time it became his vendee, and it should not now be heard to the contrary. Knowing that Bicknell & White were appearing at all times and upon all occasions for all the defendants, we are confirmed in the belief that these attorneys, as to the question now before us, were representing the Ranchos Company in this litigation. In representing Hopkins they were but representing the company. The Ranchos Company, in matters material to the appeal, was a party to the action under the name of Hopkins, and, of necessity, Hopkins' death was wholly an immaterial matter as in any way changing the aspect or situation of the litigation. Pedlar v. Stroud, 116 Cal. 462, 48 Pac. 371, and cases akin to it, do not bear upon the proposition here under consideration.

2. Defendant appeals from the judgment rendered by the trial court in conformity with the directions of this court. It is now claimed upon the part of respondents that upon such an appeal the only question which may be heard is, has the trial court entered judgment in accordance with this court's mandate? Defendant has also appealed from an order denying his motion for a new trial. This motion was made after the judgment was entered in the trial court in accordance with this court's direction. It is insisted by respondent that there is no such practice as taking an appeal from an order denying a motion for a new trial under those circumstances. Brady v. Feisel, 54 Cal. 180, supports this contention; but, in view of the fact that the appeal from the judgment raises substantially all the questions which might be brought here upon appeal from an order denying a motion for a new trial, we pass without consideration the soundness of the doctrine laid down in Brady v. Feisel. In Klauber v. Car Co., 98 Cal. 107, 32 Pac. 876, this question as to the right of appeal from a judgment such as is presented in the case before us was given careful consideration, and the reasons for the conclusion there arrived at are set forth in full. These reasons are persuasive and most convincing. Upon the doctrine of that case it must be held that in the present case the Stearns Ranchos Company had the right to appeal from the judgment here attacked, and bring before this court the merits of such an appeal by way of a bill of exceptions. In Randall v. Duff, 107 Cal. 36, 40 Pac. 20, it was said that an appeal to this court from a judgment rendered by a trial court in conformity with the directions of the appellate court was allowable in order that it might be determined whether or not the lower court had entered the judgment ordered. Such is undoubtedly the law; but that case cannot be held to limit the doctrine declared in Klauber v. Car Co.

The single point made by appellant upon the appeal, aside from an unimportant ruling upon the admission of certain evidence, relates to the insufficiency of the evidence to support the findings of fact. We have examined with care the evidence bearing upon the particular findings to which appellant's specifications have been addressed. In all material parts we are satisfied, from an examination of the record, that the evidence is sufficient to support the findings of fact. We see no substantial merit in the appeal from the order refusing to correct the file marks upon the court's decree. For the foregoing reasons the respective orders refusing to amend the judgment and correct the file marks are affirmed. The judgment and order denying a new trial are also affirmed.

We concur: HARRISON, J.; VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.

124 Cal. 331

OWEN v. POMONA LAND & WATER CO.

(L. A. 637.)

(Supreme Court of California. April 27, 1899.)

APPEAL—STAY OF EXECUTION—BOND—SUFFICIENCY—VENDOR AND PURCHASER.

1. Proceedings on a judgment are stayed by the filing of a sufficient undertaking on appeal from an order denying a new trial.

2. A judgment in favor of a vendee of land, who rescinds his contract, that he recover the amounts paid on the price, and the value of his improvements, and declaring such sum to be a lien on the land, which is ordered sold, and the proceeds applied to payment of the amount found due, the clerk being directed to docket a judgment for the deficiency, is not a judgment directing payment of money within Code Civ. Proc. § 942, providing that an appeal from such a judgment should not stay execution unless appellant execute a bond in double the amount named in the order, so that proceedings are stayed by filing the ordinary undertaking without an additional stay bond.

3. Code Civ. Proc. § 945, providing that, to secure a stay of proceedings on a judgment directing the sale of real property, appellant must execute a bond for damages by waste, and for the value of the use of the property pending appeal, does not apply where a vendee of land in possession rescinds and recovers judgment for the amounts paid on the price, and for the value of his improvements, for which amounts the land is directed to be sold.

In bank. Appeal from superior court, San Bernardino county.

Action by John A. Owen against the Pomona Land & Water Company. From a decree for plaintiff, and from an order denying a new trial, defendant appealed, pending which plaintiff issued execution, and sold the property designated in the decree. Defendant moves to set set aside the sale and quash the execution. Granted.

John S. Chapman and A. P. Nichols, for appellant. Otis & Gregg and John A. Owen, for respondent.

BEATTY, C. J. This is an action by the vendee against his vendor to recover moneys paid in pursuance of a contract for the sale of land and certain shares of water stock, and for damages. The plaintiff took possession of the land at the date of the contract, and has ever since retained possession. By the judgment of the superior court it was decreed that the contract had been rightfully rescinded by plaintiff, that it should be annulled, and that plaintiff should have judgment for the amount of his payments under the contract and the value of his improvements on the land, in all about $8,000. This sum was declared to be a lien upon the land described in the contract and upon the water stock. By further provisions of the decree the land and stock were ordered to be sold, and the proceeds, after payment of costs and expenses, applied to the payment of the amount found due to the plaintiff. In case of deficiency the clerk was directed to docket a judgment for the unpaid balance. In respect to all these provisions the decree follows very closely and exactly the terms of the ordinary decree in cases of foreclosure of mortgages. In due time the defendant appealed from this judgment, and subsequently took a separate appeal from an order denying its motion for a new trial. Each appeal was regularly perfected by the filing of a proper undertaking in the sum of $300, but no separate undertaking to stay the proceedings was given on either appeal. Subsequently the appeal from the judgment was dismissed for failure to file the transcript in time, but the appeal from the order is still pending. After the entry of the order of dismissal of the appeal from the judgment, but before the issuance of the remittitur, the plaintiff took out an execution or order of sale under which the sheriff sold the property described in the decree, the plaintiff becoming the purchaser. The appellant now moves to vacate and set aside said sale and to quash the execution upon the ground that they were in violation of the right to a stay of proceedings secured by the appeals from the judgment and order denying a new trial.

No question is made as to the power and duty of this court to grant the relief sought by the motion if all proceedings on the judgment were stayed by the appeal from the order denying a new trial. Boob v. Hall, 105 Cal. 413, 38 Pac. 977; Hill v. Finnigan, 54 Cal. 493; Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383; Brown v. Rouse, 115 Cal. 619, 47 Pac. 601; Williams v. Borgwardt, 115 Cal. 617, 47 Pac. 594; Swasey v. Adair, 88 Cal. 203, 26 Pac. 83; Hubbard v. Bank, 120 Cal. 632, 52 Pac. 1070. But the respondent contends, in the first place, that neither the appeal from the judgment nor the appeal from the order operated as a stay, because there was no stay bond, and, if this point is ruled against him, he further contends that it was only the appeal from the judgment that would have stayed execution, and, since that appeal was dismissed before the execution was taken out, the fact that the remittitur had not been issued upon the order of dismissal amounts at most to an irregularity in the proceeding, and is not a sufficient ground for setting aside the sale.

It will not be necessary to consider the second branch of this proposition further than to say that it is now the settled law of this state that proceedings on the judgment can be, and are, stayed by the filing of a sufficient undertaking on appeal from an order denying a new trial. Fulton v. Hanna, 40 Cal. 280; Tompkins v. Montgomery, 116 Cal. 123, 47 Pac. 1006.

The only question, therefore, left for determination is whether the ordinary undertaking on appeal in the sum of $300 was sufficient to stay proceedings on this judgment. If this is not one of the cases provided for in sections 942, 943, 944, or 945 of the Code of Civil Procedure, the $300 bond was all that was required to stay proceedings. Id. § 949. But respondent claims that the judgment here is one which "directs the payment of money," within the meaning of section 942 of the Code of Civil Procedure, and that there should have been an undertaking in twice the amount found due from defendant This claim is based upon the following language in the first part of the judgment: "That said plaintiff do have and recover of said defendant, Pomona Land and Water Company, the amount of the several sums of money hereinafter named," etc. This language, considered by itself, certainly does sustain the contention of the respondent. But it cannot be taken by itself, disconnected with other parts of the decree; and, when the whole decree is read together, it is found to be in substance an ordinary decree of foreclosure, in which certain property is ordered sold, and its proceeds applied upon an ascertained debt, the balance remaining due, if any, to be docketed as a personal judgment. The provision for the sale of the property and the application of the proceeds is not merely a cumulative remedy given for the enforcement of an ordinary money judgment. It is a part, and an essential part, of the only procedure for the enforcement of the judgment, and no execution could have issued against other property than that mentioned in the decree until it had been sold, its proceeds applied, and the deficiency ascertained. It is not necessary to decide whether the superior court could have rendered a personal judgment in this case for the full amount found due the plaintiff,—a judgment enforceable by an ordinary execution against the goods of defendant,—and could, at the same time, have decreed the enforcement of a specific lien upon the property described in the contract of sale. It is sufficient to say that, on a proper construction of the decree, nothing of the kind was attempted. This being so, the case cannot be distinguished from a number of other cases in which it has been held by this court that the provisions of section 942 of the Code of Civil Procedure did not apply. Kreling v. Kreling, 116 Cal. 460, 48 Pac. 383; Painter v. Painter, 98 Cal. 626, 33 Pac. 483;

Boob v. Hall, 105 Cal. 413, 38 Pac. 977. The judgment here is, in fact, one directing the sale of real property, and would be governed by the provisions of section 945 of the Code of Civil Procedure, if they were applicable. If the defendant had been in possession of the real property, the bond to stay proceedings should have secured to the respondent the damages by waste, and the value of the use and occupation; but, the plaintiff being himself in the exclusive possession, these clauses of the statute have no application, and, the case not being one of mortgage, no undertaking for payment of the deficiency was required. On the whole it appears that this is a case not covered by any provision of the statute for the filing of an additional stay bond, and proceedings on the judgment were therefore stayed by the ordinary undertaking on appeal. The motion to vacate and set aside the sale and to quash the execution herein is granted, and it is ordered accordingly.

We concur: TEMPLE, J.; VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

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6 Cal. Unrep. 266

WOLTERS et al. v. ROSSI et al. (S. F. 1,277.)[1]

(Supreme Court of California. March 21, 1899.)

FRAUDULENT CONVEYANCES—CERTIFICATES OF DEPOSIT—TRANSFER—JUDGMENT OF DISMISSAL—VACATION—EVIDENCE—DEPOSITIONS.

1. A transfer of property by an insolvent judgment debtor to his wife without consideration, made after an order for his examination in supplementary proceedings had been served, and on the day before that set for the hearing, is fraudulent.

2. The day before the one set for his examination in supplementary proceedings, which was the last day in February, a judgment debtor gave money to his wife, who deposited it in a bank, which issued to her a negotiable certificate of deposit. Several days thereafter the creditor commenced an action to set aside the transfer of the money, and on the trial a witness testified that about February or March the debtor had given witness the certificate, and thereafter the latter had turned it over to another. *Held*, that a finding was justified that the certificate was transferred before commencement of the action.

3. On the entry of judgment on an order of plaintiff dismissing the action before an answer seeking affirmative relief has been filed, the court loses jurisdiction, and cannot thereafter vacate the judgment on application of defendants, and consolidate such action with another.

4. Where neither the parties nor the issues in two different actions are identical, depositions taken in one are inadmissible in the other.

5. Depositions taken in one action are inadmissible in another as against a party who had no opportunity to cross-examine the witnesses.

Department 2. Appeal from superior court, Fresno county.

Action by Henry Wolters and others against Lena Rossi and others. From a judgment for defendants and from an order denying a new trial, plaintiffs appeal. Affirmed.

The original complaint herein was filed March 15, 1895. On April 1, 1895, the summons was filed showing proof of service on the defendants Lena Rossi and C. Rossi on March 20th, and on the defendant the Farmers' Bank on March 18th.

Geo. B. Graham and Frank H. Short, for appellants. H. H. Welch, L. L. Cory, and A. M. Drew, for respondents.

HENSHAW, J. These appeals are from the judgment and from the order denying plaintiffs' motion for a new trial. Defendant C. Rossi was a judgment debtor of plaintiffs. On January 29, 1895, an execution issued upon the judgment of plaintiffs was returned nulla bona. On the 23d day of February following plaintiffs instituted proceedings supplementary to execution, and secured an order for the examination of C. Rossi and his wife, the defendant Lena Rossi. The examination was held upon February 28, 1895, before a referee. Rossi and his wife were examined. Upon the examination it was disclosed that upon the day preceding (February 27th) Lena Rossi had obtained from her husband, through the Bank of Central California, the sum of $1,652.19, and that she had deposited this money in the Farmers' Bank at Fresno, taking a certificate of deposit negotiable in form in her name. The certificate of deposit bore date March 1, 1895. Upon March 2, 1895, the court made its order restraining the Farmers' Bank of Fresno and Lena Rossi from making any transfer, use, or disposition of the moneys represented by the certificate of deposit until further action of the court in the premises. Upon the same day this restraining order was served upon the defendants, and, a second execution having been issued upon the judgment, the bank was garnished. Leave was given to the plaintiffs to prosecute an action against the defendants Rossi and the bank to avoid the gift of the moneys by the husband to his wife, as being in fraud of the rights of plaintiffs, judgment creditors of the husband, and this action for the indicated purpose was promptly commenced. In addition to the facts which have already been recited, the complaint averred the gift by Rossi to his wife of the money in question, his insolvency at the time of the gift, and charged that the certificate of deposit from the date of its issue and delivery to the wife, Lena Rossi, until the commencement of the present action, was in the possession and control of the defendants Lena Rossi and C. Rossi, and that they remained in full ownership and control of the certificate and of the money. It was also alleged that the gift was made with the intent to hinder, delay, and defraud the plaintiffs. Upon the trial the defendants offered no evidence. The facts proved or admitted were that plaintiffs were judgment creditors of C. Rossi, and that their judgment was in full force and effect; that defendant Rossi was insolvent; that an execution issued upon plaintiffs' judgment had been returned nulla bona; that, after service upon him of the order of examination upon the day preceding the date upon which the examination was held, he had given to his wife, without valuable consideration, the sum of $1,652.19, which she had deposited in the Farmers' Bank, taking a certificate of deposit therefor, as above stated. The court, however, found that this gift to the wife was not made in fraud of the rights of any of the creditors of C. Rossi, nor with any intent upon the part of C. Rossi to hinder, delay, or defraud those creditors.

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[1] Reversed in banc. See 59 Pac. 143, 126 Cal. 644.

As the law of this state now stands, the undisputed facts in this case would conclusively establish a fraud against the creditors. See section 3442, Civ. Code, as amended in 1895. At the time of the commencement of this action, however, such a transfer by an insolvent debtor was not deemed conclusively fraudulent, and whether or not the transfer was made with a fraudulent intent was a question of fact for the judge or jury. Upon that state of the law respondents contend that the finding of the court is fully justified, and they argue that our decisions declare that conclusive evidence of fraudulent intent upon the part of the donor or grantor is not established by proof merely that he was insolvent, and that the grant or gift was made without valuable consideration. But an analysis of the cases upon which respondents rely will demonstrate that they lend little solace or support to the proposition for which they contend. The Code and fraudulent conveyance act at the time when those cases were decided, and at the time when this suit was commenced, declared that no transfer or charge could be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. In McFadden v. Mitchell, 54 Cal. 628, there was under review an instruction which was in direct violation of the Code provision, and which declared that, if there was no valuable consideration for the transfer, it was void. While condemning this instruction, as of needs it must, this court said: "Inadequacy of price and insolvency of a debtor may be circumstances more or less potential in the determination of fraud as a question of fact, but failure of consideration is not in itself sufficient to justify a court in finding fraud as matter of law." In Jamison v. King, 50 Cal. 132, it is said: "Doubtless the concurrence of insolvency on the part of the assignor, and inadequacy of price, would be a circumstance strongly tending to establish fraud, but inadequacy or failure of consideration is not of itself sufficient." In Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879, the discussion was upon the necessity of alleging a fraudulent intent in the complaint, and it was held to be an indispensable averment, since, as says this court arguendo: "The fraudulent intent which is itself a question of fact cannot be inferred from the facts stated in the complaint * * * for the further reason that a voluntary conveyance by an insolvent debtor is not necessarily fraudulent and void as to creditors." In Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557, the refusal of the trial court to set aside as fraudulent and void a deed of gift of real property, made by the defendant to his wife more than five years before execution upon the judgment was returned unsatisfied, was upheld by this court principally upon the ground that the evidence failed to show that at the time of the gift the defendant was insolvent. In Knox v. Moses, 104 Cal. 502, 38 Pac. 318, the trial court found that a voluntary conveyance by Bray, an insolvent, had been made without fraudulent intent, and upon a review of the evidence this court upheld the finding. But in that case the evidence in support of the transfer showed that, at the time the deed was made, Bray, the grantor, was engaged in business affairs of large moment; that his assets and liabilities each approximated $700,000; that he did not know that he was in an insolvent condition; that the deed was to land of trifling value, as compared with his assets; that he was residing with his family upon land of greater value, which he did not homestead, and which passed to his creditors; and that he carried on vast business enterprises for three years and a half after the date of the transfer. In Bull v. Bray, 89 Cal. 286, 26 Pac. 873, the court made certain findings, but failed to find the ultimate fact as to the fraudulent or nonfraudulent intent with which the conveyance was made, and this court held that such a finding was necessary, and that the ultimate fact of a fraudulent intent did not necessarily and conclusively follow from the facts found, saying: "Bray did actually defraud Bull in the making of the deeds by depriving him of property which would otherwise have been applied to the satisfaction of the execution; but it does not necessarily and conclusively follow therefrom that the intent was present in his mind to defraud, or that in making the transfer he may not have been actuated by the most honest motives." In that case the facts appeared as in the case of Knox v. Moses, just preceding. And a most significant and persuasive fact against the argument of fraudulent intent was the finding of the court that at the time of the conveyance Bray was not aware of his insolvency. In the concurring opinion of Chief Justice Beatty in that case it is said: "When an insolvent debtor makes a gift of his property to a donee of his own selection, there can be but one result, so far as his creditors are concerned. They are necessarily deprived of what is lawfully theirs, and the law ought to pronounce such a transaction ipso facto fraudulent and void as to them." Five years after this utterance the legislature, in consonance with it, has so declared. Still further it is said: "There should be no hesitation in stating and in everywhere insisting upon the proposition that a voluntary conveyance by an insolvent debtor is prima facie proof of a fraudulent intent, which throws upon the donee the necessity of rebutting the inference of fraud."

Such a rule may be adopted without doing the slightest violence either to the letter or to the spirit of section 3442 of the Civil Code. By that portion of the section which we have been considering it is declared merely that a transfer cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration, and this court has said, as logically it was compelled to say under that law, that the establishment of the fact of insolvency, with the fact of a voluntary gift, did not conclusively prove the fraudulent intent. In some of the cases above adverted to are shown circumstances which were deemed sufficient to overcome the presumption or prima facie showing of fraudulent intent which is thus established. For example, in Bull v. Bray, supra, while the gift was a voluntary gift, and made by an insolvent, the other facts in evidence, that the insolvent did not know of his insolvency, that he was a man of large business affairs, and that he conducted these affairs for years after the date of the gift, were sufficient to overcome the prima facie showing. In Jamison v. King, supra, the gift partook of the nature of a gift causa mortis, and was not wholly without consideration, but was made, at least in part, in cancellation of a pre-existing debt. So, while the fact that a voluntary gift was made by an insolvent was not, under our law, sufficient to establish conclusively the fraudulent character of the gift,—conclusively, in the sense that no circumstances of explanation or extenuation would suffice to change, in the eye of the law, the character of the transaction (which is the present situation under the Code),—it has not been held, and never could reasonably have been held, that the unexplained fact that an insolvent makes a voluntary gift, whereby his creditors are in fact defrauded, did not compel a recognition of a fraudulent intent.

In the case at bar we have, however, not alone the unexplained circumstance of a gift made by an insolvent without consideration, but we have the added fact that the defendant made the gift to his wife after an order of examination had been served upon him, and upon the day before he was called upon to testify under that order. No other conclusion can reasonably follow these unexplained facts than that the gift was made with the intent to defraud the rights of the plaintiff creditors, and, in this view of the evidence, the finding to the contrary is wholly unsupported.

Another of the findings of the court assailed by appellant is to the effect that the certificate of deposit was not continuously after its issuance, and was not, at the date of the commencement of this action, in the possession or control of the defendants Rossi, or either of them, and that the ownership thereof had been transferred to other persons. The importance of this finding is at once apparent when it is considered that the purpose of the action is to obtain a judgment that the $1,652 represented by the certificate is the money and property of C. Rossi, applicable to the payment and satisfaction of plaintiffs' judgment, and that a decree is sought ordering the Rossis and the Bank of Fresno to apply the money to this end. It is well settled that a certificate of deposit such as was issued in this case is a negotiable instrument, which affords a continuing security to the holder. It is not regarded as overdue and dishonored until after presentation for payment. The date of its maturity is the date of such presentation. "The certificate is payable when payment is demanded by the party entitled to receive the money, and who avouches the fact by producing the instrument with evidence of title." Daniel, Neg. Inst. § 1707. Where money has been placed on general deposit in a bank, and a negotiable certificate of deposit has been issued to the depositor for the amount, there is nothing left in the possession of the bank belonging to the depositor upon which an attachment issued against his property can fasten. The bank by the certificate becomes liable, not to refund to the depositor the specific money deposited, but to pay the amount of the deposit to the holder of the certificate, whoever he may be, on presentation. McMillan v. Richards, 9 Cal. 365. Equity, however, may restrain the transfer of such negotiable instruments, and order them subjected to such disposition as it may deem just, but before this course can afford the slightest relief it is apparent that the restraining order must be served upon the present holder of the instrument. Only so may the difficulty be met, for the promise of the bank is out, and it is a promise to pay the holder of the certificate upon presentation, and this obligation is unaffected by any litigation in which the instrument is involved, unless the instrument and the party in possession of it are before the court. Plaintiff in this case met the difficulty by his averment that the certificate of deposit remained at all times in the ownership and possession, custody, and control of the defendants Rossi. The court found to the contrary. The only evidence upon the subject is that of the witness B. T. Scott. He testified: "About the month of February or March" Mr. and Mrs. Rossi drove up to his store, and gave him the certificate of deposit indorsed by Mrs. Rossi, and told him to collect it if he chose and use it in his business. Afterwards he was instructed to turn the certificate over to W. Rigby for collection, and he did so. He did not know upon the trial where the certificate was, nor what had become of it. This being all the evidence in the case upon the question, it is clear that at the time of the trial the outstanding certificate might have passed through a dozen hands, and might be held by a bona fide purchaser for value and without notice. Certain it is that the Rossis had parted with the custody and control of it, and that any bona fide holder without notice would be entitled to receive from the bank the amount of money named in it. This evidence, then, supports the finding of the court. The restraining order and garnishment were served upon the bank, as in the case of McMillan v. Richards, after the issuance of the certificate of deposit. The plaintiffs have failed in their attempts to seize or impound the certificate. A judgment in this case compelling the bank to pay the money to the plaintiffs would not protect it against a future demand by the holder of the certificate. The plaintiffs, therefore, have unfortunately failed in their effort to grasp the corpus of the property, and cannot obtain their desired judgment.

It is plaintiffs' contention, however, that, but for an error of the court, Rigby, the last-known holder of the certificate, would have been before the court, and that by showing that he was not a bona fide holder of the certificate they would have proved themselves entitled to the moneys in bank. This contention grows out of the following state of facts: After plaintiffs had instituted this action Rigby commenced suit against the bank, averring that he was the holder of the certificate of deposit, and that the bank, after presentation and demand, had refused payment. The bank applied to the court for leave to deposit the amount named in the certificate in court to await its action, and asked that upon such deposit it be dismissed from the action, and plaintiffs in this case be substituted in its place and stead. The order was made accordingly. Thereafter, and before any answer seeking affirmative relief upon the part of the defendants was on file, Rigby dismissed his action, and procured the entry of a judgment of dismissal in due form. Upon the entry of this judgment the action was finally at an end, and the court lost jurisdiction of it. Page v. Page, 77 Cal. 83, 19 Pac. 183; Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298; Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904; Evans v. Johnston, 115 Cal. 180, 46 Pac. 906. Notwithstanding the fact that the Rigby action had thus come to an end, and that the court's jurisdiction over it was thereby lost, the court, upon application of plaintiffs in this action (substituted defendants in the other action), vacated the judgment of dismissal, and consolidated the two actions for trial. Upon the trial plaintiffs offered the depositions of Rigby and one Ehrman, taken in the Rigby action, and objection was made to their reception in evidence. The court excluded them, and properly. The Rigby action was at an end, the order of consolidation was without force and effect, and, except upon the theory that the Rigby action was an existing action consolidated with the present action, the depositions had no place in evidence; this, if for no other, yet for the sufficient, reasons that neither the parties to, nor the issues in, the two actions were identical, nor yet did the defendants Rossi in the present action have any opportunity to cross-examine the witnesses whose evidence was thus sought to be employed against them. We have preferred to discuss the questions presented upon this appeal without regard to the preliminary objection made by respondents to the consideration of the evidence upon the ground of the insufficiency of the specifications of error; but for the reasons given the judgment and order are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(124 Cal. 321)

BISHOP v. McKILLICAN, Sheriff, et al.

(S. F. 1,067.)

(Supreme Court of California. April 15, 1899.)

RECEIVERS—AUTHORITY TO SUE—RAILROADS—MORTGAGES—EXECUTION AND RECORDATION.

1. A receiver has no authority to sue for the recovery of personal property of which he has never had possession, unless authorized so to do by the court that appointed him.

2. Civ. Code, § 456, which provides that railroad corporations, for the purpose of building and equipping their roads, may issue bonds secured by mortgages on their corporate property and franchise, confers merely the power to mortgage, and not the power to mortgage real and personal property as an entirety, irrespective of the statutory requirements as to the execution and recording of real and chattel mortgages; hence, a mortgage covering real and personal property of a railroad, executed and recorded only as a real-estate mortgage, is void as to the personalty, under section 2957.

Department 1. Appeal from superior court, Alameda county.

Action by Ira Bishop, as receiver, against Robert McKillican, as sheriff, and another. From a judgment in favor of defendants, and an order denying a new trial, plaintiff appealed. Affirmed.

E. J. Pringle, for appellant. Sidney V. Smith, Fitzgerald & Abbott, and Reed & Nusbaumer, for respondents.

VAN DYKE, J. In 1890 the Consolidated Piedmont Cable Company, a corporation operating a street railroad in Oakland, executed a mortgage to the California Title Insurance & Trust Company, by its terms including all track and tracks, together with all depot grounds, buildings, machinery, workshops, dummies, cars, rolling stock of all kinds, full equipments, tools, fixtures, and other property which is now, or may hereafter, in whole or in part, be, constructed, completed, purchased, acquired, held, or owned by the mortgagor, pertaining to the said railroads, and all the corporate rights, privileges, and franchises of the mortgagor pertaining to said roads, or any of them. This mortgage was acknowledged and recorded as a real-estate mortgage, and contained no affidavit; nor was it recorded as required by the Civil Code in reference to chattel mortgages. Afterwards, it is claimed by appellants, the railroad company acquired certain rolling stock, two bundles of wire cable, some old iron, and office furniture. On the 1st day of November, 1893, the Oregon

Improvement Company, a creditor of the railroad company, brought suit against said railroad company, and caused an attachment to be issued therein. Under this writ of attachment, and on the same day, to wit, the 1st of November, 1893, McKillican, as sheriff of Alameda county, by virtue of said writ of attachment, levied upon and seized the personal property last above mentioned. On the same day, to wit, November 1st, in an action brought by the California Title Insurance & Trust Company, a corporation, against the said Consolidated Piedmont Cable Company, to foreclose said mortgage, the plaintiff herein was appointed receiver, with "authority to continue the business of the Consolidated Piedmont Cable Company, and, as incident thereto, to create such indebtedness as may be necessary in conducting said business, and with the powers incident to the office of receiver." On the trial of this action in the court below it was stipulated that certain allegations in the answer were true, and that the property described in the complaint herein was held by the defendant McKillican, as sheriff of the county of Alameda, under an attachment issued against the Consolidated Piedmont Cable Company at the suit of the defendant herein the Oregon Improvement Company; and the further following stipulation is entered into between the parties:

"Oregon Improvement Company, Plaintiff, vs. Consolidated Piedmont Cable Company, Defendant. Whereas, in the action now pending in the above-entitled court, wherein the California Title Insurance and Trust Company is plaintiff and the above-named defendant is also defendant, the undersigned has been appointed receiver of the property and assets of the above-named defendant, and has taken charge of all the property of the defendant, except such as was in possession of Robert McKillican, sheriff of Alameda county, under and by virtue of a writ of attachment levied in the above-entitled action; and whereas, the undersigned has taken possession of all the property of the defendant, but subject to the above-mentioned levy, and it is the intention of the California Title Insurance and Trust Company, the plaintiff in the action wherein the undersigned was appointed receiver, to test the validity of the prior attachment levied in the above-entitled action, and it is desirable that the property belonging to the said defendant be used by the receiver, subject to any lien which the above-named plaintiff may, by virtue of the levy under said writ of attachment, have, and it is also desirable that expense be saved in caring for the said property: Now, therefore, I, the undersigned, receiver as aforesaid, do hereby acknowledge that I have received possession from the said Robert McKillican, sheriff as aforesaid, as care taker for him, of the personal property levied upon by him under the writ of attachment in the above-entitled action, and I do hereby agree to restore the same to the possession of the said Robert McKillican, sheriff, whenever he shall demand of me so to do. But this receipt shall not prejudice any claim which I, as receiver, may make, that said levy of a writ of attachment is inferior in right to any claim as receiver. Dated Oakland, November 1, 1893. [Signed] Ira Bishop.

"To Robert McKillican, Sheriff: If Ira Bishop, receiver, etc., will sign the foregoing receipt, you are at liberty to appoint him care taker of the property levied upon by you, and the plaintiff will acquit you of any claim for damages arising from any act of his. Dated November 1, 1893. Sidney V. Smith and Warren Olney, Attorneys for Oregon Improvement Company."

And, after the execution of the stipulation, the property, up to the time of levy of execution, was used or held under, and in pursuance to, the terms of the stipulation.

From the facts, as appears in the record, the plaintiff never had possession of the articles sued for as receiver, or in any other way, except as the servant of the defendant McKillican as sheriff, whereas the action seems to be based upon the theory that the property was in the possession of the plaintiff, as receiver, and unlawfully and wrongfully taken from his possession by the defendants. As to this property, the possession of the receiver was never disturbed or interfered with. The facts, therefore, are not consistent with the plaintiff's theory of his cause of action. The only authority the receiver has for bringing this action is the order appointing him. That does not specially authorize him to bring a suit for the recovery or value of property withheld or converted, of which he never was in possession. Beach, Rec. §§ 672, 673, says: "It has been formally adjudicated that a receiver, who has had possession of property by virtue of his appointment as such receiver by a competent court, may maintain an action of detinue for the property. Although such an action could not be maintained, if grounded merely upon the right of property which may be claimed to vest in him by virtue of his appointment, yet, as a mere right of possession is a sufficient basis upon which to found the action, and as he is entitled to the possession, he may avail himself of this remedy. A receiver appointed in supplementary proceedings takes only an equitable right of redemption in chattels mortgaged by the judgment debtor, when reduced to possession by the mortgagee before the commencement of the proceedings, and he cannot maintain replevin for such chattels against the mortgagee. In a recent case in England it was held that the receiver of a pawnbroker's business was not entitled to the possession of redeemable pledges, as against the sheriff, who held them by virtue of a levy under execution made after the appointment of the receiver, but before he had perfected his security." In State v. Gambs, 68 Mo. 289, it is held that an action brought by a receiver could not be maintained, because he had received no special authority entitling him to bring suit; Judge Henry adding: "A suit by a receiver to recover property of which he had obtained possession, but which has been taken from him, rests upon a different ground. In such a case his formal possession created a special property, which would support the action." In Tibbets v. Cohn, 116 Cal. 365, 48 Pac. 372, this court says (page 369, 116 Cal., and page 373, 48 Pac.): "As a rule, however, the receiver cannot sue to recover property which has not come to his possession, or which, being in the possession of the defendant, ought to have been delivered by him. He cannot maintain trover for property of the insolvent converted before the adjudication, nor to recover property transferred by the debtor in fraud of creditors. His appointment is intended to have the effect of a preliminary injunction to preserve the property. It does not appear that there was any order of the court directing or authorizing the suit." Beach, Rec. § 650, says: "The receiver has no right to sue, except by leave of the court which appointed him. Out of the established doctrine that a receiver is the officer of the court—the hand by which it executes its will in regard to the property in its keeping—is deduced the well-nigh universal rule that a receiver may not bring any suit without having first obtained leave of court." And, since the appeal was taken in this case, in the action of California Title Insurance & Trust Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237, 49 Pac. 1, it was held that moneys due the Piedmont Cable Company did not pass to the possession of the receiver by virtue of his appointment as such, and that the same were subject to, and were attached by, Albert S. Black, a creditor of said Piedmont Company. The court say: "The mortgage did not cover the assets of the corporation due therein, beyond the property as hereinbefore stated; and the receiver was appointed, not to collect the debts due the corporation defendant, but only to take possession of the mortgaged property, operate the road, etc. When, therefore, he took possession of the money of the defendant, and collected money due to it before his appointment, which was not covered by the lien of the mortgage, he transcended his authority as receiver." Under the order appointing the plaintiff as receiver, he had no power to bring suits for the recovery of property, or to contest the right of property claimed to belong to the defendant corporation in the suit wherein he was appointed, which would or might involve risk or expensive litigation, without an order of the court to that effect.

The property in question in this action is personal, and not real, estate. The mode and manner of mortgaging chattels or personal property is pointed out in Civ. Code, §§ 2950–2972. By section 2957 it is declared: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors; (2) it is acknowledged or proved, certified and recorded in like manner as grants of real property." As already stated, the mortgage in question did not purport to be executed in pursuance of the requirements of the Code concerning chattel mortgages, but only as a mortgage of real property. The first section of the chattel-mortgage provision specifies what articles of personal property may be mortgaged, and the first subdivision includes "locomotives, engines and other rolling stock of a railroad"; the ninth, "growing crops." Simpson v. Ferguson, 112 Cal. 180, 40 Pac. 104, and 44 Pac. 484, was a case of a mortgage of growing crops. In that case a real-estate mortgage had been executed, covering the land upon which the crops were grown subsequent to the execution of the mortgage. The court say: "It is urged that sections 2955, and following, of the Civil Code, providing for the manner of mortgaging growing crops, do not establish an exclusive method; that as this class of property may under some conditions be regarded as realty, and under other conditions as personalty, it must follow that under corresponding conditions the property may be the subject of a real-estate mortgage or a chattel mortgage, according to the circumstances, and that, plaintiff having a valid mortgage upon the land, with its rents, issues, and profits, this gives him a valid lien upon the growing crops as effectually, to the same extent, for all purposes, as if executed with the formalities required in the case of a crop mortgage. We are unable to coincide in this view. In the first place, we think it quite manifest from the provisions of the Code in question that the legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purpose this species of property shall be regarded as chattels. There is nothing in the statute to indicate that it was not intended to cover every case of a mortgage given upon that class of property." Therefore it was held that the mortgage did not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. If this be "an exclusive mode for mortgaging growing crops," it is likewise as to the property in question here, as it belongs to the same category, and included in the same section. In Southern California Motor-Road Co. v. Union Loan & Trust Co., 12 C. C. A. 215, 64 Fed. 450, the circuit court of appeals, in modifying the opinion of the circuit court, held that a mortgage by a railroad company, under the authority conferred upon such companies by section 456 of the Civil Code, included personal property as well as real estate, although executed and recorded as a real-estate mortgage merely. The court, in deciding the case, say: "There is a great diversity of opinion upon this question in the different states where no express statute exists upon the subject. * * * Several states, owing to the conflict in the decisions of the courts, have settled the matter by direct legislation. * * * The Civil Code of California, in dealing with the subject of railroads and of corporate stock, provides that railroad corporations, for the purpose of constructing and completing roads, may, among other things, mortgage their corporate property and franchises. * * * There are no conditions attached to this power. It is absolute, and gives the railroad the right to mortgage personal as well as real property for the purpose mentioned, without incumbering it with any of the conditions attached to the chattel mortgage act." The same circuit court of appeals subsequently, in Illinois Trust & Savings Bank v. Seattle Electric Railway & Power Co., 27 C. C. A. 272, 82 Fed. 941, had under consideration the same subject-matter of mortgaging chattels by a railroad company under the laws of the state of Washington. In that case the court held that the failure of the trust deed to comply with the chattel mortgage law of that state rendered the mortgage void as to the personal property. The statutes of that state contain provisions for mortgaging personal property or chattels similar to ours. The court, in deciding the case, say: "This court held that a statute of California relating to chattel mortgages similar to that of Washington did not apply where the mortgage of a railroad company covers personal property in connection with real estate and corporate franchises, but in both of these cases the exception was based upon the provisions of the statute conferring upon railroad corporations organized or incorporated under the laws of the state for public purposes the power to mortgage their franchises and real and personal property as an entirety." Section 456 of the Civil Code is found in division 1, pt. 4, tit. 3, under the head of "Railroad Corporations." It is simply intended, as its language imports, to confer upon railroad corporations the power to mortgage their property. Being a corporation, and the creature of law, it would possess no such power without direct authority given to it by law. The section does not in terms, however, as implied in the decision of the circuit court of appeals, confer power to mortgage "their franchises and real and personal property as an entirety," but simply confers the power to mortgage such property, without prescribing the mode. The same power is possessed by individuals. Still, it would hardly be claimed that an individual, owning a railroad and all the other property that ordinary railroad corporations own, could mortgage the whole property, real, personal, and franchises, in one instrument as a real-estate mortgage. See, also, Hoyle v. Railroad Co., 54 N. Y. 314. The mode and manner of executing mortgages, both of real and personal property, will be found in altogether a different part of the Civil Code from that concerning corporations, to wit, under division 3, pt. 4, tit. 15. In article 2 the mode of mortgaging real property is pointed out, from section 2947 to section 2952, inclusive, and mortgages of personal property in article 3, from sections 2955 to 2973, both inclusive; and it is declared in section 2957 that "a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless" executed, acknowledged, and recorded as in that article prescribed. No exception is contained in favor of any person, whether a natural person or a corporation; and the language is too plain to be misunderstood, and requires no construction. It is intimated in the opinion of the circuit court of appeals referred to that if a state, by statute, has "settled the matter by direct legislation," the court would feel bound to follow it. We think that our state has settled the matter in the provisions of the Code referred to, and that it is the duty of this court to follow the law as there laid down. The judgment and order denying a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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124 Cal. 300

BLANKENSHIP v. WHALEY et al. (Sac. 447.)

(Supreme Court of California. April 14, 1899.)

SPECIFIC PERFORMANCE—CONTRACTS WITHIN THE STATUTE OF FRAUDS — PART PERFORMANCE— JUDICIAL SALES— TITLE TO PURCHASER.

1. The parol agreement of a landowner that, if an adjoining landowner will help him to enlarge an irrigation ditch on his lands, he will permit the latter to use the waters thereof, is, after performance by such adjoining landowner, and his use of the waters thereunder, enforceable in equity against the owner of the lands on which the ditch is located and those claiming under him with notice, though within the statute of frauds.

2. The purchaser at administrator's sale takes title free from secret defects which he could not have ascertained by the exercise of due diligence.

3. In an action to enforce a water right in favor of a third person against one claiming under an administrator's sale, the court found that the deed, which expressly reserved the water right in question, was duly executed pursuant to an order of the superior court, but made no finding whether the purchaser took with notice. *Held* that the finding was insufficient to support a judgment that the purchaser took free from any irrigation rights of such third person, since it did not appear whether the reservation in the deed was an unauthorized attempt of the administrator to create a water right in favor of such third person, and hence did not constitute notice, or whether it was inserted in the deed by order of court in recognition of an existing water right, in which event it would constitute notice.

In bank. Appeal from superior court, Tulare county.

Action by P. N. Blankenship against Samuel Whaley and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

E. W. Holland and Bradley & Farnsworth, for appellant. T. E. Clark and W. W. Cross, for respondents.

HENSHAW, J. By his action plaintiff seeks an injunction restraining defendants from interfering with him in the use of a certain ditch upon the lands of defendants. Plaintiff avers that he "constructed a certain irrigating ditch" upon lands which were at the time the lands of one R. G. Rogers, under an agreement with Rogers that he (plaintiff) was to have the perpetual right to the use of the ditch for the purpose of conducting water to his lands, together with the right at all times to enter upon the premises of Rogers to repair the ditch, and keep it in proper condition. He alleged that for 10 years last past he has openly and notoriously, and adversely to all others, used the ditch for the indicated purpose; that about a year before the commencement of the action the defendants became the reputed owners of the land upon which the ditch is constructed, but that they became such owners with full notice of the existence of the ditch, and of plaintiff's rights therein and thereto. Prior to the commencement of the action, defendants informed plaintiff that they would not then, nor at any time in the future, permit him to use the ditch, or run water through it to his lands, or enter upon the lands for the purpose of repair of the ditch, or for any purpose whatsoever. Fifteen acres of plaintiff's land consists of high, sandy soil sown to alfalfa, of the value of $50 per acre. It can be irrigated only by water conducted through the ditch, and without being irrigated the land and the crop growing thereon would be rendered entirely worthless. Unless plaintiff is permitted to use the ditch and run the water through the same without delay, his crop will be destroyed, and he will suffer great and irreparable damage. The answer denied all the material averments of the complaint excepting the ownership of the land, and it is specifically denied that defendants acquired ownership with any knowledge of any rights of the plaintiff in and to the land or to the ditch. The court found that plaintiff did not "construct" any ditch upon the land of Rogers at all, but it found that during the year 1887, while Rogers was the owner of the land, plaintiff and Rogers "entered into a parol agreement, by the terms of which plaintiff, Rogers, and others were to do the work of enlarging and increasing the capacity of the ditch mentioned and referred to in plaintiff's complaint herein, and, in consideration of said work being done as aforesaid, the parties performing the same were to have the use of said ditch and the water flowing therein, and jointly use the same during the irrigating season for irrigating purposes; that pursuant to said agreement the work of enlarging the said ditch and increasing the capacity thereof was done by said plaintiff, the said Rogers, and others, the said work being finished during the year 1887." "Thereafter, at various times between the year 1887 and the year 1893, the said parties to said agreement used said ditch and the water flowing therein for irrigation purposes." "No written conveyance of any interest in said ditch, or the water flowing therein, was ever made by said Robert Rogers, or any one else, to plaintiff." "On the 28th day of October, 1895, the said land [of Rogers], and all ditches and water rights appertaining thereto upon, over, and across the same, together with the use and possession thereof, were, by the administratrix of the estate of Rogers, then deceased, conveyed to the defendant Samuel Whaley by a deed duly executed by said administratrix in pursuance of an order of the superior court of Tulare county, state of California." "In addition to the conditions and covenants usually contained in conveyances of real estate, the deed above referred to contained the following language, to wit: 'Saving and reserving from the premises above described, and from the operation and effect of those conveyances, all the right, title, and interest in and to the old chartered ditch and the water flowing and to flow therein, for the use and benefit of the lands and premises known and described as sections 9 and 10, in township and range, and it is hereby fully understood and agreed by and between the parties hereto That the said ditch shall be and remain and the same shall continue over and across the lands and premises hereby conveyed to said lands and premises hereinbefore described as sections 9 and 10, which shall retain and be entitled to all their rights and privileges in and to said ditch and the water therein flowing, and the lands hereby conveyed shall have and are entitled to their pro rata share of water from said ditch, and all the right and title to the lands hereby conveyed in and to said ditch, and all persons having an interest in or to said ditch may lawfully enter upon said premises to repair or clear said ditch at any time while using the water therefrom on their said land.' Plaintiff's land is in section 10." No finding was made as to the defendants' knowledge or lack of knowledge of the alleged rights of plaintiff at the time they obtained title to the ditch and lands. From these findings the court concluded that the defendant Samuel Whaley was the owner in possession and entitled to the possession of the lands and the control of all ditches upon and across his lands, in connection with his co-tenants, of whom plaintiff was not one; and that the plaintiff had no right, title, or interest in and to the ditch upon and across the land for any purpose whatever. Judgment followed for defendants, and plaintiff appeals upon the judgment roll.

Notwithstanding the fact that the interest to which plaintiff pleaded he was entitled is an estate in real property, and that an agreement for the conveyance thereof is within the statute of frauds,—a proposition which is well settled in this state (Hayes v. Fine, 91 Cal. 391, 27 Pac. 772),—and, notwithstanding the further fact that the court finds that the agreement in this case was in parol, nevertheless the court further finds such an execution of the parol agreement as under the authority of Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268, would entitle the plaintiff to a specific performance of the agreement, and to a conveyance of the interest which he claims, had his action been prosecuted against the original owner, Rogers. The findings, it will be noted, declare that such an agreement was entered into; that plaintiff performed his part of the agreement; and that he thereafter used the water, at different seasons, under the agreement. If the defendants purchased the land, the ditches, and the rights appertaining thereto with knowledge or notice of plaintiff's interest, which interest stood, not as a legal interest, but as an interest subject to equitable enforcement only, plaintiff would have the unquestioned right to enforce it against them. To save this point, he pleaded that the defendants took the property with knowledge of his rights. Defendants acquired title at the administrator's sale. At such a sale the maxim caveat emptor is held to apply; but, while the purchaser at such a sale is not warranted in his title, and is chargeable with knowledge and notice of that of which, by the exercise of due diligence, he could have acquired knowledge, he is still protected by the recording acts; and secret defects in a title apparently good are, as to him, no defects at all. Love v. Berry, 22 Tex. 371; Banks v. Ammon, 27 Pa. St. 172. There being nothing of record to charge the defendants in this case with constructive knowledge of plaintiff's right, it became incumbent upon plaintiff to plead and prove, as he did, that they took title with knowledge. Upon this material question there is absolutely no finding whatsoever.

Again, by the findings it appears that the administrator's deed, through which defendants deraign title, was "duly executed in pursuance of an order of the superior court." The deed contained the exception or reservation above set forth. The administratrix could not, by any reservation or exception in her deed, whether made in pursuance of an order of court or not, create a new right or interest in the land conveyed, in the ditch, or in the waters flowing therein; but if, at the time of the deed, there were any such existing rights, it was perfectly proper for the administratrix under order of court to have noted those rights, and excepted them from the conveyance of the interest of the decedent. The finding in this regard is ambiguous. It declares that the administratrix duly executed her deed pursuant to the order of court. If, in truth, the court had ordered the deed to be made with such exception in recognition of plaintiff's rights, defendants, in taking the deed, would have been charged with notice of them. But if, however, this language in the deed was but an unauthorized attempt of the administratrix to declare a reservation, and create an interest where one did not exist, then it was void, and of no avail. Thus it appears that the findings are insufficient to support the judgment for lack of an essential finding as to the knowledge of defendants. If defendants took with knowledge of plaintiff's right, the other findings of the court clearly establish that this right was sufficient to entitle plaintiff to an execution of the parol agreement. The judgment appealed from is reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; McFARLAND, J.; HARRISON, J.; VAN DYKE, J.; GAROUTTE, J.

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124 Cal. 330

McCONOUGHEY v. TORRANCE, Judge of Superior Court. (L. A. 722.)

(Supreme Court of California. April 21, 1899.)

MANDAMUS—LACHES—APPEAL.

Mandamus will not lie to compel a trial judge to settle a statement on appeal five months after the order refusing to settle the statement was made final.

In bank. Petition by A. M. McConoughey for a writ of mandamus to compel Torrance, judge of the superior court, to settle a case. Refused.

A. M. McConoughey, for petitioner.

PER CURIAM. This is a proceeding in mandamus to compel the respondent to settle a statement on appeal. The appeal was taken within 60 days after July 28, 1898. The refusal to settle the statement was made final and definite by an order of respondent made and entered October 11, 1898. This proceeding to compel settlement was not commenced until March 24, 1899, and the application must be denied upon the ground of laches. In re Depeaux's Estate, 118 Cal. 522, 50 Pac. 682.

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124 Cal. 48

ANDERSON v. ANDERSON. (L. A. 583.)

(Supreme Court of California. April 18, 1899.)

Modification of opinion.

For prior reports, see 56 Pac. 61, 630.

PER CURIAM. The judgment heretofore rendered herein is modified by striking out the portion thereof affirming the judgment of the superior court, and adding the following, viz.: "The superior court is, however, directed to modify its judgment by providing therein that upon application of either of the parties to the action, upon notice to the other, and the proper showing therefor, it may modify or change the judgment in such mode and to such extent as it may deem just, or may set the judgment aside."

(124 Cal. 274)

BROWN et al. v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,134.)[1]

(Supreme Court of California. April 14, 1899.)

MUNICIPAL CORPORATIONS—STREETS—VACATION—CERTIORARI—WHEN LIES—EMINENT DOMAIN—COMPENSATION.

1. Under St. 1889, p. 70, which authorizes the board of supervisors to "close a street, in whole or in part, whenever the public interest or convenience may require," the determination to open or close a street by the board is the exercise of a legislative, and not a judicial, power, and hence certiorari will not lie to review it.

2. St. 1889, p. 70, provides that, after the board of supervisors has acquired jurisdiction to make improvements, it shall appoint commissioners to assess benefits and damages, unless the proposed work is for closing up the street, and it appears that no assessment is necessary. *Held*, that such determination is the exercise of a legislative function; hence certiorari will not lie.

3. The diminution in the value of a lot abutting on a street, resulting from the narrowing of the street, is not such damage as entitles the owner to compensation, where the means of ingress and egress and the supply of light and air are not impaired.

4. Persons who have not suffered such damage by the action of a municipal board as would entitle them to a private remedy therefor, but merely such damage as is sustained by the public in common, cannot maintain certiorari to review the action of the board.

5. Certiorari will not lie to review the action of a municipal board merely because it results in damage to petitioner, where the board have acted within their authority.

6. Whether the lands affected are remote from or abut on a street is immaterial, in a certiorari proceeding by the landowners, in determining whether a municipal board acted within its authority in narrowing the street.

7 Certiorari to review the action of a board of supervisors in narrowing a street will not lie on the ground that it does not appear what disposition is to be made of the area vacated.

Department 1. Appeal from superior court, city and county of San Francisco.

Petition by one Brown and others against the board of supervisors of the city and county of San Francisco for a writ of certiorari. From a judgment sustaining a demurrer to the petition, petitioners appeal. Affirmed.

Alex. G. Eells and T. W. Nowlin, for appellants. Sullivan & Sullivan, for respondent.

HARRISON, J. Turk street, in the city and county of San Francisco, between Masonic avenue on the east and St. Josephs avenue on the west, was originally laid out with a width of 100 feet. The board of supervisors of said city and county passed an order April 19, 1897, declaring the northerly 31 feet and 3 inches of said portion of Turk street to be closed and vacated. The appellants herein are owners of lands abutting upon the southerly side of said portion of the street, and instituted the present proceeding for a review of this action of the board of supervisors, and a judgment annulling said order, upon the ground that in adopting it the board acted in excess of its jurisdiction. In their application to the superior court, they allege their ownership of the abutting lands, and that they had filed with the board written objections to the adoption of the order, but that the board adopted the order without considering these objections, and in disregard thereof. The appellants also alleged that they would sustain injury and their lands be damaged by the closing of that portion of Turk street, and that the said order was adopted without making or providing for any compensation therefor, and that the board by said order adjudged that they were not entitled to any compensation for said damage, and that such determination was made without any opportunity on their part to be heard in reference thereto. A demurrer to the application was sustained by the superior court, and, the petitioners declining to amend, judgment was rendered denying their application. From this judgment the present appeal has been taken.

Counsel for both the appellants and the respondent have discussed the appeal upon the theory that the proceedings for the improvement of the street were taken under the provisions of the act of March 6, 1889 (St. 1889, p. 70), upon the ground, as suggested in the briefs, that the provisions in Act 1893, p. 220, purporting to limit the provisions of this act to cities having a population less than 40,000, is special and local legislation, within the prohibition of the constitution, and, without passing upon this question, we shall consider the appeal upon this theory.

The writ of certiorari can issue to review the action of a board or inferior tribunal only when the act to be reviewed was performed by the board or tribunal in the exercise of judicial functions, and the board or tribunal has acted in excess of its jurisdiction. Code Civ. Proc. § 1068; People v. Bush, 40 Cal. 344; Quinchard v. Board, 113 Cal. 664, 45 Pac. 856; People v. Board of Sup'rs of Contra Costa Co. (Cal.) 55 Pac. 131; Frasher v. Rader (Cal.) 56 Pac. 797. The appellants do not controvert this rule, but they insist that in the passage of the order in question the board of supervisors acted judicially, and without observing the provisions prescribed by the statute.

The act of the board of supervisors in determining whether a street shall be opened or closed, or widened or contracted, or otherwise improved, is a legislative act, performed in the exercise of the power which has been conferred upon the municipality by the legislature to enable it to provide for the welfare of its citizens; and, although the board is called upon to exercise its judgment in determining whether to authorize the improvement, such judgment is not the exercise of any "judicial functions," but is the conclusion which they form in the exercise of the discretionary power that has been intrusted to them, and upon a consideration of the public welfare and demands for which they are to provide. "The essential elements of judicial action are wanting, namely, the ascertainment of existing rights." People v. Board of Sup'rs of Contra Costa Co. (Cal.) 55 Pac. 131. We are aware that in some of the early opinions in the Reports of this state there is language that is not entirely consistent with this rule, but, although there are expressions that such a proceeding could be reviewed upon certiorari, we are not aware of any decision to that effect. Whatever dicta of this nature there may be are inconsistent with the rule, and must be considered as overruled by the later decisions.

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[1] Rehearing denied May 12, 1899.

The authority to close a street "in whole or in part," which is conferred by the act of March 6, 1889, authorizes the board to diminish the width of the street, and the adoption of the order is a determination by the board that the public interest or convenience requires the improvement. "The legislature has, by the statute referred to, conferred upon that body the power to open and close streets 'whenever the public interest or convenience may require,' and the determination of this question by that body is not open for review by the courts." Symons v. City & County of San Francisco, 115 Cal. 555, 42 Pac. 913, and 47 Pac. 453.

The act aforesaid provides that, after the board has given notice of its intention to make the improvement, objections thereto may be filed, and that the board shall hear such objections and pass upon the same; and declares that the decision of the board thereon shall be final and conclusive, and, if the objections are overruled, that the board shall be deemed to have acquired jurisdiction to order the improvement. The appellants filed certain objections to the improvement, and a day was appointed for hearing the same, and it is recited in the order that these objections were then heard, and duly considered and overruled. The appellants allege in their petition herein that their objections were "partly heard," and were subsequently considered by the board, and overruled without any notice to them. They do not, however, allege that they were refused a hearing upon any of their objections, or that the board declined to hear any argument they wished to make, and in this proceeding we cannot consider the sufficiency or insufficiency of the hearing which was given to the appellants upon their objections. The hearing thus authorized was not a judicial hearing, but merely a mode of procedure for ascertaining the public interest, and that the board might determine whether that interest would be subserved by the improvement. Whether the lands of the appellants would suffer damage by the improvement was proper for the board to consider in determining whether the public interest was such as authorized the improvement notwithstanding such effect; but if, after considering this question, it decided that the objections were insufficient to overcome the public interest, its decision, in the language of the statute, became "final and conclusive," and it acquired jurisdiction to order the improvement.

It is contended by the appellants that the board had no jurisdiction to adopt the order without at the same time providing for an assessment of the damage that would be sustained thereby, and providing for its payment. The statute provides that, after the board has acquired jurisdiction to make the improvement, "unless the proposed work is for closing up, and it appears that no assessment is necessary," it shall appoint commissioners "to assess benefits and damages." The proper construction to be given to this provision is that commissioners are not to be appointed if the proposed improvement is for closing up the whole or a part of the street, unless an assessment is necessary, and that the necessity of an assessment is to be determined by the board, and may be determined irrespective of any previous notice therefor, or after such hearing and investigation as it may deem appropriate. There can be no assessment necessary unless there is some damage for which an assessment is to be made, and, in the absence of a showing that damage will result from the closing up of the street, the board is authorized to hold that an assessment is not necessary. This provision necessarily means that the board must in the first instance determine whether an assessment is necessary, and its jurisdiction to order the improvement does not depend upon a correct determination by it of that question. The board is not authorized to determine the amount of damage or the individuals or lands which will be damaged by the improvement, but it is authorized, in the exercise of its legislative discretion, to determine, in the first instance, whether any damage will result. See Parker v. Catholic Bishop, 146 Ill. 167, 34 N. E. 473. Whether it errs in this respect or not, its action cannot be reviewed under a writ of certiorari.

It is claimed by the appellants that by the passage of the order the city damaged their lands without providing any compensation therefor, and they also allege that in their objections to the order they stated that their lands would be damaged by its adoption; but the only injury claimed is the diminution in value of their lands by reason of the reduction in the width of the street, and in their argument herein they contend that their right to have the street kept at its orginal width is property, which cannot be taken or damaged without making compensation to them therefor.

The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. Dill. Mun. Corp. § 712. In Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750, the right which the abutting owner has to the use of the street fronting upon his lot is defined to be an easement therein for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as that which he has in the lot itself, and any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. The appellants herein do not, however, claim that the reduction in the width of the street will in any respect interfere with their enjoyment of light and air, or that access to their lots is in any degree impaired. Indeed, in view of the fact that by the proposed reduction of the street it will have the same width as the majority of streets in the city, such contention could not be made. The provision in the constitution invoked by them was inserted therein to provide for instances in which property was not taken from the possession of the owner, or into physical occupancy by the public, and applies only to such damages as may be recoverable under established rules of law. The damage which the appellants may sustain by reason of a diminution in value of their lands is consequential, and damage for which they are not entitled to compensation. Mere diminution in value is not a damage to the land. "Where no portion of the land is taken, and the damages suffered are consequential, by reason of what the corporation does upon its own land or that of another, it does not seem that there is any warrant for instituting proceedings for the ascertaining of such damages." Stetson v. Railroad Co., 75 Ill. 74; American Bank-Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 N. E. 302. "The right of abutting owners in the streets is not of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interest, although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed." Reining v. Railway Co., 128 N. Y. 157, 28 N. E. 640. It has been held in other states that even the entire closing of a street upon which property abuts does not give to the owner a right of compensation, so long as there are other public streets by which he has access to his land. The mere inconvenience thereby experienced is not a damage for which he is entitled to compensation. Coster v. Mayor, etc., 43 N. Y. 399; Smith v. City of Boston, 7 Cush. 254; Egerer v. Railroad Co., 130 N. Y. 113, 29 N. E. 95; Fobes v. Railroad Co., 121 N. Y. 505, 24 N. E. 919. If the appellants are not entitled to any private remedy for damages sustained by the order of the board, they are not entitled to question the validity of the order by means of the writ of certiorari. Davis v. Commissioners, 153 Mass. 218, 26 N. E. 848. "Whether the order will have the effect to diminish the value of the plaintiffs' land, or to cause them damage, is not a ground for annulling the act of the board of supervisors, and cannot be considered in this proceeding. If the board of supervisors had the authority to pass the order, and the plaintiffs have sustained any legal damage by reason thereof, they must seek relief in a direct proceeding therefor." Symons v. City & County of San Francisco, supra. Whether the lands affected by the order are remote from the street which is affected, or abut thereon, is immaterial in determining whether the board exceeded its jurisdiction.

The suggestion of the appellants that the effect of the order is to give to the abutting owner upon the northerly side of the street the strip of land taken from the street is not available in this proceeding. No such purpose appears upon the face of the order, and the jurisdiction of the board to make the order is not dependent upon the effect it may have upon the title to the vacated portion of the street. If the closing of this part of the street has the effect to vest the abutting owner with the title thereto, the board is not deprived of its authority to make the order by reason of such result; while, if its effect is to leave the vacated portion of the street public property, it can be disposed of only in accordance with law. See Meyer v. Village of Teutopolis, 131 Ill. 552, 23 N. E. 651. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

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124 Cal. 282

BRITTAN v. OAKLAND BANK OF SAVINGS. (S. F. 926.)

(Supreme Court of California. April 14, 1899.)

Unauthorized Sale of Pledge — Rights of Pledgee and Purchaser—Stock Assignment—Sufficiency—Pleading—Amendment — Discretion—Savings and Loan Corporations—Prohibited Loan—Validity—Review — Verdict—Conflicting Evidence—Instructions.

1. A sale of pledged property not in accordance with law does not extinguish the lien and interest of the pledgee in the securities, as against the pledgor.

2. A bona fide purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee.

3. Where one transferred and indorsed bank stock in blank, and delivered the same to his agent, with power to negotiate and pledge the same, he cannot recover for a conversion thereof by the pledgee of the agent, who took it in good faith and for value, without refunding or offering to refund the amount advanced by the pledgee.

4. Delivery of a certificate of stock, with a blank assignment signed and indorsed on the back thereof, is a good assignment.

5. An abuse of discretion in refusing to permit a party to amend a pleading cannot be predicated on a refusal of an application therefor during the trial.

6. A violation of Civ. Code, § 578, prohibiting directors and officers of savings and loan corporations from borrowing therefrom, and declaring that their offices shall immediately become vacant therefor, can only be availed of at the instance of the sovereign power.

7. A loan made by a savings bank to a director, who is prohibited by Civ. Code, § 578, from borrowing therefrom, on penalty of having his office vacated, is not invalid, and may be recovered, and a pledge securing the same held until the loan is paid.

8. A verdict is conclusive, on appeal, as to facts on which the evidence is conflicting.

9. Where instructions, taken together, presented a case fairly, the correctness of a single one cannot be challenged.

Department 1. Appeal from superior court, Alameda county.

Action by Nathaniel J. Brittan against the Oakland Bank of Savings. From a judgment for defendant, plaintiff appealed. The judgment was affirmed (44 Pac. 339), and plaintiff now appeals from an order denying a new trial. Affirmed.

Jas. L. Crittenden, for appellant. Dunne & McPike, for respondent.

VAN DYKE, J. The action here is conversion. The facts of the case, as admitted, not controverted, or established by a preponderance of the testimony, are as follows:

In December, 1881, and prior and subsequent thereto, A. W. Bowman was the agent of the plaintiff herein to collect rents, pay taxes, and supervise his various properties. The plaintiff was the owner of 120 shares of stock of the Bank of California, represented by certificate No. 17, and in December, 1881, or the beginning of January, 1882, as he testifies, he assigned this certificate in blank to said Bowman, for the purpose of raising some money. Bowman was at this time, and prior thereto had been, a director in the defendant bank, and was in the habit of borrowing large sums of money from said bank on securities, generally in the shape of stocks put up by way of pledge. In the latter part of January or the fore part of February, 1882, Bowman presented to the cashier and president of the defendant bank the certificate in question, so indorsed to him in blank by the plaintiff. The certificate was received, and placed to the account of Bowman, entitled "Overdraft Account," and money was thereupon or thereafter advanced and other transactions had, the same as theretofore, up to the time of Bowman's failure, in 1884. On October 15, 1884, the defendant bank surrendered the certificate of stock No. 17 to the Bank of California, and had a new certificate, No. 809, issued to it, in place thereof, for the shares represented in the old certificate and held by it in pledge. Neither the defendant bank nor its officers, other than director Bowman, had any notice or knowledge of the fact that the certificate in question was the property of the plaintiff, up to the demand made by him October 17, 1884. On October 17, 1884, the plaintiff made a demand on the defendant for the stock in question, as the owner thereof, which demand was refused. October 27, 1884, the petition of certain creditors of Bowman was filed to have him adjudged an insolvent, and thereafter, in the usual course, he was so adjudged insolvent. At no time from the date of the transfer of the certificate to the bank was the account of Bowman for moneys advanced to him by the bank reduced below the amount of the securities, including the certificate in question, and his account showed that between July, 1884, and January, 1885, it was not less than $42,500, and, deducting the pledged stock, it was in the neighborhood of $24,000. This action was brought originally November 7, 1885, by Frank Allyn, as assignee of the plaintiff, against the present defendant, the Bank of California, said Bowman, and other parties. The complaint was amended several times, and finally, on the third amended complaint and the answer thereto, the action was tried. Before the third amended complaint was filed Bowman died, and Allyn, the former plaintiff, reassigned to the present plaintiff, who was substituted in his place, and all the other defendants, excepting the respondent here, were omitted from the complaint on which the action was tried. In April, 1895, the action was tried before a jury, and a general verdict rendered in favor of the defendant. An appeal was had to this court from the judgment, upon the judgment roll (112 Cal. 1, 44 Pac. 339), and the judgment affirmed. This appeal is taken from the order denying plaintiff's motion for a new trial. Between the time of the demand made by the plaintiff on the defendant bank for the stock in question and the bringing of the action, to wit, in August, 1885, the defendant bank sold the stock at private sale, without notice, for the sum of $18,941, which, with interest, deducted from the amount then due the bank from Bowman, left a balance of $24,000. In May, 1887, defendant bank assigned its claim against the Bowman estate in the insolvency proceedings to W. H. Chickering for $4,616.73, and at about the same date Chickering assigned the same to the plaintiff Brittan.

1. One of the contentions of the appellant is that the defendant bank, having sold the stock at private sale, without complying with the requirements of the Code, thereby lost its lien and all interest in said stock. But the case here is not that of a mere lienholder or bailee, but it is a case of pledge. The stock, as already shown, was indorsed in blank by the plaintiff to Bowman. Plaintiff dealt with Bowman, and not with the defendant bank. The account, as furnished by Bowman to the plaintiff of his transactions as his agent, as given in evidence, shows this. A further fact going to show that the plaintiff dealt entirely with Bowman, and not with the bank, is that plaintiff filed his claim against Bowman on the balance of his account, in the insolvency proceedings against Bowman, including this same stock, as certificate No. 17, and drew from the insolvency court, through the assignee in insolvency, a dividend or payment on said claim. There was also in evidence an affidavit by the plaintiff for the arrest of Bowman at the time of his failure, for the crime of embezzling the stock in ques-

tion. In that affidavit he said that Bowman "then and there was the agent of deponent, and, by virtue of his employment as such, there came into the care and custody of him, the said A. W. Bowman, one hundred and twenty shares of the capital stock of the Bank of California, * * * which said certificate of stock was indorsed in blank by deponent, and was then and there of the value of one hundred and sixty-five dollars per share,—in all, of the value of nineteen thousand eight hundred dollars,—all in lawful money of the United States; and the said A. W. Bowman, while then and there having, as aforesaid, the control and care of said shares of stock and the aforesaid certificate, did then and there fraudulently appropriate the same to his own use." This verified complaint or affidavit was filed on the 18th day of October, 1884, being the next day after plaintiff's demand on the defendant bank, and on the 20th day of the same month (two days thereafter) he brought an action against the present defendant, Bowman, and the Bank of California, for an injunction, in which it is also alleged that, for a long time prior to the 15th day of October, the defendant Bowman was the agent of the plaintiff in and about the care and management of the plaintiff's business, and as such agent had the care and custody of the said stock, which was indorsed to him in blank, giving the value thereof, the same as in the preceding affidavit. This court, in Williams v. Ashe, 111 Cal. 180, 43 Pac. 595, distinguishes between a mere lienholder and a pledgee. In that case Ashe turned over certain horses to one Kelly in pledge as security for a sum of over $4,000, and, after holding them some time, and becoming dissatisfied with the first arrangement, Kelly claimed them as owner, and as such sold and delivered them to the plaintiff Williams. Williams supposed he was buying the horses absolutely, and both he and Kelly testified that the sale was intended as an absolute sale. Nevertheless, it was found that the transaction between Ashe and Kelly was that of a pledgor and pledgee. Ashe having got possession of the horses, Williams brought an action to recover them. The jury in the case returned a verdict for the plaintiff, Williams, for the return of the property, and found the value of his interest in said property to be the sum of $4,909.74. The judgment following this verdict was for the return of the horses to plaintiff, and decreeing a lien upon them for the sum named. Defendant Ashe appealed from the judgment. In the opinion of this court it is said: "Williams, it is to be remembered, is suing primarily for the recovery of the possession of the horses, and is basing his claim upon an absolute purchase of them from Kelly. Kelly insists that he was the owner, and sold the horses (and not any pledgee's interest in them) to Williams; that Ashe's debt to him had been completely extinguished, and that the relation of creditor and debtor did not exist between them at the time he made the sale. Ashe, upon the other hand, has the horses in possession, and asserts that Kelly was but a pledgee; and, having sold contrary to his rights as pledgee, having repudiated the pledge and asserted ownership,—in short, having made a wrongful conversion of the property,—the lien is extinguished, and he is entitled to retain possession against both of them. So far as concerns the rights of one who has a mere lien, as distinguished from one who claims as pledgee, the question has been answered repeatedly. It is the general rule that a lienholder who refuses, upon proper demand, to deliver the property without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after action commenced. It is so held in this state by the cases of Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161, and Sutton v. Stephan, 101 Cal. 545, 36 Pac. 106; and, from the number and uniformity of the authorities examined, it may with safety be said that this rule is universal. Section 2910 of the Civil Code enunciates the same principle. "It is also the rule that if one having but a lien is sued in replevin, and answers claiming absolute ownership, he will not be permitted upon the trial to assert any right as lienor. His lien is absolutely lost. [Citing a number of cases from other states.] * * * The latter rule is, however, subject to this manifestly just limitation that, if one who has claimed as owner is afterwards proved to have but a lien, he shall not thereafter be deprived absolutely of his lien, if his claim was honestly, though mistakenly, entertained and pressed; but, before he can be allowed his lien, he must abandon the false claim of ownership." Again: "But in the case of a pledgee the rule is otherwise. The reason for the distinction seems to be based upon two considerations: First, that the pledgee has a special property in the chattels which the other class does not possess; second, that a contract of pledge carries with it the implication that the security may be sold to discharge the obligation, while in case of a lien (except as aided by statute) the right of lien is not understood to carry with it any general right of sale. Story, Bailm. §§ 311–325. But, whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser, who will be allowed to hold the property until the extinguishment of the original obligation." The sale in this case, not being in accordance with law, simply passed to the purchaser the rights held by the defendant bank, and if suit had been brought against such purchaser by the plaintiff he would have been required to pay or tender only the same sum that he is required to pay or tender, as against the defendant bank, the pledgee. This court, in the case of Williams v. Ashe, 111 Cal. 180, 43 Pac. 595, says:

"But, after this brief consideration of a few of the cases, it remains to be added that in this state the question was early considered, and decided in accordance with the foregoing views, in the case of Dewey v. Bowman, 8 Cal. 145, wherein it is declared that, if a pledgee sells the property absolutely, without demand or notice to one having full knowledge of his title, while the absolute title does not pass, still the property remains in the hands of the purchaser as a pledge, with the rights to the purchaser which were enjoyed by the original pledgee." See, also, Belden v. Perkins, 78 Ill. 449, and Talty v. Trust Co., 93 U. S. 321. The plaintiff, having transferred or indorsed the stock in blank, and delivered the same to his agent, with power to negotiate or pledge the same, cannot recover from a pledgee of such agent, who took it in good faith and for value, without refunding or offering to refund the amount advanced by the second party, to whom it was so pledged. In McNeil v. Bank, 46 N. Y. 325, it was held that an innocent subpledgee was entitled, as against the original pledgor, to hold the stock for the full amount advanced by the subpledgee. The opinion proceeds: "Where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the parties with whom they deal directly, but are derived from the acts of the real owner, which preclude him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." Again: "The common practice of passing the title to stock by delivery of the certificate, with blank assignment and power, has been repeatedly shown and sanctioned in cases which have come before our courts. * * * A blank transfer on the back of the certificate to which the holder has affixed his name is a good assignment, and a party to whom it is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature." Civ. Code, § 2991.

2. Another contention on the part of the appellant is that the court below erred in excluding the defendant's assignment to Chickering, and Chickering's assignment to plaintiff, of the claims of the defendant against Bowman and his insolvent estate. The basis of this contention, as appears in the briefs and by the oral argument of the appellant's counsel, is that by this sale the bank had no further claim against Bowman against which to offset or recoup the stock or the proceeds thereof. As appears from the foregoing statement of facts, the original certificate of stock was surrendered to the Bank of California, and a new certificate issued to the defendant. This was held by the defendant in lieu of the former, as a pledge to secure its account for money loaned Bowman; and this account was much greater than the value of the stock at the time of plaintiff's demand, October 17, 1884. When the plaintiff demanded the stock, he made no offer to pay the indebtedness of Bowman for which it was held in pledge, or any part of it; and, the demand being refused, the defendant held the new certificate as such pledgee up to the sale of the stock in August, 1885. After the sale, as already stated, the proceeds thereof were applied on the Bowman indebtedness, leaving still a large balance of indebtedness from Bowman to the bank. The claim filed by the bank in the insolvency proceeding was long after this sale and was for the balance only of the overdraft account or indebtedness of Bowman to the bank, after deducting the proceeds of such sale. The amount received on the Chickering assignment was $4,616.73, as already stated. Appellant, however, claims that the defendant could not apply the proceeds of the stock sold in August, 1885, to the overdraft account of Bowman, but was obliged to keep such proceeds in lieu of the stock, subject to the demand of the plaintiff. But the defendant did apply such proceeds to the Bowman account, and this action is brought for the conversion of said stock by reason of such sale, and the application of the proceeds by the defendant, as aforesaid. Besides, the matter offered in evidence was not relevant to the issues presented by the last amended complaint and the answer thereto, on which the action was tried. It appears, however, that during the trial the plaintiff asked leave of the court to add a paragraph to his last amended complaint, pleading the matter of the assignment by the defendant of its claim in the insolvency proceeding of Bowman, but the court refused to grant such leave, and the appellant assigns this as one of the errors. The matter of granting or refusing leave to amend is very largely in the discretion of the trial court, and we cannot say that in this instance, taking into consideration the time when the application was made, there was any abuse of discretion to refuse the application.

3. At the time of the transaction between Bowman and the bank, as already stated, he was a director in the bank. Civ. Code, § 578, declares that no director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, and declares that the office of any director or officer who acts in contravention of this provision shall immediately thereupon become vacant. This, however, is of no advantage to the appellant, as the violation of the provision in question could only be availed of at the instance of the state or sovereign power. Jones v. Indemnity Co., 101 U. S. 628; Bank v. Matthews, 98 U. S. 621. Besides, the transaction was executed.

In Bank v. Burns, 104 Cal. 473, 38 Pac. 102, the court, in answering a similar contention that the transaction was void as being in contravention of the provision of the Code, says: "We do not think this contention can be sustained. The obvious purpose of the section of the Code invoked and relied upon was to protect savings banks and their depositors. To hold, therefore, that if the deposits or funds of such a bank should be borrowed by any of its officers, directly or indirectly, no action could be maintained by the bank to recover the money, would often work out great injustice and wrong." The bank, therefore, could have sued Bowman to recover back the money loaned, and it can hold the pledged stock or its proceeds in a suit for the recovery of the same until such money lent on the faith of such pledge is repaid.

4. Appellant contends that the evidence is insufficient to support the verdict, in that the evidence, as claimed, shows that when the plaintiff demanded the stock defendant asserted the unqualified ownership thereof, and refused to deliver it on that ground. This is contested by defendant, and there is a substantial conflict in the evidence in reference to this, and the jury found by its verdict for the defendant. In such case, it must be assumed by this court that the facts are in accordance with the defendant's contention on this point.

5. Appellant challenges the correctness of some of the instructions given at the request of the defendant, and of the refusal to give other instructions offered by the plaintiff, and also some of the court's charges to the jury. But, taking the instructions and charges all together, they presented the case fairly to the jury.

It will not be necessary to notice in detail the other points presented on behalf of the appellant. It is sufficient to say that we see no errors in any of them prejudicial to the appellant, or which would justify a reversal. The order denying a new trial is affirmed.

We concur: HARRISON, J.; HENSHAW, J.

(124 Cal. 352)

HOLLADAY v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,298.)[1]

(Supreme Court of California. May 3, 1899.)

SAN FRANCISCO PUEBLO LANDS — DONATION— ORDINANCES.

On June 20, 1855, the city of San Francisco adopted Ordinance No. 822, known as the "Van Ness Ordinance," relinquishing and granting all of the right and claim of the city to lands within its corporate limits to persons who were in actual possession thereof prior to January 1, 1855. On September 25, 1855, it adopted Ordinance No. 845, providing for a map exhibiting the streets and grounds reserved for use of the city; and thereafter the so-called Van Ness map was prepared, and on October 16, 1856, adopted by the board of supervisors of the city and county of San Francisco, by order declaring it to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes. On March 11, 1858, the legislature ratified the ordinances and order (St. 1858, pp. 52–56); and on July 1, 1864, congress passed an act (13 Stat. 333) providing that all the right and title of the United States to lands within the city limits, as defined April 15, 1851, was relinquished to the city for the uses and purposes specified in the ordinances.

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[1] Rehearing denied June 2, 1899.

Held, that Ordinance No. 822 did not itself operate to convey title to one who was in possession of land at the time when it was passed, but that it derived its force from the act of the legislature, and the act of congress confirming it, and that a square designated on the Van Ness map as a public park was dedicated to a public use by reason of these acts, and one claiming and in possession of land in such park prior to January 1, 1855, did not acquire title thereto by such possession.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by S. W. Holladay against the city and county of San Francisco. From a judgment for defendant, and certain orders, plaintiff appeals. Affirmed.

S. W. & E. B. Holladay, L. D. McKisick, and Jefferson Chandler, for appellant. H. T. Cresswell and Gaillard Stoney, for respondent.

BRITT, C. Plaintiff claims to be the owner of a half block of land lying along the south side of Washington street, between Gough and Octavia streets, in the city and county of San Francisco, and prosecutes this action to quiet his title thereto. Said half block is parcel of the lands to which the city, early in its history, laid claim as successor of the former Mexican pueblo. On June 20, 1855, the common council of the city passed Ordinance No. 822,—the so-called "Van Ness Ordinance,"—the second section whereof proceeded as follows: "The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, and to their heirs and assigns forever; * * * provided, such possession has been continued up to the time of the introduction of this ordinance in the common council," etc. There were various exceptions, of no present concern; and by section 4 of the ordinance the city reserved to itself "such lots and lands as may be selected and reserved for streets and other public purposes under the provisions of the next succeeding sections." Section 10 of the same provided that application should be made to the legislature to confirm and ratify the ordinance, and to congress to relinquish the right and title of the United States to the said lands for the uses and purposes in the ordinance specified. On September 27, 1855, said common council passed Ordinance No. 845, providing, among other things, for the preparation of a plan exhibiting the streets and other grounds reserved for the use of the city, and to be selected and located pursuant to the former ordinance (No. 822). Thereafter, ostensibly under authority of said ordinances, a map or plan, commonly known as the "Van Ness Map," was prepared by a commission chosen by the common council, upon which was delineated, as set apart for public use, a square called "Lafayette Park," including the premises here in controversy; and on October 16, 1856, a body acting as the board of supervisors of the city and county of San Francisco (the act of April 19, 1856, consolidating the government of the city and county, having meanwhile gone into effect) passed an order in terms adopting the said map, and declaring it to be the plan of the city "in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes," in the portion of the city to which the same related. The selection so made of land for said park was after the time limited for that purpose by the ordinances had expired, and in some other important respects transcended their provisions. The legislature of this state, by an act approved March 11, 1858, declared that the said ordinances and order "be and the same are hereby ratified and confirmed." St. 1858, pp. 52–56. By the act of congress approved July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the state of California," all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined on April 15, 1851 (which included the site of said Lafayette Park), was relinquished to the city and its successors "for the uses and purposes specified in the ordinances of said city ratified by" the aforesaid act of the legislature of March 11, 1858. Some reservations are specified in the act of congress not affecting the present case. 13 Stat. 333. The court below found as a fact that under and by virtue of the ordinances aforesaid, and the said acts of the legislature and congress, respectively, the land described in the complaint was reserved and set apart and dedicated to public use as and for the park aforesaid; also, that the defendant is seised in fee and entitled to the possession thereof in trust for the benefit of the people of the state and of the city, for the purposes of a public park. The court further found, however, that such land has never been used as a park, and that defendant has never had actual possession thereof, but that plaintiff is, and his predecessors in interest ever since and long prior to January 1, 1855, have been, in the open and exclusive possession of the land, claiming to own the same as against the whole world. The judgment was that plaintiff take nothing, and that defendant is the owner and entitled to possession in trust, as declared in the finding.

A fuller history of the legislation above mentioned, and of the title of the city to the pueblo lands, and of the proceedings for the selection of public grounds under the Van Ness ordinance, appears in the reports of some of the cases presently to be cited; notably, in Hoadley v. City and County of San Francisco, 50 Cal. 265; Id., 70 Cal. 320, 12 Pac. 125; Id., 124 U. S. 639, 8 Sup. Ct. 659,—which involved the right of the city to portions of certain other squares, upon circumstances substantially the same as those of the present case. The plaintiff here contends that many decisions which have been rendered concerning the Van Ness ordinance proceed on a false assumption, viz. that the ordinance became effective in consequence of the statutory ratification thereof, and not of its own vigor. Treating as void the attempt of the city officials to dedicate the land to the uses of a park, his chief contention is that the ordinance itself operated to convey the title to his predecessors in possession at the time it was passed; that the legislature had no right to ratify the ordinance, and no right to ratify the order adopting the map; and this, he urges, is a new question in this court.

It is unnecessary to investigate anew the nature and foundations of the title of the city to the pueblo lands. No claim is made that any private right had attached to the land in controversy at the time of the conquest of the country, in 1846; and the title, with that to other unappropriated lands of the pueblo, undoubtedly passed to the United States. People v. Holladay, 68 Cal. 439, 443, 9 Pac. 655; Association v. Knight, 85 Cal. 470, 24 Pac. 818; Galvin v. Palmer, 113 Cal. 52, 45 Pac. 172; Palmer v. Low, 98 U. S. 16; U. S. v. City of Santa Fé, 165 U. S. 701 et seq., 17 Sup. Ct. 472; U. S. v. Sandoval, 167 U. S. 296–298, 17 Sup. Ct. 868. True, the city, as successor of the pueblo, had an inchoate and imperfect right in the land, which was at length, with divers restrictions, confirmed by the United States; but, as has been often held, this was a qualified right,—a trust for the benefit of the inhabitants of the city, and subject to governmental control. Hart v. Burnett, 15 Cal. 530, 580, 581; Payne v. Treadwell, 16 Cal. 220, 233; Grogan v. City of San Francisco, 18 Cal. 592; Baker v. Brickell, 87 Cal. 334, 25 Pac. 489, 1067, and cases cited; Board v. Martin, 92 Cal. 209, 217, 28 Pac. 799; Ames v. City of San Diego, 101 Cal. 392, 393, 35 Pac. 1005; Grisar v. McDowell, 6 Wall. 363; City and County of San Francisco v. Le Roy, 138 U. S. 656, 667, 11 Sup. Ct. 364. To what extent this power of control resided in the state of California, and to what extent in the United States, is a matter of no great importance here, since both governments assumed to ratify the ordinance substantially upon the terms imposed by the state. City and County of San Francisco v. Le Roy, supra.

The elaborate argument of the plaintiff is largely an effort to show that no reason existed for confirmation of the ordinance by any superior authority whatever. We attempt no exhaustive response to the question, but may observe: (1) The city could alienate its pueblo lands only in accordance with the trust upon which they were held. City of San Francisco v. Canavan, 42 Cal. 542. (2) As the city held the land in trust for all its inhabitants, the wholesale donation contemplated by the ordinance, to persons who had no higher right than mere occupancy, without regard to the extent of their occupation, —whether or not in excess of the building lots and patches for cultivation which the pueblo authorities might have alienated,—certainly tended to subvert the trust with which the city was clothed. The power to make such a grant, if it existed in the city unchecked, might readily have created "a monopoly in the hands of a few of what was before the right of all." Hart v. Burnett, 15 Cal. 568, 581; Redding v. White, 27 Cal. 285. (3) The predecessors in interest of the plaintiff, who were in possession at and prior to the time of the passage of the Van Ness ordinance, made no claim to the land under grant from any alcalde or other municipal authority. On the contrary, they occupied the land adversely to the city. It is not apparent how the city owed a duty to, or was charged with a trust in favor of, persons who denied its title, and with hostile intent invaded its possession. (4) The ordinance shows on its face (section 10) that the common council regarded the grant as provisional, and subject to further legislative action. Hoadley's Adm'rs v. City and County of San Francisco, 124 U. S. 646, 8 Sup. Ct. 659. (5) The paramount title being in the United States, and the inchoate title of the city being liable to modification by the government of the United States (Grisar v. McDowell, 6 Wall. 365), the common council was incompetent by ordinance to devest that government of the power of such modification. See People v. Holladay, 68 Cal. 439, 9 Pac. 655; Board v. Martin, 92 Cal. 210, 28 Pac. 799; City and County of San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364. Upon whatever grounds the view is founded, it is certain that the courts have uniformly, so far as we discover, assumed that, as an instrument for the transmission of title into private hands, the Van Ness ordinance derives its force from the legislation confirmatory thereof; and in some instances it has been distinctly so ruled. Valentine v. Mahoney, 37 Cal. 389; Hoadley v. City and County of San Francisco, 50 Cal. 265, 273; Id., 70 Cal. 320, 12 Pac. 125; Id., 124 U. S. 639, 646, 8 Sup. Ct. 659. It appearing that the ordinance was of its own force inoperative to convey the land in contest to plaintiff's predecessors, the result is, as remarked in the case last cited (124 U. S. 646, 8 Sup. Ct. 663), that: "The ordinance granted only such title as the city was permitted by congress and the state to convey. In its legal effect, the act of congress conveyed the lands to the city for the uses and purposes specified in the ordinances and the order of the city ratified by the act of the legislature. In this way the * * * squares, as designated in the report of the commissioners, * * * were dedicated to public use." Sawyer v. City and County of San Francisco, 50 Cal. 370; People v. Holladay, 93 Cal. 241, 29 Pac. 54; San Francisco v. Mooney, 106 Cal. 586, 39 Pac. 852.

Plaintiff further argues that "one of the most vital and controlling questions in the case is, what effect is to be given to the decree of the United States circuit court of the 18th of May, 1865, confirming the claim of the city to the pueblo lands?" Inasmuch as that decree contained a declaration of its own purpose, as follows: "This confirmation is in trust for the benefit of the lot holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city;" and since, as has appeared, the land in dispute was not granted to plaintiff's predecessors by the city, but, on the contrary, was dedicated by competent authority to public use,—we cannot think he is aided by said decree. Mills v. City of Los Angeles, 90 Cal. 523, 27 Pac. 354. See U. S. v. City of Santa Fè, 165 U. S. 699 et seq., 17 Sup. Ct. 472. Other views advanced by plaintiff are either sufficiently covered by the foregoing remarks, or have been ruled adversely to him in previous cases. It is so of his contentions that the Van Ness ordinance was a contract between the city and the possessors of the land, and not subject to legislative impairment; that dedication could not be made of the city's land held in adverse possession, and that compensation to the persons in such possession was necessary (Hoadley v. City and County of San Francisco, 70 Cal. 320, 325, 12 Pac. 125; Id., 124 U. S. 639, 646, 8 Sup. Ct. 659; Sawyer v. City and County of San Francisco, 50 Cal. 370; Mills v. City of Los Angeles, 90 Cal. 522, 27 Pac. 354), and that irregularity or invalidity of the proceedings of the commissioners who selected and mapped the land as a park was beyond the curative power of the legislature (City and County of San Francisco v. Mooney, 106 Cal. 586, 39 Pac. 852, and cases cited); and that he has acquired title by adverse possession (Hoadley v. City and County of San Francisco, 50 Cal. 265; Board v. Martin, 92 Cal. 210, 28 Pac. 799; City and County of San Francisco v. Bradbury, 92 Cal. 414, 28 Pac. 803).

We are aware that this opinion is but a threshing over of the straw of long-past litigation. We have, however, upon the urgent insistence of plaintiff, given attentive consideration to the grounds upon which rest some of the more important decisions cited, and perceive no sufficient reason for recommending the disturbance of any of them. The judgment and orders appealed from should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

VAN DYKE, J. I concur in the judgment, for the reason that the questions involved in this case, by repeated decisions both of this court and the supreme court of the United States, have become settled, and should not now be disturbed.

124 Cal. 359

FISK et al. v. MITCHELL et al. (Sac. 577.)

(Supreme Court of California. May 3, 1899.)

JUSTICE COURTS—DOCKET ENTRIES—JURISDICTION.

In an action on a default justice's judgment, the jurisdiction of the justice over defendant is not shown by proof of an entry in the justice's docket of the fact of service of the summons on him, under Code Civ. Proc. §§ 911, 912, requiring the justice to enter in his docket the date of the summons and the time of its return, without providing for the entering of the fact of service, and providing that the entry of the date of the summons and time of its return shall be prima facie proof of the facts therein stated.

Commissioners' decision, department 1. Appeal from superior court, Sacramento county.

Action by A. G. Fisk and others, as executors of Asa Fisk, deceased, against F. D. Mitchell and L. H. Brown. There was a judgment for plaintiffs, and defendant Brown appeals. Reversed.

J. B. Devine, for appellant. Newman & Clayton, for respondents.

BRITT, C. Action on a judgment alleged to have been duly given and made in favor of plaintiffs' testator in a suit by him against Mitchell and Brown in the justice's court of the city and county of San Francisco. Such judgment was taken by default upon failure of said defendants to appear in the justice's court. By his answer in the present case Brown raised the issue whether said judgment was duly given and made. Upon this issue plaintiffs introduced in evidence an abstract of the judgment itself, and also a transcript of the justice's docket entries pertaining thereto. Such entries showed the filing of a complaint by Asa Fisk, the testator, against the defendants, and that summons was issued; also the following: "May 26, 1892. Summons retd. served on defts. Mitchell and Brown, May 10 and 20, '92, and filed." There was no other proof that service of summons in that action was made. The court below, in this case, however, seems to have considered it sufficient, and rendered judgment for plaintiffs. By section 911, Code Civ. Proc., every justice is required to enter certain specified proceedings in his docket, and the next section (912) declares such entries to be prima facie evidence of the facts stated. The fault of plaintiffs' proof is that these sections do not require the fact of service of summons to be entered in the docket, and hence do not impart to such entry, if made, the character of prima facie evidence. The provision of section 911 relating to the summons is merely that its date and the time of its return shall be stated in the docket. It follows that plaintiff failed to sustain the burden of showing affirmatively that the justice's court acquired jurisdiction to render the judgment sued on. Kane v. Desmond, 63 Cal. 464. The judgment appealed from should be reversed, with directions to the court below to grant a new trial.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to grant a new trial.

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124 Cal. 335

GILL v. CITY OF OAKLAND. (S. F. 1,288.)

(Supreme Court of California. May 2, 1899.)

MUNICIPALITIES—OPENING STREETS—ASSESSMENTS—OBJECTIONS—COUNCIL—ADJOURNMENT—NOTICE—PAYMENT UNDER PROTEST—CLOUD ON TITLE—LIABILITY OF CITY.

1. Under St. 1889, p. 76, § 20, providing that, if there be a deficiency in assessment for opening a street, or for any cause it appeared desirable, the council might order supplemental assessment, a second supplemental assessment was authorized where a deficiency occurred.

2. Where, under St. 1889, p. 73, § 14, requiring the city clerk to notify objectors to the report of commissioners of assessment of the time for hearing objections and passing on the report by the council, the clerk notified an objector of the exact hour the report would be considered, but the council met an hour before that time, and adjourned to the next night for want of a quorum, and the objector was present at the hour fixed in his notice, and found the council chamber closed, and had no actual notice of the adjourned meeting, and made no inquiry of the clerk regarding it, the action of the council at such meeting in passing on the report and overruling his objections was void.

3. Under St. 1889, p. 73, § 16, making the deed of the superintendent of streets prima facie evidence of the regularity of proceedings to open a street, and conclusive evidence of the necessity of taking the land, and of the correctness of the compensation awarded therefor, the payment of a void assessment under protest to prevent sale and clouding of title was not voluntary, so as to preclude recovery.

4. Under St. 1889, p. 70, whereby the council authorizes an assessment for opening streets, conducts all the proceedings, requires the fund raised to be paid to the city treasurer, who places it in a separate fund designated by the name of the street to be opened, the city retaining control of the fund from first to last through its proper officers, a distinct organization, separate from the city, to wit, a street-opening district, was not created, of which the city became merely a creditor because of advancing money to it; and the liability of the city for an assessment illegally collected was not affected by the fact that it was to reimburse a fund transferred to the street-opening fund, and that plaintiff's money was not in fact used for street-opening expenses.

5. It is no defense to an action against a city that the claim was not presented to, nor acted on by, the council, the charter nowhere requiring it.

6. Where the statute clothes a street superintendent with authority to convey good title to land on which a street assessment is delinquent, one suing for an assessment illegally collected need not show the former's authority to carry out a threat to sell; the complaint showing that the tax was delinquent when paid, and that a deed would have carried good title.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Action by Edward Gill against the city of Oakland. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

W. A. Dow, for appellant. J. H. Smith, for respondent.

CHIPMAN, C. Action to recover $2,405.20 alleged to have been paid by plaintiff to the street superintendent of defendant, under protest, as an assessment in a street opening. The city of Oakland by its council, in 1889, adopted a resolution of intention to open and extend Filbert street in said city between certain points. The proceedings were taken under the street-opening act of 1889 (St. 1889, p. 70). No question arises as to the regularity of the proceedings and the collection of the assessment as originally levied. A deficiency occurred of $6,641.31 in the collections under the assessment, to meet which the council advanced this amount by transfer from the general fund of the city, pursuant to section 18 of the act, and upon condition that the general fund should be reimbursed out of a supplemental assessment thereafter to be made. Such supplemental assessment was duly made, and no question arises out of this supplemental assessment. But, after the collection of the whole of this assessment, there still remained a deficiency in the street-opening fund of $3,315.45 to meet the fund transferred from the general fund. A second supplemental assessment was ordered for the purpose of reimbursing the city in full, and to pay the expenses incident to the levy and collection of such supplemental assessment. The commissioners filed their report and second supplemental assessment with said council, showing an assessment against plaintiff of $2,405.20. Plaintiff and others filed written objections to the confirmation of said report and assessment, which objections were set down to be heard September 19, 1892, at 9:15 o'clock p. m., of which hearing plaintiff had due notice. A question arises as to whether plaintiff was bound by the action of the council at this and the meeting which followed the next night. The findings as to these two meetings are as follows: "That at the time set for the hearing of his objections filed to the report of the commissioners, as alleged in section 14 of said amended complaint, there was no session of the said council; that some time prior on that night to the time set for said hearing one member of said city council was present in the council chamber of said council, together with the clerk of said council, and then and there declared the meeting of said council set for that night adjourned to a succeeding night, and that said adjournment was then and there entered by the said clerk upon the minutes of said council; that said plaintiff was not present at said adjournment; that he had no notice thereof, and was not present at said succeeding meeting, and had no notice thereof, and that at said succeeding meeting said council took up said objections and passed upon them, without sustaining them or any of them, and then and there confirmed and adopted said report of said commissioners." On the 22d day of September, 1892, the street superintendent published the fact that he had received the assessment roll containing the assessment against plaintiff's property, and notifying the public that the assessment would become delinquent if the assessments were not paid before the expiration of 30 days thereafter. Within five days after the expiration of the time, as above stated, the said superintendent caused to be published a notice that he would sell at public sale, on November 19, 1892, all lands within said assessment district upon which said second supplemental assessments were not paid, and for the purpose of paying the same. Plaintiff's lots were included among the delinquents. Whereupon, to avoid the sale, he paid the assessment under protest. The finding on this point is: "That said plaintiff did on the 18th day of November, 1892, pay to the said superintendent of streets the said sum of $2,405.20, and under protest as alleged in section 17 of said amended complaint, and that he did pay the same to prevent his said lots of land from being sold for the nonpayment of said new supplemental assessment, and to prevent his title to said lots from being clouded." Plaintiff had judgment, from which and from an order denying its motion for a new trial defendant appeals.

1. Appellant's first contention is that the second supplemental assessment was authorized. Respondent denies this, and claims that the council exhausted its authority in making the first supplemental assessment. Section 20 of the act provides: "If * * * there should be a deficiency * * * or for any cause it appears desirable, the * * * city council may order a supplemental assessment, and report the same in manner and form as the original, and subject to the same procedure." Section 25 reads: "The provisions of this act shall be liberally construed to promote the objects thereof." Without resort to this latter section, we think a reasonable construction of the statute warranted the second supplemental assessment, if the proceedings were regularly pursued. This seems to us too plain to call for argument.

2. It is objected by respondent, however, that the assessment was void, for the reason "that the plaintiff was deprived of his right to appear before the city council at the hearing before it of his objections filed to the confirmation of the commissioners' report of their proceeding in the second supplemental assessment." The facts from which the finding above given was drawn are the following: The hearing of plaintiff's objections to the assessment, which he had duly filed with the city council, were set down for 9:15 p. m., September 19, 1892. The objections were that the council had no authority to make the assessment; that it was illegal and unequal; that plaintiff's property was assessed higher in proportion to other property in said district, and not in proportion to the benefits derived or damages suffered thereby. Plaintiff went to the city hall, the place of meeting of the council, about 9 p. m. of the day fixed for the hearing, and was there at the time fixed, and remained from eight to ten minutes after the time so fixed. Plaintiff testified· "The front door to the main entrance of the building was locked, and I could not get in the building. There were others there, and could not get in at the same time. I remained until after the time set for the hearing, and then left. I had no notice served upon me of an adjournment of the hearing of that evening to any other time. I was not present the next evening when my objections were taken up and passed upon by the council, and had no actual notice of the time the hearing was to be had, or of the adjournment from the 19th to the 20th." He further testified: "During the office hours of September 20, 1892, I did not call at the city clerk's office; nor did I make any endeavor to ascertain anything in connection with the hearing of said objections, nor did any one in my behalf." The minutes of the council show that a regular meeting was called to order by the clerk on September 19th (hour not given). Upon roll call, only one councilman (MacDonald) was present, and ten were entered absent. The minutes read: "There being no quorum present, Mr. MacDonald moved the council adjourn to meet Tuesday, September 20, 1892, at 8 p. m. So ordered. The council then adjourned. By J. M. Brady, City Clerk." The minutes of the meeting September 20th read: "An adjourned meeting of the Oakland city council was held on the above date." Upon roll call, seven members were found to be present, and four absent. "The hour of 9:15 p. m. having arrived, it having been set as the time for hearing the protest of James Borland and others against confirming the new supplementary assessment for the opening of Filbert street, the president declared the said hearing in order." The minutes show the proceedings as to the protestants present and those "not appearing," among whom it is conceded was plaintiff, and that all objections were overruled. It will be observed that the adjournment of the 19th did not fix the hour for hearing plaintiff's objections on the 20th, so that an examination of the minutes would not have informed him at what hour to attend on the 20th. The act requires the commissioners to file their report of the assessment with the clerk, and the clerk to give notice, by publication, of such filing, requiring all interested persons to show cause why the report should not be confirmed, and the clerk must fix the day for the hearing, which must be stated in said notice. Section 13. Objections must be in writing and be filed with the clerk, "who shall, at the next meeting after the day fixed in the notice to show cause, lay the said objections, if any, before the city council, which shall fix a time for hearing the same, of which the clerk shall notify the objectors; * * * and at such time * * * shall proceed to pass upon such report," etc. Section 14. It appears from the complaint and answer that Councilman MacDonald and Clerk Brady attended at the

council chamber on September 19th, at the hour of 8 o'clock p. m., and adjourned the meeting, record of which has been stated above.

Had plaintiff notice of the adjourned meeting of September 20th? We do not think he had, and we are of the opinion that the proceedings were therefore, as to him, unauthorized and void. The statute conferred the right to notice, without giving which the council could not pass upon his objections. Williams v. Bergin, 108 Cal. 166, 41 Pac. 287; Schwiesau v. Mahon, 110 Cal. 543, 42 Pac. 1065. Upon the power to adjourn a meeting, Mr. Dillon states the rule to be that "a regular meeting [which this appears to have been], unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation." Dill. Mun. Corp. 287. The statute gave to plaintiff the right to be heard at the time and place noticed. He was not bound to attend at an earlier time. It is alleged and not denied, and is found by the court as the fact, that the time for hearing plaintiff's objections was fixed at a stated hour, and the court on sufficient evidence found that there was no session or meeting of the council at that hour. The only meeting held by the council on that day was more than one hour previous to the noticed hearing, and for what purpose it then met is not shown. It was, we suppose, a regular meeting, and may be conceded to have been called for regular business; but the meeting to consider objections was called for the hour of 9:15, and we do not think that that business could have been transacted at 8 p. m., in the absence and without the consent of the parties interested; nor could the council at 8 p. m., without notice to and without the consent and in the absence of such interested parties, adjourn a hearing fixed for the hour of 9:15 p. m. It was the duty of Mr. MacDonald, the sole attending councilman, to remain at the council chamber until the hour fixed by the council for this hearing, namely, 9:15 p. m. Had he done this, his action in adjourning the hearing at that time would have given actual notice to plaintiff, who was there and then in attendance; and, if plaintiff had not been present, he could not be heard to complain of an adjournment of the hearing, of which he had due notice. Plaintiff was not bound to make inquiry from the clerk as to what had taken place at some previous hour of the day by the council, and had he done so, as we have seen, it would not have enlightened him. As we view the matter, the session held at 8 o'clock (if it can be called a session) had no power to act upon plaintiff's objections at that hour, and the council got no greater power by the adjournment than it had at the hour it adjourned. Dill. Mun. Corp. § 267, and note. By failure to meet at 9:15, and either act upon plaintiff's objections or adjourn the hearing to a day and hour certain, the council lost jurisdiction to consider the objections without a new notice to plaintiff.

3. Appellant contends that, even if the proceedings were void, plaintiff's payment was voluntary, and the money cannot now be recovered. The act of 1889 (section 16) makes the deed of the superintendent of streets prima facie evidence of the regularity of the proceedings thereunder, and is made "conclusive evidence of the necessity of taking or damaging the lands taken or damaged, and of the correctness of the compensation awarded therefor." Under the rule stated in Pixley v. Huggins, 15 Cal. 128, many times approved by this court, the deed would cast a cloud upon plaintiff's title. It has been recently held here that, where an officer is about to sell property under a void assessment, he may be enjoined. Chase v. City Treasurer (opinion filed Dec. 2, 1898) 55 Pac. 414. This remedy was open to plaintiff in the present case. But it was not the only remedy available to him. He also had the right to pay the assessment under protest, setting forth the grounds of its illegality, in order to prevent the sale and clouding the title of his property; and he could look for relief in an action at law, which this is. The facts which gave the remedy of injunction gave the remedy at law, and payment after protest, under the circumstances here disclosed, was payment under duress. Where the deed shows on its face that the tax or assessment was void, or the law under which it was levied was invalid, a payment has been held to be voluntary, and not recoverable. Such were the facts in the cases cited by appellant. In the present case, however, plaintiff's rights would have been cut off if he had not paid the assessment or enjoined the sale. It is claimed by appellant that section 3819, Pol. Code, does not apply to local assessments,—citing Elberg v. San Luis Obispo Co., 112 Cal. 316, 41 Pac. 475, and 44 Pac. 572; Pacific Mut. Life Ins. Co. v. San Diego Co., 112 Cal. 314, 41 Pac. 423, and 44 Pac. 571; Davis v. City & County of San Francisco, 115 Cal. 67, 46 Pac. 863. Those cases are clearly distinguishable from this case. But we do not understand that this action rests upon the Code section cited, and it is not necessary to decide whether it does or does not apply. The money exacted from plaintiff under duress was not legally due, and might be recovered back irrespective of the Code provision. Meek v. McClure, 49 Cal. 623, citing the cases in which it is so held.

4. It is further claimed by appellant that the city of Oakland is not liable because the fund was for the use of, and to be disbursed by, another organization, to wit, a street-opening district within the city, of which the city was merely a creditor by reason of advancing money to it. We do not think that the act of 1889 creates a distinct organization, separate from the municipality, in the sense urged by appellant. The council authorizes the assessment. It conducts, through its agencies,

all the proceedings; and the fund raised must be paid over to the city treasurer, who "shall, upon receipt thereof, place the same in a separate fund, designating such fund by the name of the street * * * or place for the * * * opening or other improvement of which the assessment was made." The city retains control of the fund from first to last through its proper officers. The court found, upon sufficient evidence, that the money paid by plaintiff was turned over to the city treasurer, "and was thereupon used by said city and appropriated by her to municipal purposes." We do not think the liability of the city is less because the assessment was for the purpose of reimbursing the fund transferred to the street-opening fund, and because plaintiff's money was not in fact used in street-opening expenses.

5. It is contended that plaintiff has no cause of action against defendant because the evidence fails to show that he presented his claim to the council, or that it was acted upon by the council. Respondent replies that there is no provision of the charter of the city of Oakland which requires a claim to be first presented to the council or city before a suit can be maintained upon it. Appellant has called our attention to no such provision, and we have found none. Section 40 does require that "every demand must, before it can be paid, be presented to the auditor to be approved." He must examine and approve or reject the claim. If he reject it, he must return it to the council, with his reasons for rejecting it, and a majority of the council may allow it upon the approval of the mayor, and it may then be audited. These and some other provisions are made for the allowance and payment of claims in the ordinary course; but no provision is made for actions against the city brought upon such or any claims. The evidence shows that plaintiff did present his claim to the auditor long before this suit was brought, who rejected it, and it was shortly afterwards sent to the council, and referred to the auditing committee; but no action is shown to have been taken on the claim by the council. We do not think the council could avoid the suit by refusing or neglecting to act upon the claim.

6. Appellant's remaining point is that the complaint fails to state a cause of action because it does not appear therein that the superintendent who threatened to sell plaintiff's property was clothed with authority, real or apparent, to carry out his threat, or that he would have made a deed to the purchaser if the assessment was not paid,—citing Bank v. Chalfant, 52 Cal. 170; Bank v. Webber, Id. 73; Bucknall v. Story, 46 Cal. 589. The Bank of Santa Rosa Case was an action to recover a tax illegally assessed. It did not appear from the complaint that the tax was delinquent; nor that the defendant was, when he demanded payment of the tax, armed with authority, real or apparent, to carry out his threat to sell the property. Held no legal duress shown, and that payment was voluntary. In the other case cited in 52 Cal., the proof was that the tax was paid before it became delinquent, and before any threats were made to sell the property for its collection. Held not duress. The case in 46 Cal. was one where the assessment was void on its face. Payment of the tax was made under protest to prevent sale. Held voluntary. In the present case the proceedings of the council and of the superintendent up to the point of advertising the property for sale to pay the tax in question are fully set out. The statute clothed the street superintendent with ample authority to carry out his avowed purpose to sell. The tax was delinquent, and on the face of the proceedings a deed after sale would have conveyed a good title. We think the complaint was sufficient. It is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(124 Cal. 344)

LOS ANGELES COUNTY v. HOLLYWOOD CEMETERY ASS'N. (L. A. 525.)[1]

(Supreme Court of California. May 2, 1899.)

CEMETERIES—CONSTITUTIONAL LAW—CLASS LEGISLATION.

1. The ordinance of Los Angeles county, prohibiting the establishment of cemeteries without permission of the county supervisors, is not a valid exercise of police power, within Const. art. 11, § 11, granting to municipal corporations the right to pass police regulations, since the ordinance does not regulate, but prohibits, the pursuit of a lawful business by making the right to exercise such calling dependent on the will of the supervisors.

2. A county ordinance prohibiting the establishment of cemeteries without the permission of the county supervisors is unconstitutional, since it permits the owners of established cemeteries to make burials without the restrictions which are placed on the owners of cemeteries established after its passage.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Suit by the county of Los Angeles against the Hollywood Cemetery Association. From an order overruling defendant's demurrer to the complaint, and from a judgment for plaintiff, defendant appeals. Reversed.

Edwin Baxter, for appellant. J. A. Donnell, Cole & Cole, and Silent & Campbell, for respondent.

CHIPMAN, C. Injunction to restrain defendant from establishing a cemetery upon certain lands and interring human bodies therein. The complaint shows that the supervisors of Los Angeles county duly passed an ordinance, the first section of which reads: "It shall be unlawful to locate or establish, extend or enlarge, any cemetery, graveyard,

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[1] Rehearing denied May 29, 1899.

burying ground, or crematory, within the limits of the county of Los Angeles, without the permission of the board of supervisors first had and obtained." The second section directs how to apply for such permission, and what facts shall be set forth in the petition therefor, and that 30 days' notice of the hearing of the petition shall be given by publication in some newspaper published in the county. The third and last section provides for publication of the ordinance. It is alleged that since said ordinance took effect defendant has located, and is now locating and establishing, a cemetery (upon certain lands described) situated in said county, "without the permission of the said board of supervisors first had and obtained, and contrary to and in violation of all the provisions of said ordinance." The complaint then sets out certain acts now being done by defendant in furtherance of its said purpose, and that it "will continue in the work of locating and establishing such cemetery, in violation of said ordinance, * * * and greatly to the injury of the entire neighborhood of the said location, unless restrained," etc. Defendant answered the order to show cause by general demurrer to the complaint and by certain affidavits, which latter were controverted by counter affidavits. The demurrer was overruled, and the court granted an injunction as prayed for, directing defendant to refrain from proceeding further to establish said cemetery and from burying any human bodies in the land described. Defendant appeals from the order overruling the demurrer, and from the judgment and order granting the writ, and from the writ.

The demurrer admits the allegations of the complaint, and raises the questions discussed by counsel. The trial court disposed of the case on the demurrer and on the sufficiency of the complaint. We shall therefore take no notice of the affidavits.

The contention of defendant is that the ordinance is violative of the fourteenth amendment of the federal constitution, and of section 11, art. 1, and section 11, art. 11, of our state constitution, and is an unreasonable exercise of the power to regulate, and therefore invalid. The ordinance before us simply makes it unlawful to establish a cemetery without using it for the burial of the dead; and the complaint does not charge in terms that defendant has used its land, or is about to use it, for the burial of the dead. Counsel on both sides, however, and the court as well, treat the ordinance and the complaint as aimed, not only at the dedication or establishment of the cemetery, but also at the burial of the dead therein. We shall, therefore, assume that the broader meaning of the word "cemetery" is intended in the ordinance and the complaint.

From the opinion of the learned judge who sat in the case (printed in the record), it is manifest that he regarded the establishment of a cemetery for the interment of human bodies "as an avocation which may be well presumed to have an injurious tendency." It is not so stated, but the opinion proceeds, I think, upon the assumption that a cemetery is a nuisance per se, or, at least, may be so regarded in measuring the extent of the police power to regulate it. We cannot concur in this view, nor can we concur in the position that the business of conducting a cemetery is an avocation presumably having an injurious tendency. We think, however, and in this we quite agree with the learned counsel for respondent, that there are many considerations, too obvious to require enumeration, which bring cemeteries within the power of reasonable regulation by both city and county municipalities.

Before proceeding further, it may be well to observe, as to this power of regulation given by our constitution to municipalities, while alike conferred upon cities, towns, and counties, that an ordinance passed pursuant thereto may be reasonable when confined to the limits of a city or town which would be entirely unreasonable when put in operation in all parts of a large county thinly populated in many of its parts. "Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely-populated town or in a county." Dill. Mun. Corp. § 327.

Article 11, § 11, of the constitution of this state, provides as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." This section is reenacted in the county government act (section 25, Act April 1, 1897; St. 1897, p. 452). Of this provision it was said in Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245, as to cities and towns, that it is sufficiently broad and comprehensive to "sustain the enactment of any ordinance having a reasonable tendency to promote the health, comfort, safety, and welfare of all the inhabitants of the municipality, and which would not be in conflict with some general law."

Is the ordinance before us a reasonable exercise of the power conferred by the constitution and the statute upon boards of supervisors, and as applicable to counties? It cannot be assumed that the supervisors in the present case legislated with a view to reach the defendant's enterprise especially, or that they knew it was in contemplation when the ordinance was enacted. On the contrary, it must be presumed that their purpose was to promote the welfare of the inhabitants. The validity of the ordinance must be determined from its face alone. The ordinance makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the county without the permission of the supervisors. It does not attempt to deal with or prohibit private interments, nor with interments in cemeteries already established. It declares that in no part of Los Angeles county, however remote from any city or town, even though the location be suitable for the purpose and entirely satisfactory to the neighboring inhabitants, no cemetery shall be established except by permission of the supervisors first obtained. As the ordinance is silent as to interments in cemeteries already established, it necessarily permits burials in such cemeteries without restriction, and thus allows the owners of cemeteries already established the right to exercise privileges denied to defendant. It is not unlawful to establish a cemetery for the burial of the dead, deriving profit therefrom as a business enterprise. To provide for the repose of the dead is as lawful as to provide for the comfort of the living. There are reasons why the burial of the dead should be subject to reasonable regulation which may not justify similar restrictions or regulations as to the homes of the living, but we can see no more reason why the right to establish cemeteries in a county should be subject to the will of the supervisors than that the right to engage in any other lawful enterprise should be so circumscribed. There is a wide difference between regulation and prohibition, —between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality. It would hardly be contended that an ordinance declaring it to be unlawful to engage in the business of farming or merchandising in the county without the permission of the supervisors would be a reasonable exercise of legislative power, or could reasonably be said to be exercising the power to regulate. The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupations; they may regulate the manner of conducting the business, if it be of a character tending to be injurious; but if the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business, the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. We do not think it was ever intended by the people, in ordaining the section of the constitution referred to, or of the legislature in the statutory enactment, to include, in the power to make and enforce regulations, a power purely personal and arbitrary; "for," as was said by Matthews, J., in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery." In Austin v. Murray, 16 Pick. 121, the ordinance prohibited any person from bringing into the town of Charleston any dead body, or cause the same to be conveyed through the streets, or to be buried on the premises of such person, without a permit from the selectmen of the town. The court said that if the by-law had been limited to the populous part of town, and had been made in good faith, "for the purpose of preserving the health of the inhabitants, which may be in some degree exposed to danger by the allowance of interment in the midst of dense population, it would have been a very reasonable regulation. But it cannot be pretended that this by-law was made for the preservation of the health of the inhabitants. Its restraints extend many miles into the country, to the utmost limits of the town. Such an unnecessary restraint upon the right of interring the dead we think essentially unreasonable." In State v. Mott, 61 Md. 297, the city council of Baltimore was granted power to pass ordinances to preserve the health of the city, to prevent and remove nuisances, prevent the introduction of contagious diseases within the city, and within three miles thereof regulate the places for manufacturing soap and candles, the erection of slaughter houses and distilleries, "and wherever every other offensive trade is carried on." The city passed an ordinance making it unlawful for "any person * * * to work, operate, or continue in use, for the purpose of burning oyster shells or limestone, any kiln situated or erected within the limits of the city of Baltimore." The ordinance was held to be void, because an absolute prohibition of a lawful occupation, which might, on the remote outskirts of the city, be carried on without injury to anyone.

2. Aside from the objections just considered, the ordinance is unequal in its operation. In Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, an ordinance of the city and county of San Francisco made it unlawful for any person to purchase or sell any land within the county for the purpose of interring any human body therein, but permitted interments in plots or lots belonging to persons, associations, or corporations, for their families or members. The ordinance was held to be unreasonable and invalid, as assuming to limit the privilege of burial to one class of citizens, and denying it to another class within the same district. It was further held that any restriction of the rights of the individual by virtue of the police power must extend to all individuals who might exercise the right. I am unable to distinguish this case from the one in hand. It is true the ordinance in Bohen's Case expressly gave to the then owners of lots the right to use them for burial purposes, while denying the right to any person who might thereafter purchase a burial lot. It differs from the Los Angeles county ordinance only by expressing in words what the latter clearly implies. Both ordinances discriminate in favor of a class of persons. The fact that the supervisors reserved the power to place all persons on an equality by granting permission does not relieve the ordinance from this objection. There

is still a class with unrestricted rights which the other class may not exercise without permission, and whether this permission may or may not be granted rests in the arbitrary power of the supervisors. I can add nothing to the force of the reasoning in the Bohen Case, and the authorities there cited, in support of the principles laid down, need no reenforcement.

It is advised that the injunction be dissolved, and the order overruling the demurrer be reversed, with directions to sustain the demurrer.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the injunction is dissolved, and the order overruling the demurrer is reversed, with directions to sustain the demurrer.

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124 Cal. 361

PEOPLE v. PICETTI. (Cr. 522.)

(Supreme Court of California. May 4, 1899.)

LIMITATIONS—INDICTMENT—MISDEMEANORS.

Pen. Code, § 801, requiring indictment or information for a misdemeanor to be brought or filed within one year, applies where the information or indictment charges a felony, and defendant is convicted of a misdemeanor.

Department 1. Appeal from superior court, city and county of San Francisco.

John Picetti was convicted of petit larceny, and he appeals. Reversed.

Devoto & Demartini, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. The defendant was informed against on the 12th day of September, 1898, by the district attorney of the city and county of San Francisco, for the crime of grand larceny, alleged to have been committed on the 15th day of March, 1897. He was tried and convicted of petit larceny. This appeal is taken from the judgment and order denying his motion for a new trial.

As the sole ground for this appeal it is claimed that, the defendant having been convicted of petit larceny, the judgment is void, inasmuch as the statute of limitations bars the prosecution of the defendant under such circumstances. This contention is based upon section 801 of the Penal Code, which provides: "An indictment for any misdemeanor must be found, or an information filed, within one year after its commission." Giving a liberal construction to this provision of the Code, we have arrived at the conclusion that the defendant should not have been convicted of the crime of petit larceny. To our surprise, we have been unable to find any provision of the law prescribing a limitation for the prosecution of ordinary or simple misdemeanor. But the provision quoted above does declare, in effect, that all misdemeanors prosecuted by indictment or information are barred by the statute of limitations in one year. This defendant has been prosecuted by information, and has been convicted of a misdemeanor. He has, therefore, been prosecuted for a misdemeanor by information, and the one-year statute would seem to apply. By a strict construction of this provision of the Code it might be held that it only applied to those specific cases where the information or indictment upon its face charged a misdemeanor. But a more liberal construction would make the statute apply to all those cases where, under the indictment or information, the defendant may be and is convicted of a misdemeanor. Such construction should maintain, especially in view of the fact that otherwise, in every case where a defendant is prosecuted for felony and convicted of misdemeanor, there would be no statute of limitations which could be invoked. These conditions as to such convictions arise every day, and we conclude that the one-year statute of limitations should be held to apply to those cases. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

(124 Cal. 409)

ACKLEY v. FISHBECK. (S. F. 972.)[1]

(Supreme Court of California. May 15, 1899.)

APPEAL — ASSIGNMENT OF ERRORS — RECORD — REVIEW.

1. An order denying a motion for a new trial will not be reviewed upon appeal, where the assignment of errors, though attached to the statement upon which the case is submitted, is not authenticated as a part of the record, and is excepted from the stipulation certifying to the contents of the transcript.

2. Where the judgment is supported by the findings of the inferior court, and there are no assignments of error, the appellate court will not examine the evidence to determine whether it supports the findings.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Edward Ackley against J. R. Fishbeck to recover upon an account for services rendered by plaintiff's assignor. There was judgment for a portion of plaintiff's claim, and plaintiff appeals. Affirmed.

Moses G. Cobb, for appellant. Wm. W. Guth, for respondent.

CHIPMAN, C. Action for services as physician rendered by plaintiff's assignor, Dr. Daywalt, to the wife of defendant, at the city and county of San Francisco, from February 1, 1892, to April 1, 1894, when the patient died. Plaintiff's counsel, in his brief, states the case as follows: "The wife's sickness was of a malignant character; and the physician's attendance and treatment was part of the time daily, and part of the time weekly or monthly, according as the disease advanced, or according to the wife's presence in or absence from San Francisco. The cause was tried by the court without a jury, the contention being, on the part of plaintiff, that the sickness treated was continuous and the same sickness throughout the whole time, and that the statute of outlawry only began to run from the termination of the service; that the last item in the account drew after it, or took in, all the preceding items, because a part of the same transaction." Defendant denied the indebtedness and pleaded the statute of limitation, and his contention was that each day's service was a separate cause of action, and the statute ran from each day, as the service was rendered. The court gave judgment for five days' attendance, or only those attendances that were within the two years before the complaint was filed. The appeal is from the judgment, and from an order denying the motion for new trial, and comes here on a statement of the case.

1. The statement contains no assignment or specifications of errors. There is appended to the statement, but forming no part of it, what is designated as "Assignment of Errors," but it is not authenticated as part of the record, and is excepted from the stipulation certifying to the contents of the transcript. There is nothing to show that it was considered on the motion for a new trial. The appeal from the

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[1] Rehearing denied June 14, 1899.

order is here, therefore, without any specifications of errors, and cannot be considered. Code Civ. Proc. § 659, subd. 3; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419, and cases there cited.

2. The appeal from the judgment alone can be considered, and we are to determine only whether the findings support the judgment. The court found that plaintiff's assignor attended defendant's wife at different times, "without any express agreement with her or with defendant to attend her for any stipulated length of time or any stipulated sum of money"; that Dr. Daywalt was "free to render his account for services up to any time, and collect for the same"; that he charged $3 for each visit to the house of defendant, and $2 for each visit at his office, which were reasonable charges, and that defendant's wife paid said doctor from time to time on account of his attendance, and that defendant and his said wife were free at any time to dispense with said doctor's services and employ another physician; that said doctor rendered a bill for $505 against defendant, no part of which has been paid; that said doctor attended plaintiff's wife on March 28, 29, 30, and 31, and April 1, 1894; that plaintiff brought suit March 28, 1896. And as conclusions of law the court found that all the items of service rendered more than two years prior to the commencement of the action were barred by the statute of limitations, and plaintiff could only recover for services rendered on and after March 28, 1896, to wit, the sum of $15 for visits on March 28, 29, 30, and 31, and April 1, 1894. Judgment was accordingly entered. The findings support the judgment, and, as we cannot examine the evidence to determine whether it supports the findings, the judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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124 Cal. 415

CAMPAN v. MOLLE et al. (L. A. 508.)

(Supreme Court of California. May 16, 1899.)

SALE OF LAND—LOAN OF PURCHASE PRICE—SUBROGATION TO VENDOR'S RIGHTS—HOMESTEAD—PRIORITY OF CLAIM.

1. Where a vendor of land retains the legal title until full payment of the price, so that he has no lien, one loaning the price to the vendee, who agrees to give a mortgage as security after receiving the legal title, which he refuses to do, has no claim to subrogation.

2. Civ. Code, § 1241 (4), makes a homestead claim superior to a mortgage lien created before filing of the declaration, unless such mortgage was executed and recorded prior thereto. Code Civ. Proc. § 726, prohibits more than one action to recover any debt or enforce any right secured by real-estate mortgage. One loaned the purchase price of land to a vendee, who agreed to execute a mortgage to secure the loan on obtaining the title, but he refused, and filed a declaration of homestead. Thereafter the lender recovered a personal judgment for the loan, but did not, in that action, seek to enforce any claim against the land. *Held*, that any lien which the lender had, in the nature of an equitable mortgage, was not superior to the homestead claim.

Department 1. Appeal from superior court, Los Angeles county.

Action by one Campan against J. M. Molle and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Appel & Whitney, for appellant. Walter F. Haas, for respondents.

HARRISON, J. On July 11, 1896, the defendant J. M. Molle held an agreement for the purchase of a parcel of land from the owner thereof for the sum of $350, and at his request plaintiff, on that date, loaned to the defendants the said sum of money, for which they executed to him their promissory note, and afterwards applied the money in payment of the balance due on the agreement, and obtained the legal title to the land. The plaintiff alleges, "upon information and belief," that the defendants promised him that, if he would advance the said money, they would secure him in its payment by giving him a mortgage upon the land when they should obtain the legal title thereto; and alleges that, after they had obtained the legal title, they refused to execute said mortgage. Subsequently the plaintiff brought an action upon the note, and on the 29th of March, 1897, obtained judgment against the defendants, and each of them, for its amount. Prior thereto, viz. January 18, 1897, Molle had filed a declaration of homestead upon the premises. The plaintiff seeks by this action a judgment setting aside and canceling this declaration of homestead as void, and that the land be applied towards the payment of his judgment. A demurrer to the complaint was sustained by the superior court, and from the judgment thereon the plaintiff has appealed.

It is claimed in support of the appeal that, by virtue of the transaction between the plaintiff and the defendants, the plaintiff was subrogated to the rights of the vendor of the land, and is entitled to enforce the claim against the land as fully as could the vendor. The complaint does not, however, contain the contract between the vendor and the defendants, or show the relation between them. Nor does it appear therefrom that the vendor had any rights which he could enforce against them. It merely shows that the defendants had the right to purchase the land for a given sum of money. It does not appear at what time the defendants paid the money to the vendor, or when the land was conveyed to them, and, as the vendor was to retain title to the land until full payment therefor should be made, there was no vendor's lien to which the plaintiff could be subrogated. The transaction between the plaintiff and the defendants was merely a loan of money upon their agreement to give him security, which they afterwards refused to do.

Neither can the claim of the appellant that he has a lien upon the land in the nature of an equitable mortgage, prior to that of the homestead, be maintained. If it be assumed that the agreement between him and the defendants constituted an equitable mortgage, the statute declares that the homestead claim is superior to the lien of a mortgage created before the filing of the declaration of homestead, unless such mortgage was "executed and recorded" prior thereto. Civ. Code, § 1241 (4). By putting his claim upon the promissory note into a personal judgment after the declaration of homestead had been filed, he elected to look to the personal obligation of the defendants instead of the security promised by them. If he would have claimed a priority of the lien of the homestead, he should have asserted it in that action. Section 726, Code Civ. Proc., declares that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate"; and, if the plaintiff held an equitable mortgage upon the premises, his failure to enforce it in that action had the effect to deprive him of such security. Mascarel v. Raffour, 51 Cal. 242; Ould v. Stoddard, 54 Cal. 613. If the claim of homestead is ineffective, his remedy at law, by means of an execution upon his judgment, is ample. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

124 Cal. 406

DE GROOT v. PETERS. (L. A. 636.)

(Supreme Court of California. May 15, 1899.)

INJUNCTION—WHEN GRANTED—TRESPASS.

1. Injunction will lie to restrain one from intruding into another's store, and holding himself out as a partner of such other, collecting money due the latter, and converting it to his own use, where he is insolvent, and threatens to continue such conduct, and such claim of partnership has no foundation in fact.

2. A person is not entitled to free access to the store of another, by whom he had recently been employed at a compensation based on a percentage of the net profits of the business, for the purpose of protecting his interest, where the employer avers that the business never yielded a net profit, and the employé shows no reason why his presence is necessary to protect his share of the profits, if there were any.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by Walter I. De Groot against Louis H. Peters. From an order refusing to dissolve an injunction against plaintiff, he appealed. Affirmed.

Fuller & Burnett, for appellant. J. Noonan Phillips and Goodrich & McCutchen, for respondent.

BRITT, C. Plaintiff alleged in his complain in this action that himself and defendant are partners under the name of the Buffalo Woolen Company, constituted such by an agreement in writing, engaged, it seems, in the business of merchant tailors; and, upon information and belief, he charged that defendant committed divers specified acts of misconduct in the course of said business, wherefore he prayed a dissolution and an accounting. Defendant answered denying any partnership with plaintiff, and exhibiting a contract in writing between them, by the terms whereof (as the court below seems to have interpreted it, and we think correctly) the plaintiff was employed by defendant as a salesman upon a salary in said business, with a contingent right to one-fourth of the net profits of the same, but was not made a partner with defendant. At the time of filing such answer, defendant filed also a sworn cross complaint, in which he averred, among other things, that the written contract exhibited in his answer is the same agreement mentioned in plaintiff's complaint; that plaintiff was in his employ as a salesman, and that, after the commencement of this action, plaintiff neglected his duties in that capacity, and harassed defendant in the conduct of his business, and that defendant discharged him; that nevertheless plaintiff holds himself out to the public as a partner in said business, and intrudes into defendant's office and place of business, and there remains, interfering with defendant's affairs; that he has collected money from the patrons of defendant, due to the latter, and converted it to his own use; that he claims the right to do these things as a partner in the business, and threatens and intends to continue such acts contrary to the will of defendant; and that plaintiff is insolvent. Defendant prayed an injunction to restrain the continuance of said conduct of plaintiff, and the court granted the writ. Afterwards plaintiff answered the cross complaint, denying some of its averments, and reasserting his status as a partner; but he did not deny that his alleged contract of partnership is contained in the instrument described in the pleadings of defendant, or that he attempts to participate in the management of the business, or that he is insolvent. He moved for a dissolution of the injunction. The motion was heard on the pleadings, and was denied; hence this appeal.

Several questions of procedure are raised by counsel on each side, but none of them are of sufficient moment to preclude or avoid a decision of the substantial subject of dispute disclosed by the record. As to this the main insistence of plaintiff is that, conceding himself to have no interest as a partner, yet the case-made shows that, at most, he is a mere trespasser in defendant's store, and that injunction does not lie to restrain him; citing Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703. This case is clearly distinguishable from that. Upon the defendant's showing (which, for the purposes of this appeal, must be said to be quite imperfectly repelled by plaintiff's answer to the cross complaint), it appears that plaintiff is not only a trespasser upon the premises of defendant, but assumes a control over his business, intercepts moneys due to him, and holds himself out to the public as a partner having the right to do these things. Bodily ejection of plaintiff from the premises would not necessarily prevent the continuance of such injuries, nor would an action for damages afford adequate relief; for the reasons, among others, that it would be extremely difficult to ascertain in pecuniary terms the amount of damage, and that plaintiff is admittedly insolvent. No authority in point is brought to our notice, but the following illustrate in some measure the principles which should govern here: Kellogg v. King, 114 Cal. 378, 46 Pac. 166; Routh v. Webster, 10 Beav. 561; Iron Works Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88; Bates, Partn. §§ 772, 990; T. Pars. Partn. (4th Ed.) § 216.

Plaintiff also contends that, in any event, he should have been allowed free access to the store, in order to protect his interest in the net profits of the business. On that point it is sufficient to say that the defendant averred positively in his pleadings that the business never yielded any net profit, and offered to submit his books and all his transactions to scrutiny in support of his assertion; and the plaintiff showed no reason why, if there were such profits, his presence in the store is necessary for the protection of his share thereof. The order appealed from should be affirmed.

I concur: **GRAY, C.**

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(124 Cal. 368)

CITY OF LOS ANGELES v. LOS ANGELES CITY WATER CO. et al. (two cases). (L. A. 655 and 656.) LOS ANGELES CITY WATER CO. v. CITY OF LOS ANGELES et al. (L. A. 657.) CRYSTAL SPRINGS LAND & WATER CO. v. SAME. (L. A. 658.)[1]

(Supreme Court of California. May 5, 1899.)

MUNICIPAL CORPORATIONS — CONTRACT WITH WATERWORKS COMPANY—CONSTRUCTION — CONSENT TO MODIFICATION — WITHDRAWAL — WATERS OF RIVER—RIGHTS OF CITY—INJUNCTION.

1. Under a contract with a city, a waterworks company was not to take from the river from which it was allowed to get its supply "more than ten inches of water without the previous consent" of the city, and the contract did not provide under what particular pressure the 10 inches were to be taken. But it would have taken many times 10 inches under a 4-inch pressure to have supplied the demand for water when the contract was made, and much more to supply the subsequent growth of the city, which the contract also contemplated the company should supply from the same source. The company, without objection, drew from the river many times 10 inches under a 4-inch pressure for many years. *Held*, that the contract would not be construed to mean only 10 inches under a 4-inch pressure.

2. A city's consent for many years to a waterworks company's taking more water from a river, from which it was to get its supply, than it may have been entitled to under the contract cannot be withdrawn during the life of the contract after the company has expended large sums in reliance thereon.

3. Under a contract with a waterworks company a city gave to it full control of its waterworks plant for 30 years, with power to enlarge it, and extend its pipes, mains, etc., to answer all the needs of the inhabitants. It was to be allowed to collect water rents not to exceed specified rates, and was to supply the city with water free for municipal purposes, and pay $1,500 per year to the city besides. At the end of this time the city was given the right to take possession on payment of the value of the improvements made. Throughout the ordinance by means of which the agreement was made, it was referred to as a contract. The works taken by the company were of a very meager description, and were entirely superseded, and constituted no part of the plant established by the company at the end of the 30 years. *Held*, that the contract was not a lease, and that the city could not take possession of the plant at the end of the 30 years without at the same time paying or tendering the value thereof.

4. A city has only the right to the use of such an amount of the water of a river within its limits as is necessary to supply the wants of its citizens and of the municipality. It does not have a riparian owner's right to have the water of the stream flow as it is accustomed to flow, without any regard to its use, and hence is not entitled to damages for its diversion, except where it is in a position to use it.

5. A city entitled to possess and own a waterworks plant supplying its inhabitants with water on paying or tendering to the waterworks company the value thereof at the end of a certain period cannot interfere with contracts between rate payers and the company, and appropriate to itself the benefit thereof, when its right to buy the plant accrues.

6. A city without the power to take possession of a waterworks plant rightfully may be enjoined from doing so forcibly.

In bank. Appeal from superior court, Los Angeles county.

Action by the Los Angeles City Water Company against the city of Los Angeles and others, by the Crystal Springs Land & Water Company against the same defendants, and by the city of Los Angeles against the plaintiffs in the former two actions. In the first two named actions there were orders enjoining and restraining defendants from taking possession of certain waterworks property, and they appeal. In the last-named action the court made an order appointing a receiver to receive the water rates and income from the waterworks property before referred to, but refusing to appoint him to take possession of the property, and both parties appeal. By agreement of parties the appeals are argued and submitted at the same time. Orders in the first two named actions are affirmed, and in the last-named action the order appointing the receiver is reversed, and the refusal to appoint is affirmed.

W. E. Dunn and Lee & Scott, for city of Los Angeles. J. S. Chapman and White & Monroe, for water companies and S. G. Murphy.

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[1] For opinion on petition for rehearing, see 57 Pac. 571.

McFARLAND, J. These four appeals are taken by the various parties from certain orders made in three certain actions pending in the superior court of the county of Los Angeles. One of the three actions was entitled "Los Angeles City Water Company, Plaintiff, vs. The City of Los Angeles and the Persons who Constituted the Mayor and Common Council of said City," and in that case the appeal is by the defendants in said action from an order of the court below enjoining and restraining the defendants from taking possession of certain waterworks property hereinafter mentioned; and this is the appeal numbered L. A. 657. Another of said actions is entitled "Crystal Springs Land and Water Company, Plaintiff, vs. City of Los Angeles et al., Defendants," and the appeal in that case is by the defendants from a similar order enjoining and restraining the defendants from taking possession of certain waterworks described in the complaint therein. This is the appeal numbered L. A. 658. The other of the three actions is entitled "The City of Los Angeles, Plaintiff, vs. The Los Angeles City Water Company and The Crystal Springs Land & Water Company," above mentioned. In this action the plaintiff sought to have a receiver appointed to take possession of the waterworks property above mentioned, and to restrain the defendants therein from collecting water rates, or receiving any income from said property. The court made an order appointing a receiver to receive the water rates and income from said property, but refused to appoint a receiver to take possession of the property. The defendants therein appealed from the order appointing the receiver, and this is the appeal numbered L. A. 655. The city of Los Angeles appealed from that part of the order which denied a receiver for the purpose of taking possession of the property, and this is the appeal numbered L. A. 656. The three cases were not consolidated in the court below, but they were heard, and the orders appealed from were made, at the same time. By agreement between the parties the appeals were all brought here in the same transcript, and were argued all together, and submitted at the same time.

The litigation in all the cases arose out of a certain written contract made on the 22d day of July, 1868, and the determination of the rights of the various parties depends upon that contract, and upon facts occurring subsequently to its execution. The municipal name of the city of Los Angeles was at that time "The Mayor and Common Council of the City of Los Angeles," and by that name the city was the party of the first part to the contract, and John S. Griffin, Prudent Bradbury, and Solomon Lazard were the nominal parties of the second part; but as the municipality afterwards took the name of the city of Los Angeles, and as Griffin and others, shortly after the execution of the contract, assigned all their rights therein to the Los Angeles City Water Company, which assignment was anticipated by both parties at the date of the contract, we will, for convenience, speak of one of the parties as the city of Los Angeles and of the other as the Los Angeles City Water Company. Facts occurring after the execution of the contract are shown in the record by various affidavits and other evidence.

At the time of the execution of the contract the city owned a water plant of a very meager character. It consisted mainly of a water wheel and a few miles of wooden pipe. By the contract the city covenanted and agreed "to deliver and concede" to the parties of the second part, their heirs, assigns, etc., the exclusive use, control, possession, and management of the waterworks, together "with the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use and benefit, except as hereinafter provided, hereby giving and granting the parties of the second part * * * the right to lay pipes in any and all the streets of said city, and to dig and make all necessary excavations for that purpose, and the right of way through, upon, and over land or streets belonging to the said city of Los Angeles, with the additional right to take water from the Los Angeles river at a point above or near the present dam; provided always, that the said parties of the second part * * * shall at no time take from the said river for the use of said waterworks more than ten inches of water without the previous consent of the mayor and common council of said city." This grant was made upon the consideration that the parties of the second part should pay to the city $1,500 per annum "until the conclusion of the term of this contract"; that they should surrender to the city certain claims which they held against the city for damages; and upon the further consideration that they should make certain improvements "about, in, and upon said waterworks, at their own proper costs and expenses," to wit, that they should lay down 12 miles of iron pipes of sufficient capacity to supply the inhabitants of the city with water for domestic purposes, that they should erect one hydrant, as a protection against fire, at each corner of each cross street where "the water pipes are now, or may hereafter be laid by virtue of this contract"; that they should erect an ornamental fountain upon the public plaza at a certain cost; and that they should "within two years from the approval of this contract and ordinance construct at their own expense such ditches, flumes, or erect such machinery in connection with said waterworks as will secure to the inhabitants of said city a constant supply of water for domestic purposes, and shall construct reservoirs of sufficient capacity for that purpose." The parties of the second part agree "that they will make the improvements hereinbefore mentioned and set forth in the following manner, to wit: That they will replace all the wooden pipes now belonging to the said waterworks within one year from the signing and approving of this contract and ordinance, and that they will extend said iron pipes as fast as the citizens desiring to be supplied with water for domestic purposes will agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets now supplied with water. That they will, within one year from the date hereof, place a hydrant, to be used as a protection against fire, at one corner of one street at each of the cross streets where the pipes are now laid down, and will erect hydrants at other street corners, according to the terms of this contract, as fast as the pipes are extended through the streets of said city. That they will erect or cause to be erected an ornamental fountain upon the public plaza, of such design as the mayor and common council shall direct, within one year from the date hereof. That they will furnish water for the public schools and city hospitals, jails, free of charge, when the same are near the pipes, the city furnishing the necessary conduits for that purpose. That they will make all the improvements herein mentioned and set forth, and keep the same in repair, at their own cost and expense, for the said period of thirty years, and return the said waterworks to the said party of the first part at the expiration of the said period of thirty years in good order and condition, reasonable wear and the damage of the elements excepted, upon the payment to them of the value of the improvements made after the approval of this contract, to be ascertained as hereinbefore provided, * * * and will pay all state and county taxes assessed upon said waterworks during the said period of thirty years." Another provision is to the effect that the parties of the first part "shall have and do reserve the right to regulate the water rates charged by the said parties of the second part, or their assigns: provided, that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the said parties of the second part for water." There is also an agreement by the parties of the second part that a certain lease theretofore executed by the city to one Sansevaine shall be surrendered up and canceled. There is also a provision that the rights conceded to the parties of the second part shall not embrace certain waterworks of the city used for the distribution of water for the purpose of irrigation, except as to the 10 inches of water before mentioned; and the parties of the second part covenant that they will not dispose of any water for the purposes of irrigation, "but shall only take from said river the water necessary for domestic purposes as above specified." The parties of the first part covenant "that at the expiration of the period of thirty years from the execution of this instrument they will pay to the said parties of the second part * * * the value of the improvements made in, about, and upon the said waterworks in pursuance of this contract; the same to be ascertained by arbitration, in case the parties cannot agree upon the value thereof, the said party of the first part and the parties of the second part * * * to choose one man each, and the two men thus chosen to select a third man, and the judgment of the three men thus selected shall be final in the premises. And the said party of the first part hereby covenants and agrees to make no other lease, sale, contract, grant, or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract, always without prejudice to any rights already granted." The foregoing are, we think, all the parts of said contract necessary to be now stated. Other parts of the contract may be hereafter noticed; and other facts disclosed by the record which are material in the case will be presently stated.

At the date of the execution of the contract the city of Los Angeles contained only from 5,000 to 6,000 inhabitants, and its boundaries were confined to four square leagues of land. At the termination of the 30 years, in 1898, its population was over 100,000, and its boundaries had been extended in several directions so as to include from 10 to 15 additional square miles. As fast as this increase in area and population took place, the water company, at vast expense, extended its pipe lines, reservoir system, and other necessary parts of a water plant so as to supply the growing wants of the city and its people. It extended its lines outside of the territory over which the city had municipal jurisdiction at the date of the contract, and acquired from others reservoirs and water property which were on the new territory, and constructed upon land which the city did not own, and through streets which had no existence in 1868. Throughout all the territory, old and new, it furnished free water for hydrants, fire apparatus, school purposes, etc., as the increasing population and settlement demanded. It is quite clear from the record that the company substantially complied with all its covenants in the contract.

The 30 years mentioned in the contract ended on the 22d day of July, 1898. When that date was near at hand, the city had made no arrangements to pay for the improvements, and had made no tender of the value thereof. On the other hand, it claimed the right to take possession of all the waterworks property without any previous payment of the value thereof, and threatened to take such possession immediately at the termination of the 30 years. It claimed to be in the position of a lessor, with the right of possession at the end of the term. There had been no fixing of the amount of the value of the property by arbitration. The city had no money in its treasury with which to pay for the value of the property. There was a great difference of opinion between the two parties as to such value. The city, however, admitted that the value was as much as $1,000,000, and it is quite apparent that under the law it had no means to raise that amount of money except by the issuance of bonds, which would have to be sanctioned by a vote of the electors of the city, and thus the prospect of its ability to pay was distant and contingent upon the consent of the electors. Under these circumstances the Los Angeles City Water Company, a few days before the expiration of the 30 years, brought the action hereinbefore alluded to, to restrain the city from taking possession of the property out of which the appeal No. 657 arose. The Crystal Springs Land & Water Company, it is proper to say here, is a corporation which owns, or claims to own, a certain water plant which it had leased to the Los Angeles City Water Company, the pipes, plants, etc., of the former company connecting with the works of the latter; and there is a contention between the parties as to whether or not the property, or at least a part of it, claimed by the Crystal Springs Company, belongs to the Los Angeles Water Company, and is part of the property which the city should have under the said contract. As the city also threatened to take possession of part of the property claimed by the Crystal Springs Company, the latter also brought an action against the city to prevent that threatened action of the city, at the same time the action just above referred to was brought by the Los Angeles City Water Company, and, so far as these present appeals are concerned, no adjudication as to the relationship between these two water companies is necessary. The court granted the injunction in the said suit of the Crystal Springs Company against the city. Shortly after the commencement of the two last-mentioned cases, the city commenced the action hereinbefore mentioned for the appointment of a receiver to take possession of the property of the said two water companies, and to manage and control the same. An order was made in said action appointing a receiver to collect and receive the rents, issues, and profits of said property, "including water rates" derived from the sale of water by the Los Angeles Water Company to the people of the city; as well those which had accrued since the filing of the complaint as those which should accrue thereafter. By said order the defendants were ordered to pay to the receiver all moneys in their possession derived from the water rates since the filing of the complaint, including those which had been deposited in the Farmers' & Merchants' Bank of Los Angeles under a stipulation between the parties to the effect that the money should be deposited in said bank temporarily during the hearing of the motion for a receiver. The appeal by the water companies from this order is the most important one now before the court.

Before considering the main questions in the case, it is proper here to notice a preliminary point made by the city, and somewhat insisted on, to wit, that the only quantity of the water of the Los Angeles river to which the water company is entitled under the contract is 10 inches under a 4-inch pressure. This contention cannot be maintained. The words of the contract on this subject are simply that the company shall not take from the river "more than ten inches of water without the previous consent" of the city. There is nothing in the contract about "four-inch pressure," nor is there any intimation as to what the parties meant by "ten inches" of water. But, looking at the context and the subject-matter of the contract, it is quite evident that the parties did not mean only 10 inches under a 4-inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times 10 inches under a 4-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city, and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for 30 years from a flow of 10 inches under a 4-inch pressure would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of 10 inches under a 4-inch pressure. Soon after the execution of the contract the company was using 300 inches under a 4-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from 300 to 700 inches so measured. Therefore, whatever (if anything) was meant by the simple words "ten inches," the contract was immediately, and has been continuously, construed by the action of the parties as meaning more than 10 inches measured under a 4-inch pressure. There is no pretense that the city ever objected to the use of this water by the water company until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than 10 inches from the river. It is difficult to imagine how this ordinance was passed seriously, for if the water company had been prevented from taking from the river at that time more than 10 inches of water under a 4-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own, and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company for nearly 30 years to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract. This same contention was made by the city in the case of Los Angeles City Water Co. v. City of Los Angeles (U. S. Cir. Ct. S. D. Cal.) 88 Fed. 745; but the court held otherwise. In that case Wellborn, the learned judge holding the court, said: "If it be conceded, as claimed by defendants (which, however, I do not decide), that the provision of the contract limiting the quantity of water to be taken from the river without previous consent of the city is sufficiently certain for enforcement, or, more specially, that said quantity is ten inches measured under a four-inch pressure, still the consent of the city to the taking of a greater quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent." The court cites, as authorities to the point, Rhodes v. Otis, 33 Ala. 600; Woodbury v. Parshley, 7 N. H. 237; Lacy v. Arnett, 33 Pa. St. 169; Russell v. Hubbard, 59 Ill. 339; Beall v. Mill Co., 45 Ga. 33; Veghte v. Power Co., 19 N. J. Eq. 153; Railroad Co. v. Battle, 66 N. C. 546; Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268; Grimshaw v. Belcher, 88 Cal. 217, 26 Pac. 84; Smith v. Green, 109 Cal. 228, 41 Pac. 1022,—all of which sustain the point.

The main question in these cases is this: Had the city the right to take possession of the waterworks at the end of the 30 years without paying for the same or tendering payment? If this question should be answered in the negative,—and we think it should,—then it seems to clearly follow that all the orders of the court below appealed from on these appeals must be affirmed, except the one appointing the receiver, and this latter order must be reversed. The city undertakes to contend that the contract is a lease,—a lease pure and simple; and as the contract, according to the city's contention, must be thrown into the category of a "lease," it contends for one of the well-known features of a lease of land, to wit, that at the expiration of the term the lessor has an immediate right of re-entry and possession. This position is not tenable. The written instrument in question cannot be categoried into any smaller class than that of a "contract." It is a contract with many and various covenants. It was not called a lease (however suggestive that might have been) by the parties who made it. The city entered into the contract by means of an ordinance which was entitled "An ordinance contracting for the care, maintenance, and improvements of the city waterworks." The first section says that "the contract" hereinafter set forth, etc. The second section describes it as "this agreement." It was afterwards said "that at the expiration of the period of thirty years from the execution of this instrument they will pay," etc. In another part of the instrument it is called "this contract and ordinance." In another place it speaks of "the terms of this contract." In another place it speaks of "the approval of this contract." The only place where there is any reference whatever to the contract as a lease is the agreement that the party of the first part will "make no other lease, sale, contract, grant, or franchise to any person or persons"; and this language can as well be construed as designating the instrument a "sale, contract, grant, or franchise" as designating it a "lease." In the opinion of the court below it is well said as follows: "I do not perceive any theory which justifies the contention that the agreement is a lease as to the pipe lines, flumes, and other 'improvements' constructed by the water company. Manifestly, the city could not lease what it never had, and the present distributing system did not exist at the time the agreement of 1868 was executed. In fact, the system then existing has been entirely superseded, and constitutes no part of the present plant. Neither can it be said with any show of reason that the distributing pipes and reservoirs constructed by the water company constitute improvements on the leased property, and revert therewith, and as part thereof, upon the termination of the lease." The instrument in question could as well be called a "contract to purchase," with all the incidents of such a contract following, as a "lease." It is, in fact, a contract by which the city agreed to give immediate possession to the water company of a small line of wooden pipes which the city then owned, and to allow it to build new waterworks throughout the city as necessity demanded, with covenants on the part of the water company that it would change what little the city had then in the way of waterworks into better ones, and would create new works as fast as the demands of the city required; that the water company should have the right to do this, and to collect water rates for a period of 30 years in consideration of the covenants entered into by the water company, and that upon the expiration of 30 years the city would pay the company for all the works which it should have created, and that the water company, upon payment therefor, should then deliver possession of all the waterworks, as they should exist at the end of the period, to the city. The rights of the parties do not rest upon legal implications. They are determined by covenants expressly stated in the contract. These are that the city should pay for the works to be created by the water company, and that the company should deliver possession thereof to the city "upon the payment" to it of the value of such property. There is no agreement, express or implied, that the company should yield up possession before payment. Even in the case of a strict lease of land, where the lessee is to erect improvements to be paid for by the lessor at the expiration of the term, the lessor is entitled to possession at the end of the term without payment—leaving the tenant to his action to recover the value—only where there is no express agreement in the instrument which changes the result that flows by implication from the mere nature of a lease. In such a case, if the clear meaning of the contract is that the lessor is to have possession only upon payment, then he has no right to possession prior to payment. Such a case is presented in Swift v. Sheehy, 88 Fed. 924. There the court say: "There is in this contract, distinguishing it from the cases principally relied upon by the defendant's counsel, an express provision that the lessor can only become the owner of and entitled to the possession of the buildings and improvements upon the payment to the lessees of the value thereof. * * * At common law, under a contract of lease by which the lessee was permitted to make improvements upon the land during the existence of his lease, without further express reservation as to the termination of the term, the improvements went with the land back to the lessor. The contract in question does not only require the lessor, at the termination of the lease, to pay the lessees the value of the improvements, but it, in effect, entitles the lessees to retain the ownership and possession until the lessor shall pay them therefor."

But the case of National Waterworks Co. v. Kansas City (decided by Judge Brewer) 10 C. C. A. 653, 62 Fed. 853, more nearly approaches the case at bar than any to which our attention has been called. In that case the contract between Kansas City and the waterworks was very similar to the one in the case at bar. There the contract ran for 20 years. The water company was to create waterworks, which the city was to have at the expiration of 20 years upon payment of the value; and a trial court had held that at the end of the 20 years the city was entitled to take possession of the waterworks without payment. But the circuit court of appeals reversed the case, and Judge Brewer, in delivering the opinion of the court, among other things, said: "We dissent in toto from the claim of the city that at the lapse of the twenty years the title to this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation, as best it could. * * * Now, the familiar and ordinary law of business transactions is that he who parts with title receives at the time payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provides that no grant so made shall confer the right to operate the waterworks for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of the twenty years the city shall purchase and pay therefor. * * * In so far, therefore, as the decree of the circuit court attempts to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous." Our conclusion therefore is, both upon principle and authority, that the city at the expiration of the 30 years had no right to the possession of the waterworks without payment, or tender of payment, of their value.

The court below, when appointing a receiver to collect the water rates and enjoining the water company from collecting such rates, seems to have laid stress upon the consideration that the city was the owner of the water in the Los Angeles river which is used through the waterworks of the water company. It seems to have been determined, however, that the city has only the right to the use of such an amount of the water of the river as is necessary to supply the wants of its citizens and of the municipality. It has not the right of a riparian owner to have the water of the stream flow as it is accustomed to flow, without any regard to its use. It is entitled to the use of the water only when it is in a position to use it, and could not recover damages for its diversion except when it was in a position to use it; and it is apparent that it is not in such position, for it is not in possession of any system of waterworks through which such use could be exercised. It is doubtful if the city, having encouraged the water company in making such large expenditures of money to perfect its system, could enjoin the company from continuing to use the water until the city had entirely ended the contract by paying for the company's works. But, whether or not it could enjoin the company from using the water, there is no principle upon which it could interfere with the contract between the water company and the rate payers, and appropriate to itself the benefit of that contract; and having no right to the possession of the waterworks, or in the contract between the water company and the rate payers, we see no principle upon which, through the appointment of a receiver, it can prevent the water company from enjoying the fruits of its contract with the rate payers.

With respect to the equitable remedy of the water company to enjoin the city from taking possession of the waterworks, we do not see how the city can complain. Not having the power to take possession of the property rightfully, it is just and equitable for the water company to enjoin it from using its municipal power to take such possession forcibly. In that event, considering the present inability of the city to pay, and the fact that there is no method by which the water company could compel payment within any reasonable time, if at all, the water company would have no remedy that would be in any sense adequate; and we think, therefore, that the remedy by injunction was an entirely proper one. And, in accordance with the views above expressed, there is no just ground for the appointment of a receiver to take away from the water company its current revenues, which are necessary to meet its current obligations, when the city would in no event be entitled to that revenue before final settlement and payment by the city of the value of the works. This fact makes it unnecessary to consider the point made by the water company that a receivership in fact destroys the business and rights of a corporation, contrary to the statute. It is to be observed that the rights of the city, under any view of the proper basis for a final settlement, will be adequately preserved. It is not necessary to here determine what the basis of that final settlement should be; but if it should be finally held that the city should pay the value of the property at the end of the 30 years, with legal interest thereon until the time of payment, and that the water company should account for the intermediate profits, still, upon the estimate of the value of the property made by the city itself, it would be amply protected, even though the settlement be not made, as it should be made, within a reasonably short period.

In accordance with the foregoing views, the orders appealed from in L. A. 657 and L. A. 658 are, and each of them is, hereby affirmed. In L. A. 655 the order appointing a receiver and enjoining the water companies from collecting the water rates, and from appropriating the water rates already collected, is reversed; and in L. A. 656 the order refusing to appoint a receiver to take actual possession and to manage and control the property, appealed from by the city, is affirmed.

We concur: GAROUTTE, J.; HENSHAW, J.; HARRISON, J.; TEMPLE, J.

(124 Cal. 385)

LOS ANGELES CITY WATER CO. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY. (L. A. 662.)[1]

CITY OF LOS ANGELES v. LOS ANGELES CITY WATER CO. et al. (L. A. 655, 656, 657, and 658.)

(Supreme Court of California. May 5, 1899.)

CERTIORARI—REVIEW OF ORDERS AFTER APPEAL AND STAY OF PROCEEDINGS.

Where, after appeal from an order appointing a receiver, and the filing of a stay bond, a further order is made in the proceeding by the inferior court, the appellant is entitled to have such order vacated on certiorari in the appellate court.

In bank. Action by the city of Los Angeles against the Los Angeles City Water Company. Judgment for defendant. After appeal by plaintiff, the Los Angeles City Water Company and others brought certiorari to review an order made by the superior court, and in an action between the same parties, from which an appeal was taken, the Los Angeles City Water Company and others petitioned for an injunction. Order for the application in certiorari annulled, and restraining order granted in accordance with the prayer of petitioners.

White & Monroe, for petitioners.

PER CURIAM. The above case, L. A. 662, is a petition in certiorari to review a certain order made by the superior court in a certain action by the city of Los Angeles against the petitioner, the Los Angeles City Water Company, after the petitioner had appealed to this court from an order of said superior court appointing a receiver, etc., and had given an undertaking to stay proceedings in the amount fixed by the judge of said court. The other matter above entitled, arising out of the appeals No. 655 et seq., is a petition for a certain restraining order. There has this day been filed an opinion in the said appeals L. A. 655, 656, 657, and 658 (57 Pac. 210), determining the merits of these several cases in favor of the petitioner, and this determination lessens the importance of the two petitions here under review, and makes it unnecessary to state the facts here in detail, as they are substantially given in the opinion above referred to. It is sufficient to say that petitioner is entitled to have the order involved in the certiorari proceeding vacated, and to have the restraining order asked for in the other proceeding. In the said proceeding in certiorari, L. A. 662, the order sought to be reviewed is annulled, and in the other matter—City of Los Angeles v. Los Angeles City Water Co. (L. A. 655, 656, 657, and 658) —it is ordered that a restraining order be issued in accordance with the prayer of the petitioners.

(124 Cal. 411)

ABRAHAMS v. LOS ANGELES TRACTION CO. (L. A. 474.)[1]

(Supreme Court of California. May 15, 1899.)

STREET RAILROADS — NEGLIGENCE — SPRINKLING CARTS—TRIAL—QUESTIONS FOR JURY — COMPROMISE AND SETTLEMENT — EVIDENCE — RATIFICATION.

1. Plaintiff was rightfully driving a street sprinkler on a street-car track. According to his custom, on turning into the street on which the tracks were, he followed rapidly behind a passing car, sprinkling the street as he went, and turned around several times to see that no accident might happen. A car coming behind plaintiff sounded the only warning bell 700 feet away, and then came on with accelerated speed; not attempting to slack the car until within two or three car lengths of the cart, and even then not using the most effective appliance for stopping the car. The cart and its load weighed five tons, and made considerable noise when sprinkling. *Held*, that the street-car company

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[1] Rehearing denied.

[1] Rehearing denied June 13, 1899.

was negligent, so as to be liable for the injuries to plaintiff.

2. A person severely injured by an accident compromised the claim next day, and made his mark as signature to the receipt. He testified that his mind was a blank as to the occurrences from the time of the injury until several days after the alleged settlement, when he was taken to a sanitarium. Two witnesses testified that he spoke of the settlement after coming to the sanitarium, and there was nothing to show that at that time any one had informed him of the settlement. *Held*, that the question whether he had knowingly settled the claim was for the jury.

3. Evidence of a person who had been injured, that he knew nothing of what occurred the next day, when he made an alleged settlement of his claim, is equivalent to a statement that he was "entirely without understanding" at such time.

4. The retention of money paid in settlement of a claim for personal injuries is not a ratification of the settlement, where retained without knowledge of how it was obtained.

5. Where the jury were instructed that they might deduct from the amount of damages for personal injuries any money given to plaintiff by defendant by way of an alleged settlement, defendant cannot complain that it was injured by such payment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by Frank Abrahams, an incompetent person, by Henry Stieler, guardian of his person and estate, against the Los Angeles Traction Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. H. Lamme and E. E. Milliken, for appellant. Brooks & Trask and S. S. Lawson, for respondent.

CHIPMAN, C. Action for personal injury. Trial by jury, and verdict for plaintiff in the sum of $3,000. Defendant appeals from the judgment entered upon the verdict, and from an order denying defendant's motion for a new trial. Defendant presents but two contentions for consideration: (1) That plaintiff was guilty of contributory negligence; and (2) that plaintiff accepted the sum of $100 in full satisfaction of the claim, at a time when he was not entirely without understanding.

1. Plaintiff was employed by one Cross to drive a sprinkling wagon, in whose employ he had been for three years, in the city of Los Angeles. Pico and Georgia Bell streets run at right angles to each other; the latter, north and south. Double street-car tracks pass over Georgia Bell street at the points in question. On the morning of November 20, 1895, plaintiff filled his tank, and drove to Pico street, as was his custom, and thence along Pico street to its junction with Georgia Bell street, which latter he was to sprinkle. As he entered Georgia Bell street, a car passed going south, and he turned and followed this car along the track towards Sixteenth street. He testified: "On entering the street I turned around, in order to see whether I could see a car or hear a bell. I saw no car, nor did I hear a bell. And then I followed the car at a rapid pace in order to sprinkle, and during the sprinkling I turned around several times, in order to see that no accident might happen, for I had always sprinkled in that manner without any accident." Again he testified: "I entered Georgia Bell street. I kept the right wheels of my sprinkling cart upon the west side of the right-hand track or rail of the street-car track. We always so entered; drove and sprinkled continually in that way." At a distance of about 600 or 700 feet from Pico street he met a car coming north on the other track, to his left. He testified: "I drew my mules a little distance from the track, so I might not sprinkle the car as it passed me." About this same time a car coming behind him struck his cart with great force, and threw him forward under the mules' feet. Appellant relies upon the case of Everett v. Railway Co., 115 Cal. 105, 43 Pac. 207, and 46 Pac. 880. In that case the court said: "In walking or riding along a line of railway, where cars or trains are passing or likely to pass at short intervals, one, while in a position to be endangered by such vehicles, must pay attention to his surroundings, and employ his natural faculties, and exert due diligence, to avoid such danger, and he must listen and look to ascertain whether danger is threatened by his situation; and a failure so to do constitutes negligence per se." Again: "With greater reason does this rule apply to one who is traveling laterally along the line of a railroad, and knows that engines will soon follow. * * * It is negligence for a person to walk upon the track of a railroad, whether laid upon a street or upon an open field, and he who deliberately does so will be presumed to have assumed the risk of the peril he may encounter." Quoting these paragraphs, appellant contends that they apply here, and are conclusive against plaintiff's right to recover. The two cases are widely divergent in their facts. Everett was riding a bicycle, which, with little strength exerted by the rider, could almost instantly be turned aside sufficiently to escape an approaching car. The motorman sounded the gong, and used every means to warn the rider of the car's approach, and persons on a passing car called out a warning to him. The speed of the car was reduced, the reverse lever was used, and every available means, by warning and by the appliances of the car, was used to avoid the accident, to all of which Everett gave no heed. Abrahams was on the track rightfully to water the street, and where he had been accustomed to go, and with the knowledge of the man operating the street cars. As he turned into Georgia Bell street, he looked north, and saw no car approaching. He followed rapidly behind a passing car, sprinkling the street as he went, and "turned around several times in order to see that no accident might happen." His vehicle and its load, the evidence showed, weighed about five tons. The noise made by his wagon and the

falling water readily accounts for his not hearing the only warning bell, sounded 700 feet away from him. The approaching motorman came on with accelerated speed, and did not attempt to slacken it until within two or three car lengths—one witness said ten feet—of the wagon. He gave no alarm at that time, nor immediately before, and failed to use the most effective appliance at hand, but used one which he testified was defective, and incapable of stopping the car quickly. It must be apparent that the two cases do not admit of the same rules of law. In approaching at high speed so unwieldy a vehicle as a modern sprinkling cart, a motorman of an electric car cannot reasonably assume that the track will be cleared as quickly as by a bicycle. In our cities, where heavily freighted wagons and vehicles of every description frequently take the track of the street cars, common observation teaches, what must be presumed to be well known to motormen, that a warning 700 feet away to the driver of a sprinkling cart, by sounding the car gong, may not be heard by the driver of the wagon; and the motorman would not be justified in quickening his speed to the highest point, and advancing without further warning, on the assumption that the signal would be heard and obeyed in time to clear the car. It was said in the Everett Case: "Persons cannot be recklessly and wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question whether they will be able to get out of the way." The court thought the evidence did not tend in that case to make such a case. We think the evidence in the case before us did tend to make just such a case.

2. But it is contended that plaintiff made a settlement of his claim, and at the time of making it he was not entirely without understanding. After the accident, plaintiff was put in the car and taken to the power house. It was about 7:30 o'clock in the morning. Dr. Bullard was called, and, soon after, Dr. Dickson, the company's physician, came, and had plaintiff removed to his house about an hour later. Dr. Dickson testified that plaintiff "was suffering considerably from the shock of the accident. * * * Then, with the assistance of Dr. Bullard, who gave the anesthesia, I made a thorough examination of the arm, and saw that it was in such a condition that it would be necessary to give it rest for twenty-four or forty-eight hours, and bandaged it, and put on temporary splints. Dr. Bullard gave the ether at that time." Plaintiff was given anesthetics at the power house to alleviate his sufferings. Dr. Dickson's testimony is to the effect that he attended him during the day and saw him at midnight of the 20th, and that part of the time the patient was dozing, and part of the time awake; that he "talked intelligently towards evening," spoke of depending upon his arms for a livelihood, and thought the company ought to pay him something; and that he seemed rational. Dr. Dickson also testified that he reported the case to Mr. Hook, the manager of the company, that same evening, and informed him that plaintiff claimed damages. Mr. Hook went early the next morning to Dr. Dickson's house, prepared with the printed form of settlement of claims of this character, and at once approached plaintiff on the subject of compromising or settling for the damage. Mr. Hook testified that plaintiff appeared to understand what he was about, and for some time hung out for $200, but finally agreed to take $100 in full satisfaction of all claims against the company. This voucher or receipt is in evidence, and purports to be signed by plaintiff by mark or cross, and is witnessed by Mary E. Spear. She testified that she saw plaintiff make his mark at the request of Mr. Hook, but both Dickson and Hook say she was not present when he touched the pen, but was called in to sign as a witness. She heard no conversation between Hook and plaintiff as to the settlement. After the paper was signed, Hook drew the check of the company, dated November 21st, on the bank in that city, and gave it to plaintiff, and took away with him the voucher or receipt signed by plaintiff. There is evidence that plaintiff could not write the English language, except to write his name, or understand or speak it but indifferently. He gave his testimony through an interpreter. Of his mental condition while at Dr. Dickson's, the only evidence is given by Hook and Dickson. Neither the nurse, Mary Spear, nor Dr. Bullard was asked as to his mental condition. The evidence upon this point, up to the time of signing the receipt, rests upon the testimony of Hook and Dickson, which stands against plaintiff's that his mind is and was a blank as to what occurred from the time he was picked up and taken to the power house until he was taken to the sanitarium; and, as to the check for $100, he testified that he did not know why it was given to him; nor could he have known if he had no memory of what took place at Dr. Dickson's. There is no evidence that any one informed him that he had made a settlement, but both Dr. Dickson and Mrs. Simpson testify that he spoke of it himself soon after coming to the sanitarium, and said that the company had not given him enough; that he ought to have had $200 instead of $100. The most that can be said of this evidence is that it created a conflict. We cannot say that plaintiff's testimony was so inherently improbable, in view of his known condition at the time of which he speaks, and of the surrounding circumstances, as to justify the court in taking this question of fact away from the jury. But it is strenuously urged that the evidence conclusively shows that plaintiff was not, when he made the settlement, "entirely without understanding, within the meaning of the statutes of this state"; citing section 39, Civ. Code, relating

to the right of rescission where a person of unsound mind, but not entirely without understanding, has entered into a contract. Plaintiff's guardian made affidavit, after the answer was filed, denying that Abrahams ever made, signed, or executed the receipt pleaded. He also stated that, if the mark of Abrahams was made to the receipt, it was procured and placed there without his knowledge or consent, and when he did not know or understand the nature or character or legal effect of the instrument to which his mark was so affixed; that, if made, it was done when he was under the influence of narcotics, and was not mentally competent to know the nature or legal effect of the said receipt or release. The trial was conducted on both sides as though this issue was raised by the pleadings, and without objection to any of the evidence. The court gave instructions to the jury especially directed to the issue whether plaintiff at the time was entirely without understanding. It is now too late to object that the issue was not presented. It is conceded that plaintiff was not adjudged incompetent until July 15, 1896, and the court instructed the jury that this was evidence of incompetency only on that date, and not before. It seems, therefore, that the question of plaintiff's mental condition, and whether he was or was not entirely without understanding, properly went to the jury. Defendant relies upon the evidence of Hook, Dickson, and Mrs. Simpson, as conclusively showing that plaintiff knew what he was doing when he signed the receipt, and that plaintiff's testimony that he knew nothing that occurred at that time is not evidence that he was not entirely without understanding; i. e., that his mind was unsound, but not wholly lacking discernment or power to reason or understand what was transpiring about him. If, however, we are to accept the plaintiff's testimony, as the jury certainly did, it seems plain enough that he was "entirely without understanding" concerning the matter as to which he is sought to be held responsible; for he says he was wholly unconscious, and knew nothing of it. "Understanding" is defined to mean "the act of one who understands or comprehends; comprehension; apprehension and appreciation; discernment." Cent. Dict. If he did not know what he was doing, he did not understand what he was doing; and, if he was in such condition as not to know anything that was transpiring, he was entirely without understanding. Defendant contends that, even if he was incompetent to make the contract of release, he afterwards ratified, and is therefore bound by, it. We do not think the evidence shows, without conflict, that he ratified the agreement of release. He testified that he did not know why he was given the $100. He found himself with it, and that was all he knew. It is true that defendant's witnesses testified to facts which tended to show that he must have known how he came by the money. But he denied the admissions testified to by Dickson and Mrs. Simpson; and it nowhere appears that the facts about the settlement, as claimed by defendant, were communicated to him after he came to himself. Keeping the money in ignorance of how he came by it was not a ratification of an agreement he never entered into, and of which he had no knowledge. The jury were instructed that, if they found that the plaintiff was entitled to recover damages, they might "deduct from the amount of such damages any money given to Abrahams by the defendant." The defendant could not, therefore, complain that it was injured by this payment. Sheanon v. Insurance Co., 83 Wis. 507, 53 N. W., at pages 884, 885. We think the case was fairly submitted to the jury by the instructions given, and that the judgment and order should be affirmed, and it is so advised.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(124 Cal. 418)

WITTFIELD et al. v. FORSTER et al.

(L. A. 546.)

(Supreme Court of California. May 16, 1899.)

TRUST CONVEYANCE—VALIDITY.

1. By the terms of a deed of trust, the grantor conveyed all his property, both real and personal, to the grantee in trust for a certain lodge, to have and to hold unto said trustee, his successors and assigns, forever. *Held*, that the trust was void, since it did not come within any of the four purposes enumerated by Civ. Code, § 857, for which, under the provisions of said section, express trusts may be created, and did not indicate with reasonable certainty the subject and purpose of the trust, as required by section 2221.

2. Under Civ. Code, § 866, providing where an express trust is created as to realty every estate not embraced therein is left to the author of the trust, and section 871, providing that, when the purpose of an express trust ceases, the estate of the trustee also ceases, where the trusts declared in an instrument are void, either the trustee takes no estate, or there is a resulting trust to the grantor or his heirs.

Department 2. Appeal from superior court, San Diego county.

Action by Heinrich Wittfield and others against George Forster and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Withington & Carter, for appellants. McDonald & McDonald, D. C. Collier, Jr., and N. H. Conklin, for respondents.

McFARLAND, J. This action is brought by the executor and heirs at law of Gustav Wittfield against the defendants, George Forster and San Diego Lodge No. 35, Free and Accepted Masons, an unincorporated association. There are two counts in the complaint. The first count is in the ordinary form of an action to quiet title to certain lands, and the second count avers the execution by the deceased, Gustav Wittfield, of an instrument in writing, executed by him a few days before his death, purporting to convey all his property, both real and personal, to the said George Forster in trust for the said San Diego Lodge, and the prayer is that said deed be decreed to be void, and to have created no trust, and that the plaintiffs are entitled to the possession of the land embraced by said instrument, and that defendants be decreed to account for the personal property referred to in said instrument. The court rendered judgment for the defendants, and the plaintiffs appeal from the judgment.

The case turns upon the question whether or not the instrument above referred to creates a valid trust. The following is a copy of said instrument: "Gustavus Wittfield to George Forster, trustee: I, Gustavus Wittfield, of San Diego, California, for and in consideration of one dollar, to me in hand paid, do hereby grant, sell, and convey to George Forster, of San Diego, Calif., as trustee in trust for San Diego Lodge No. 35, Free and Accepted Masons, of the state of California, all the property I now own, both real and personal, and of whatever kind and nature or description, and wherever situated. To have and to hold unto said trustee, his successors and assigns, forever. Witness my hand, this 8th day of September, 1894. Gustavus Wittfield." This instrument is manifestly not a conveyance to Forster for his own beneficial use. Its terms clearly show an intention to create a trust, and, if the trust is not sufficiently definite to be carried into effect, or is for any reason illegal or invalid, the instrument either conveys no title or leaves a resulting trust in favor of the grantor or his heirs, where, as in this case, he dies intestate. The law on this subject is very fully stated in the case of Nichols v. Allen, 130 Mass. 212, and cases there cited. No matter what the terms of an instrument creating a trust may be, the "trustee takes an estate adequate to the execution of the trust, no more and no less." Morffew v. Railroad Co., 107 Cal. 587, 40 Pac. 810. Section 1032 of Pom. Eq. Jur. is as follows: "First form: Trust resulting to the donor. This type includes the three following subdivisions: (1) Where property is conveyed by will or deed upon some particular trusts or particular objects, and these purposes fail in whole or in part, or the particular trusts are so uncertain and indefinite that they cannot be carried into effect, or they lapse, or they are illegal. In all these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor or his heirs, residuary devisees, or legatees, or personal representatives of the testator. The following are illustrations: Where property is given by will or deed, stated to be on trust, but no trust is declared; or upon trusts to be thereafter declared, but no such declaration is made; or is given upon some trust which has wholly failed and become inoperative; or real property is given upon a trust which is too uncertain, indefinite, and vague in its declarations to be carried into effect; or if the property is given upon a trust which is illegal, and therefore void; or upon a trust which fails by lapse, and the property is not otherwise disposed of." These propositions declared in the text are supported by the authorities referred to. Section 866 of our Civil Code provides that, "where an express trust is created in relation to real property, every estate not embraced in a trust, and not otherwise disposed of, is left to the author of the trust or his successors." Section 871 provides: "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases." And section 2279 provides: "A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful." Under these authorities, where the trusts declared in an instrument are illegal, or for any reason void, either the trustee takes no estate, or there is a resulting trust to the grantor or his heirs; and in the case at bar it is immaterial which of these results follows.

It is contended by appellants that the trust sought to be created in this case is void (1) because the attempted trust is not one of those named in section 857 of the Civil Code; (2) because the instrument does not indicate with any reasonable certainty the purpose of the trust; and (3) because the beneficiaries are not indicated with any reasonable certainty, and that therefore the trust, not being for charitable purposes, is void. We think that the first and second contentions of the appellants must be sustained; and therefore it is not necessary to consider their third contention.

1. Section 847 of the Civil Code provides that "uses and trusts in relation to real property are those only which are specified in this title"; and section 857 in the same title provides that express trusts may be created for four different purposes mentioned in the four subdivisions of the section. It is not necessary to state those four subdivisions here. It is sufficient to say that the attempted trust involved in the case at bar does not come within either of them, and is therefore void.

2. Moreover, section 852 of the Civil Code provides that a trust in relation to real property must be created by a written instrument; and section 2221 provides that the instrument must indicate "with reasonable certainty the subject, purpose and beneficiary of the trust." In Pom. Eq. Jur. par. 1009, the author says: "The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter of property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in

which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." If we apply the statutory declaration above quoted, and the principle found in the above language of Pomeroy, we see that the language employed in the instrument is entirely too vague and uncertain to constitute a valid trust. The duration of the estate attempted to be granted to the trustee, the nature and quantity of interest which the beneficiaries are to have, and the manner in which the trust is to be performed, are all left undeclared and without any reasonable certainty; and, of course, there is no statement of any of the purposes for which, under section 857, an express trust may be declared. And this uncertainty also makes the attempted trust as to the personal property void.

More than three years after the death of Gustavus Wittfield, and more than that time after the execution of said instrument, and long after the commencement of this action, the respondent George Forster executed and filed for record a written instrument, by which he undertook to declare and define the trusts which he claims were intended to be declared by said Wittfield. But the rights of appellants attached at the death of Gustavus Wittfield, and their status with respect to the property could not be changed or affected by any subsequent act of Forster. The latter could not, by declaring a trust in property which he did not own, defeat the title of the true owners. For the reasons above given, the judgment in favor of respondents was erroneous. The judgment appealed from is reversed, and the cause remanded.

We concur: TEMPLE, J.; HENSHAW, J.

124 Cal. 363

COWDERY v. McCHESNEY. (Sac. 580.)

(Supreme Court of California. May 5, 1899.)

PLEADING—AMENDMENTS — WITNESSES — OPINIONS —VALUE — BOOK ACCOUNTS — BEST EVIDENCE — TRANSACTIONS WITH DECEDENTS — HARMLESS ERROR.

1. A complaint to recover for labor furnished under an agreement to pay what it was reasonably worth, but which failed to state the reasonable value of the services, may be amended at the trial so as to state such value.

2. A witness stated that he had been employed as a ranch superintendent in the same character of work as that done by plaintiff at the K. ranch, particularizing the character, places, and times of such work; that he had seen plaintiff working on the K. ranch, and that he (witness) was familiar with that ranch; that he knew plaintiff was superintendent of the K. ranch, and looked after the stock and farming of the place; that he knew the fair and reasonable value of such services as were rendered by plaintiff on the K. ranch during the years in dispute; that he knew about what was being paid in the vicinity for such services during said years. *Held*, that the witness was qualified to testify as to the value of plaintiff's services.

3. The fact that one of the parties has kept a book account of their transactions, does not affect the rule that the oral evidence of persons having personal knowledge of the transactions is the best evidence of the items unless they were made in pursuance or the result of a written contract between the parties.

4. A party may testify whether anything has been paid to him "since" the death of the other party to the contract.

5. In an action on account, errors at the trial will not be deemed harmless because of a want of a showing of nonpayment of the account by defendant's testator, where there is no explanation under oath, on defendant's part, as to why certain books kept by plaintiff for the deceased, and last seen in defendant's possession, which might show nonpayment, were not produced in compliance with the order of court made on plaintiff's request.

6. In an action on an account, where the court had erroneously excluded all of plaintiff's proof to establish the account, and a nonsuit had been granted, it cannot be claimed, on appeal, that, irrespective of such errors, the nonsuit was proper, because no evidence of nonpayment of the claim was introduced.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by W. A. Cowdery against Clark McChesney, as executor of the will of George M. Kasson. From a judgment of nonsuit, and an order denying a new trial, plaintiff appeals. Reversed.

Jas. A. Louttit and Louttit & Middlecoff, for appellant. John A. Percy, Budd & Thompson, and Nicol & Orr, for respondent.

GRAY, C. This is an appeal from a judgment for defendant, and from an order denying plaintiff's motion for a new trial. The action was brought to recover a balance due on a mutual, open, and current account. A claim embodying an itemized statement of this account had been presented to defendant as executor of the last will of deceased, and by him rejected. At the conclusion of plaintiff's efforts to lay before a jury evidence in support of his claim, a motion for a nonsuit was granted by the court. A portion of the account involved in the suit consisted in a claim for several years' labor by plaintiff for the deceased in his lifetime. In the complaint it was alleged that the deceased, at the time the plaintiff commenced working for him, agreed to pay him what his services were reasonably worth, but the complaint contained no allegation as to the value of the services. On the trial plaintiff endeavored to prove the value of these services, but his questions to that end were objected to on the ground, among others, that they were germane to no issue in the case. This objection was sustained, whereupon the plaintiff moved the court for leave to amend the complaint so as to state therein the value of the said services. The motion to amend was denied, and counsel for plaintiff again propounded questions to establish the value of these services, but was balked by the further objections of the defendant and the ruling of the court sustaining the same, and the plaintiff never did succeed in getting any evidence of the value of such services before the jury. We think the action of the court was erroneous. It was an error not to permit the complaint to be amended so as to state the value of the services, and this error was prejudicial to plaintiff, because the court subsequently sustained objections to evidence sought to be introduced as to the value of those services, on the ground, as it was stated, "there is not the slightest issue, either by the complaint or answer, on that matter." Respondent contends, however, that the witness R. A. Meyers, called to establish the value of the services, was not qualified to speak on the subject, and the objections to his testifying were, therefore, properly sustained. The witness stated, in substance, that he had been employed in the same character of work as that done by plaintiff at the Kasson ranch, and stated in detail the character, places, and times of the work that he had done of a similar nature to that which Cowdery had performed for Kasson; that he had seen Cowdery working on the Kasson ranch, and was familiar with that ranch. He also stated as a fact within his own knowledge that Cowdery was superintendent of the Kasson ranch, and looking after the stock and after the farming of the place, and that he knew what would be a fair and reasonable value of such services as were rendered by Cowdery to Kasson upon the Kasson ranch during the years 1894 and 1895; that he had been engaged in work of the same character in this (San Joaquin) county and Butte, and knew of others engaged in work of that character, and knew about what was being paid in 1894 and 1895 in San Joaquin county and counties adjoining. Upon this evidence the witness Meyers was clearly qualified to testify as to the value of the services of a ranch superintendent, and answer the questions asked him as to the value of Cowdery's services, and it was error for the court to sustain the objections to these questions on the ground of a supposed want of foundation for the same; and the same thing may be said of the court's ruling as to questions propounded to the witness Atwood.

Mrs. Cowdery was called as a witness by plaintiff, and, after testifying to the character of the work performed on the Kasson ranch by the plaintiff, Cowdery, the following proceedings were had: "Q. Mrs. Cowdery, during the year 1889 was there any transaction between Mr. Kasson and Mr. Cowdery of a business nature, by which Mr. Kasson transferred any property to Mr. Cowdery, or sold him anything? Mr. Budd: We object upon the ground that it is incompetent, irrelevant, and immaterial and not germane to any issue raised by the pleadings. Mr. Middlecoff: I am going now into the proposition of a mutual, open, and current account. Mr. Budd: We make the further objection that it is not the best evidence. The account itself is the best evidence. The Court: If that is your objection, I will sustain your objection. Mr. Middlecoff: We except. Q. I will ask you, Mrs. Cowdery, whether or not in the year 1889 Mr. Cowdery bought any eggs or butter from Mr. Kasson. Mr. Budd: We make the same objection, if the court please. The Court: Gentlemen, now I will make a ruling. I will allow you to prove items of an account, but you must first prove the existence of an account. I order that as the order of the trial. I will order that first the existence of the account must be proved. Then I will let you into the items of it. Mr. Middlecoff: Was there any account between Mr. Kasson and Mr. Cowdery for anything sold by Mr. Kasson to Mr. Cowdery during the year 1889? Mr. Nicol: We object on the ground that it calls for an opinion and conclusion of this witness. (The court sustained the objection, to which ruling of the court plaintiff excepted.) Q. What, if anything, did Mr. Kasson sell Mr. Cowdery in the year 1889? Mr. Nicol: We object upon the ground that it has been asked, objected to, and been ruled upon. The court: I have ruled on that once, and I now sustain the objection on the ground that it is in violation of the order of trial that the court has prescribed. Mr. Middlecoff: We take an exception. Q. Did you see any books of account at the ranch during the year 1889? Mr. Nicol: We object on the ground that it calls for the opinion of the witness as to a matter of fact. (The court sustained the objection, to which ruling of the court plaintiff excepted.) Q. I will ask you whether, in the year 1889, Mr. Kasson directed you to deliver any butter or eggs to Mr. Cowdery. Mr. Nicol: We object upon the ground that it is immaterial. The court: The objection is sustained upon the ground that it is violating the order that the court has prescribed for the trial. Mr. Middlecoff: We except. I don't know as I understand the order of the court. The court: I have said that the order of the trial would be that before you go into proving the items of an account you must first prove that there was an account. Q. I will ask you if any account book was kept at the Kasson ranch during the year 1889, in which there was any record or anything written down concerning any transaction, or purporting to concern any transaction, or regarded transaction, between Mr. Kasson and Mr. Cowdery. Mr. Budd: We object,—First, on the ground that it is incompetent; second, on the ground that it calls for a conclusion of the witness as to what certain matter concerned or involved. (The court sustained the objection, to which ruling of the court plaintiff excepted.)" In excluding evidence of the items of the account, a copy of which was in plaintiff's claim against the estate of Kasson, and also set out in the complaint in this action, and in ordering that the account must be proved before the plaintiff would be permitted to go into the items of it, the court erred. The only way an account can be proved ordinarily is by establishing by evidence the several items of the same, and the oral evidence of persons having personal knowledge of the transactions is the best evidence of the items unless there is something to indicate that such items accrued in pursuance of, or are the result of, a written contract between the parties. The fact that one or both of the parties have kept a book account of their transactions does not affect the rule of evidence, and the oral testimony of eye and ear witnesses to the transactions in which the various items of an account accrued is still primary, and not secondary, evidence of such items. The books themselves are secondary or supplementary evidence. The "order of trial," as it was called by the court, seems impracticable, if not impossible, to comply with.

Of William Cowdery, called as a witness in his own behalf, the following question was asked, and the following proceedings had: "Q. Has anything been paid to you since his death on account of any services rendered by you to him during his lifetime, if you rendered any such services? Mr. Nicol: We object on the ground that this witness is not competent to testify in answer thereto under section 1800 of the Code of Civil Procedure, and the question is leading. The Court: The objection is sustained upon the ground that the question necessarily carries with it the fact of an account existing prior to his death. Mr. Middlecoff: I note an exception. Q. If any balance upon any account was due to you upon the death of George M. Kasson, does that balance still remain unpaid? Mr. Nicol: We make the same objection. (The court sustained the objection, to which ruling of the court plaintiff excepted.)" The inquiry contained in these questions did not relate to anything that occurred before the death of deceased, and does not fall under the inhibition of section 1800, Code Civ. Proc. The ruling of the court was therefore erroneous.

Respondent contends that if plaintiff failed to make out a case by not proving nonpayment of his claim, the judgment of nonsuit must stand, no matter whether errors were committed by the court below in other particulars, so long as these errors did not affect the admission of evidence going to the proof of nonpayment. We have already seen that one error of the court consisted in excluding evidence of nonpayment subsequent to the decease of Kasson. There seems, however, to be no evidence of nonpayment during the lifetime of Kasson. As to that period the book accounts or memoranda kept by the deceased, or under his directions, in his lifetime, might well be looked to for evidence of this negative fact. It appears that there were some books kept by plaintiff for Kasson, one termed a "petit book" and the other a "ranch book." The last seen of these books, according to the sworn testimony, they were in the possession of McChesney, the defendant; and, though vigorous efforts were made to secure their production on the trial, it seems that it was impossible to find them. It may be that these books would disclose evidence of the nonpayment of plaintiff's claim; possibly they would not. At all events, this court should not say to the plaintiff on this appeal, "We will presume that the errors of the court were without prejudice to you because you produced no evidence of nonpayment," so long as there is no explanation under oath on the part of the defendant as to why the books were not produced in compliance with the order of the court. If we were to do that, it would seem that we might be permitting the defendant to take advantage of his own wrong. Notwithstanding the provisions of section 1880, Code Civ. Proc., a foundation for the introduction of the account books might have been laid through the testimony of the plaintiff himself. Roche v. Ware, 71 Cal. 375, 12 Pac. 284. Another sufficient answer to the position of respondent is that it would have been a vain thing for plaintiff to prove the nonpayment of his claim until he had first established the existence of such claim by competent proof. He had offered what he deemed to be competent proof to that end,—presumably all the proof he had,—and it had been excluded by the court. It was time, then, for him to bring his case to a cheerful conclusion. Any effort to prove the nonpayment of a claim that he had failed to establish would have been an unwarranted trespass upon the time and good nature of the trial judge. The law does not require a vain thing. For the errors herein specified, we advise that the judgment and order denying a new trial be reversed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

124 Cal. 387

Ex parte TRUMAN, City and County Treasurer. (Cr. 539.)

(Supreme Court of California. May 11, 1899.)

CONTEMPT—PARTIES TO ORIGINAL PROCEEDING—ORDER UPON COUNTY TREASURER TO PAY MONEY.

Contempt proceedings will not lie against a county treasurer for his refusal to obey an order of court for the payment of a money demand, where he was not a party to the proceeding in which the order was made; the treasurer being entitled in such case to make such defense as he may deem meritorious.

In bank.

Application for a writ of habeas corpus by I. J. Truman, city and county treasurer, for his release from the custody of the sheriff of the county of San Francisco. Writ granted.

John H. Dickinson and J. J. Truman, Jr., for petitioner. Geo. D. Collins, for respondent. J. C. Campbell, amicus curiæ.

PER CURIAM. This is an application for a writ of habeas corpus by I. J. Truman, treasurer of the city and county of San Francisco. The superior court of the city and county of San Francisco, and Hon. Carroll Cook, judge thereof, had made its order directing the treasurer to pay certain moneys to the stenographic reporter of the judge's court. The order was based upon the provisions of section 274 of the Code of Civil Procedure, as it stood before the unconstitutional amendment of 1885, which declares: "In criminal cases when the testimony has been taken down or transcribed upon the order of the court, the fees of the reporter shall be certified by the court and paid out by the treasury of the county or city and county in which the case is tried upon the order of the court." Upon the treasurer's refusal to comply with the order and pay the moneys as directed therein, he was cited before the presiding judge of the court in contempt proceedings, and, after hearing, was for his refusal adjudged to be in contempt, and ordered to be imprisoned by the sheriff until he complied with the order of court. Upon being taken into custody by the sheriff, he sued out this writ of habeas corpus. By this proceeding there is sought to be determined the validity of that portion of section 274 of the Code of Civil Procedure above quoted. But that question is not justly presented for determination upon this hearing. It is the duty of the treasurer not only to refuse to pay any and all demands which he believes to be illegal, but also to refuse to pay a legal demand unless it shall have been presented to him for payment after compliance with all the forms and requirements of the law touching the presentment of such a demand upon the treasury. If the demand in question was a legal and collectible demand, the stenographic reporter had his remedy by proceedings in mandate; and, upon the other hand, the treasurer, called regularly before the court in that proceeding, could make such defenses to the enforcement of the claim as he deemed meritorious. But he was not a party to the proceedings which resulted in the order of the court directing the payment, and contempt proceedings, therefore, could not lie against him for his refusal to comply with the order. Ex parte Widber, 91 Cal. 367, 27 Pac. 733. Let the prisoner be discharged.

(124 Cal. 435)

PEOPLE v. McMAHON. (Cr. 483.)

(Supreme Court of California. May 18, 1899.)

CRIMINAL LAW — APPEAL — TRIAL — REMARKS OF DISTRICT ATTORNEY.

1. Affidavit of defendant as to irregularities occurring during trial, printed in the transcript, but not appearing in the bill of exceptions, in no way authenticated, and marked as having been read on motion for new trial, cannot be considered on appeal.

2. In a prosecution for robbery alleged to have been committed by defendant after leaving the saloon of H., it is not error for the district attorney in his closing remarks to refer to H. as "Old Harris, the whisky seller," and to state that "this man [referring to defendant] ought to be in the penitentiary."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Dan McMahon was convicted of robbery, and appeals. Affirmed.

W. J. Murphy and Brooks & Trask, for appellant. Atty. Gen. Fitzgerald, for the People.

COOPER, C. The defendant was convicted of the crime of robbery, alleged to have been committed on the 24th day of February, 1898, by the felonious stealing, taking, and carrying away from the person of one Heisler certain silver coins of the value of $18. He appeals from the judgment, from the order of the lower court denying motion for a new trial, and from the order denying a motion in arrest of judgment.

The principal point made by defendant's counsel is that the evidence is not sufficient to sustain the verdict. Heisler testified: That on the evening of February 24th he met the defendant in the saloon of one Harris, after dark, and that witness, defendant, and one Patterson went into the back room of the saloon, and were drinking, remaining there about half an hour. That the three then left Harris' saloon, and defendant said they would go to another place. They walked just one block, and turned to the right, when defendant or Patterson grabbed witness by the throat, and one or both of them struck him a violent blow over the eye, which knocked him down, and rendered him for a time insensible. That when he recovered he found that all his money had been taken from his pocket, the amount being about $18. He then returned to the saloon of Harris. The witness Swope testified that he saw defendant and Patterson, on the night of February 24th, at the saloon of Harris; that he also saw Heisler there, and the three afterwards left together; that afterwards Heisler came back, and showed witness an injury on his face. The witness Steele testified that he saw Heisler on February 25th, and his eyes were swollen and bruised. It is not necessary to further discuss the testimony. If the testimony of these witnesses was believed by the jury, it was amply sufficient to sustain the verdict. The verdict is conclusive evidence that the jury believed it. Under the well-known rule, we cannot disturb the verdict of the jury when there is sufficient evidence to support it.

It is claimed that "the conduct of the district attorney was certainly outrageous during the trial." There is nothing in the record tending to show any misconduct on the part of the district attorney. There is printed in the transcript an affidavit of defendant, in which certain language claimed to have been used by the district attorney is quoted. This affidavit is not in the bill of exceptions, and is in no way authenticated. It is not even marked as having been read on motion for new trial. It therefore forms no part of the record, and cannot be considered. Sup. Ct. Rule 29; People v. Price, 17 Cal. 311; People v. Mahoney, 77 Cal. 529, 20 Pac. 73. But, even if authenticated, the remarks are not such as to have in any way prejudiced the defendant. The affidavit states that, after speaking of Harris, who kept the saloon, as "Old Harris, the whisky seller," the district attorney said, "This man [referring to defendant] ought to be in the penitentiary." This is merely an opinion expressed by the district attorney during the argument, and was not a statement of any fact, or a suggestion of something as being true which had not been proven. The district attorney must be allowed some latitude in commenting on the case, and his conduct in a case or statements must be such as in a material matter to have prejudiced the defendant before such conduct or statements would be ground for setting aside a verdict. This disposes of all the alleged errors complained of in defendant's brief, and we do not discover any others. The judgment and orders should be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

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124 Cal. 422

O'BRIEN v. O'BRIEN. (S. F. 1,070.)

(Supreme Court of California. May 17, 1899.)

DIVORCE—DECREE—ALIMONY—AMENDMENT—FINDINGS OF FACT—BILL OF EXCEPTIONS—SETTLEMENT—NOTICE—WAIVER OF OBJECTIONS.

1. Where, at the time noticed for the settlement of a bill of exceptions, counsel for both parties were present, and appellant presented the bill and the proposed amendments, and by consent the hearing was postponed several times before objection was made that appellant, in his notice, omitted to state that he would present the proposed amendments as well as the bill, such objection is waived.

2. Where the question of alimony is raised by the pleadings in a divorce case, the failure to find on that issue is a judicial error, and not a clerical misprision; and hence the judgment cannot be amended by adding an order reserving the question of alimony for further consideration.

3. The amendment of a judgment for divorce by adding an order reserving the question of alimony for further consideration is not harmless error.

4. Where a court has lost jurisdiction by entering a final decree in divorce, the subsequent appearance of defendant to contest a motion for alimony does not give the court jurisdiction to amend the decree by adding an order reserving the question of alimony for further consideration.

5. In a divorce case the court filed a "Memorandum of Decision," which, as a finding of fact, was insufficient to sustain a judgment, but which ordered that the question of alimony be reserved for further consideration. Afterwards the court signed and filed findings and a decree, which made no mention of alimony. *Held*, that the memorandum of decision could not be considered as a finding, so as to make the failure of the decree to reserve the question of alimony, in accordance therewith, a mere clerical misprision, authorizing an amendment.

6. A memorandum of decision in a divorce case which fails to show the jurisdictional fact of residence, or the facts constituting the grounds for divorce, and which does not contain a separate statement of facts and conclusions of law, and does not direct judgment, is insufficient, as a finding of fact, to sustain a judgment.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action for divorce by Julia Scott O'Brien against Michael O'Brien. From an order amending a decree for plaintiff by adding an order reserving the question of alimony for further consideration, respondent appeals. Reversed.

Beatty & Beatty, for appellant. Henley & Costello and R. R. Bigelow, for respondent.

CHIPMAN, C. Proceedings to amend a decree of divorce by motion. The trial of the action was concluded on July 8, 1895, and on that day the then trial judge, Hon. D. J. Murphy, signed, and there was filed by the clerk, a paper entitled "Memorandum of Decision." It is a brief statement of three paragraphs, prefaced as follows: "In this case, after fully considering the evidence, I am led to the following conclusions, and find the facts to be." Paragraph 1 is a statement that the evidence is not sufficient to support the claim that the parties intermarried in 1890, or were husband and wife prior to July 21, 1893; paragraph 2 is a finding that the marriage was solemnized on July 21, 1893; paragraph 3, "that said defendant has been guilty of such acts of cruelty towards plaintiff as entitled her to a divorce on the ground of extreme cruelty, and the court so orders. The question of alimony and counsel fees is reserved for further consideration." Findings were not waived. On the same day a minute order was entered as follows: "This case having been heretofore submitted to the court for consideration and decision, and taken under advisement, and now the court being fully informed, and having fully considered the same, it is hereby ordered that the marriage heretofore and now existing between the defendant and plaintiff be, and the same is hereby, dissolved, and a decree of divorce granted to the plaintiff, on the ground of the extreme cruelty of the defendant towards the plaintiff. It is further ordered that the question of counsel fees and alimony be reserved for further consideration and decision. See memorandum of decision on file herein." Nothing further appears until July 25, 1895, when the record shows full findings and decision, in the opening paragraph of which it is stated as follows: "And the court, having heard and duly considered the evidence, and having examined the pleadings, and having given full and mature consideration of the law and facts, now renders and makes this its decision in the case, and finds the following facts." Then follows a statement of the facts of the marriage, residence of the parties, an outline of the married life of the parties, and the specific acts of cruelty proven, from which facts the court finds its conclusions of law, that the plaintiff is entitled to a decree dissolving the bonds of matrimony, "and it is hereby ordered that judgment be entered accordingly. Dated July 25, A. D. 1895. D. J. Murphy, Judge. [Indorsed] Filed in open court July 25, 1895. C. F. Curry, Clerk, by C. C. Morris, Deputy Clerk." The decree follows, of the same date, and is signed by the judge, and was entered in the judgment book on that day. On July 29, 1895, the attorneys for plaintiff served notice on defendant's counsel of the rendition and entering of the decision of July 25th in favor of plaintiff. This notice was filed on July 30th. No mention was made of counsel fees or alimony in the findings or decree of July 25th. On October 1, 1895, counsel for plaintiff served notice on defendant's counsel that a motion would be made on October 4, 1895, for an order awarding plaintiff counsel fees and alimony, to be heard on all the papers and records in the case, and upon testimony to be offered. The motion was heard by Judge A. A. Sanderson, and on October 29, 1895, he signed an order granting alimony and counsel fees. Subsequently defendant, by his counsel, moved the court to modify its order and reduce the amount of alimony, which was refused by an order entered December 14, 1895. Nothing further appears until on February 18, 1897, when the court made an order amending the decree of July 25, 1895, nunc pro tunc, by inserting at the end thereof the following, "It is ordered that the question of alimony and counsel fees be reserved for further consideration," on the ground that the omission of this reservation "was the result of clerical misprision and error, and that the amendment thereof would be in furtherance of justice." The appeal is from this order.

1. Plaintiff objected to the settlement of the bill of exceptions, and renews the objection here, on the ground that defendant, in his notice, omitted to state that he would present to the court the amendments offered by plaintiff thereto, as well as the proposed bill of exceptions prepared by defendant; citing section 650, Code Civ. Proc. At the time noticed, counsel for both parties were present; and defendant presented the bill and the proposed amendments to the court, and asked that the bill be settled and allowed. By consent the hearing was postponed several times, and was finally proceeded with April 30, 1897, and then for the first time the objection now urged was made. The court had jurisdiction of the bill and the amendments, and the order of continuance necessarily included both. By appearing and consenting without objection to these several continuances, plaintiff waived any right she may have had to challenge the sufficiency of the notice through which she appeared. Hicks v. Masten, 101 Cal. 651, 36 Pac. 130.

2. The principal question is whether the court had the power to amend the judgment. It was said in Egan v. Egan, 90 Cal. 21, 27 Pac. 24: "Courts have the power at all times to allow amendments to judgments for the purpose of having the judgment, as entered, express that which was rendered, so that the record will contain the actual decision of the court. Where the clerk fails to enter judgment as it is pronounced, the court has always the power to correct the matter and order the proper entry to be made. Clerical misprisions can be corrected at any time by an order of the court, but judicial errors can be remedied only through a motion for a new trial or an appeal." See, also, Bank v. Dusy, 110 Cal. 69, 42 Pac. 476, and Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775. We think, from the evidence upon which the order here in question was made, it clearly appears that the decree entered July 25th, as signed by the judge, was his last direction to the clerk, and was the decision in the case, and there was no mistake or misprision of the clerk. If error was committed in rendering the judgment, it was a judicial error, which could be remedied only by appeal or motion for a new trial. Bank v. Dusy, supra. Looking to the findings of facts and conclusions of law, we find them full and complete as a foundation for the decree. They are signed by the judge, as is also the decree. The complaint set forth the financial situation of defendant, and asked "that defendant be compelled by an order of this court to make permanent provision for the support of this plaintiff, and to pay to this plaintiff alimony and counsel fees as may be meet and just in the premises." The question of alimony was therefore an issue in the case. The court made no finding of fact upon this issue, and the decree is silent upon the subject. This was error, as every material issue must be met by the findings. Plaintiff could have had the omission corrected before the judgment was entered, by additional findings (Condee v. Barton, 62 Cal. 1; Hayes v. Wetherbee, 60 Cal. 396), or there remained the remedy of appeal or motion for new trial after the entry of judgment (Egan v. Egan, supra). The contention of respondent is that the "memorandum of decision" is "legally and technically sufficient to constitute findings, and does constitute findings"; that the findings of July 25th do not purport to supersede the first set, and there is no conflict between them, and they should be construed together to support the judgment (citing Smith v. Taylor, 82 Cal. 533, 544, 23 Pac. 217); that, construing the two together, it clearly appears that the intention of the judge was to reserve the question of alimony and counsel fees for further consideration, and hence the omission to insert in the decree any provision as to alimony and counsel fees was the mistake of the clerk,—a clerical misprision, which the

court could correct at any time on motion. Respondent makes the point that, if the court lost jurisdiction, it was restored by the consent of defendant in appearing and contesting plaintiff's motion for permanent alimony; citing Thomp. Corp. 7558; Works, Jur. 225; Rued v. Cooper, 109 Cal. 682, 689, 34 Pac. 98; Brown v. Crow, 3 Hardin, 443. And finally respondent contends that, having regained jurisdiction by consent, the order of the court amending the judgment nunc pro tunc, if erroneous, was not prejudicial to defendant, and therefore will not be reversed. It cannot be said that this order was without possible injury to defendant; for, if the judgment should stand as amended, it would carry with it the power to make still further orders as to alimony. But we do not think the court regained jurisdiction. When the court entered its final decree of July 25th, it had no further jurisdiction over the parties or the subject-matter. Howell v. Howell, 104 Cal. 45, 37 Pac. 770. The appearance of defendant in the subsequent matter of the motion for permanent alimony did not have the effect to reopen the judgment, or authorize its amendment by motion. In Kamp v. Kamp, 59 N. Y. 212, where an application was made for alimony after a final judgment which made no provision as to alimony, and the defendant appeared and contested the application, it was said: "The jurisdiction of the court over the subject-matter of the action and over the parties terminated with the entry of final judgment, except to enforce the judgment and carry out its provisions. The court then lost jurisdiction over the person of the defendant for every purpose." The authorities cited by respondent do not sustain her contention. The case of Rued v. Cooper, supra, for example, decides nothing more on the point than that consent may give jurisdiction over the person. The court said: "If the court can be said to have lost jurisdiction at all, it could only be as to the assignee; but as to him it may be restored by consent, the court not having lost jurisdiction of the subject-matter." The findings of fact of July 25th were signed by the judge, and, that there could be no mistake as to his intention as to what the decree should contain, he signed that also. Why he omitted all mention of alimony, and said nothing in the course of the findings or decree indicating his intention as first expressed in the "memorandum of decision" and "minute order," is left wholly to conjecture. In such a situation, it seems to us the soundest and safest rule is that the last expression of the intention of the judge—it being an expression fully supported by the findings—must be conclusive. It would be subversive of that sanctity and stability everywhere given to final judgments to hold otherwise. We cannot presume, as counsel for plaintiff claims we should, that the judgment was entered pursuant to the findings of July 8th, and that, therefore, it was the omission of the clerk not to include in the decree the reservation as to alimony. To do this would be to subordinate the final and deliberate act of the court to a presumption. Nor was the action pending by virtue of section 1049, Code Civ. Proc., until the time for appeal had passed, in the sense claimed, to wit, that until after the time for appeal had elapsed the court could set aside, amend, or annul the decree. If it were true, as plaintiff contends, that the findings of July 25th do not sustain the judgment, and that the memorandum of July 8th is sufficient for that purpose, we could see force in the contention that the decree should be made to rest upon the so-called first findings. But we do not think the memorandum, treated as findings, sufficient to support the judgment. It fails to show the jurisdictional facts of residence. It sets forth no ultimate facts from which the legal conclusion of cruelty may be drawn. There is no separate statement of facts and conclusions of law, and neither the "memorandum" nor the "minute order" directs judgment to be entered. Looking at these entries of July 8th, it seems to be the more rational view that the judge regarded them as wholly insufficient, and hence the final and formal findings of facts, conclusions of law, and decree. We are unable by any reasonable interpretation of this final action of the court to conclude otherwise than that it decided to ignore the question of alimony altogether, which, while it was error, was judicial in its character. Nor can we wholly disregard the fact that the judge signed all these papers. It is true, his signature did not make the act any more or less binding, but upon the question of his intention the fact has some significance. It is said in Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775: "The decree, as entered in 1893, was signed by the judge, and, under any view, it was his last direction to the clerk, and was the decision in the case. It has been held that it is not necessary for the judge to sign a judgment, * * * but, where the judge does sign the decree, his signature, as was said in Re Cook's Estate, 77 Cal. 227, 19 Pac. 434, is intended 'to give the clerk a surer means of correctly entering what has been adjudged.'" It results from the foregoing that the order should be reversed, and it is so advised.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(124 Cal. 389)

HITE v. HITE. (S. F. 1,489.)[1]

(Supreme Court of California. May 13, 1899.)

DIVORCE—ALIMONY.

In an action for divorce, brought by a wife, where the marriage is denied, to entitle her to alimony and suit money she must prove it by a preponderance of the evidence; a mere prima facie showing is not sufficient.

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[1] Rehearing denied June 13, 1899.

McFarland and Garoutte, JJ., dissenting.

In bank. For opinion in department, see 55 Pac. 900.

TEMPLE, J. This is an appeal from an order allowing alimony and suit money in an action for a divorce. Plaintiff contents herself in her complaint, so far as her cause of action is concerned, with the averment of her marriage to defendant, and a charge of adultery against him. Defendant denies the marriage, and avers that the person with whom he is charged to have committed adultery is his lawful wife. He also charges that plaintiff, since her alleged marriage to him, has had illicit relations with other men. The order or judgment appealed from was made after notice and a hearing upon which many affidavits were read, as were also depositions of the parties. In addition to the showing as to her lack of means and the faculties of the defendant, the plaintiff states that she will require 30 or 40 witnesses, many of them to prove that the parties have cohabited together as husband and wife, and are generally reputed to be such, and that the defendant has frequently so represented. In her deposition she states that the contract consisted simply in this: that the defendant said to her, "You are my wife;" that no witnesses were present; and that she had refused longer to live with defendant unless he married her. These facts are specifically denied by the defendant. He admits the cohabitation, and that he has supported the plaintiff, but he avers that she is an Indian woman, who had, prior to his relations with her, been kept by many other men, by one of whom (Gibbs) she had a son, Thomas H. Gibbs, who makes an affidavit on her behalf in this case. Defendant also states that since she commenced living with him she has several times left him, living with other men; and that she sometimes went with the Indians to their fandangoes, and returned when she chose. He denies that either ever supposed the relations to be matrimonial, or that he ever called her wife, or represented her to be such. He says that he never even spoke to her upon the subject, but he admits that he supported her and her son. Thomas H. Gibbs, the illegitimate son of the plaintiff, corroborates the statements of his mother, and says he "was always told and led to believe by said John R. Hite that plaintiff was the wife of said John R. Hite." Plaintiff also read the affidavit of one James D. Westfall, who deposed that on one occasion defendant introduced plaintiff as his wife, and also that the parties were generally reputed to be husband and wife. This constitutes the evidence of plaintiff upon the issue of marriage. The defendant, in addition to his specific denial, read the depositions of 10 other persons, all of whom depose that they were intimate acquaintances of both parties, and well acquainted in the neighborhood where they lived. They unite in saying that neither party ever claimed to be married to the other, and they were not, at any time, reputed to be husband and wife. Some of them corroborate other statements made by defendant as to illicit relations of plaintiff with others. In addition, the reputation of Gibbs, plaintiff's son and main witness, was attacked.

Appellant contends that the showing was insufficient to justify the action of the court in granting alimony. The testimony of plaintiff in regard to the contract of marriage was in itself quite unsatisfactory, especially when taken in connection with the charge in defendant's affidavits, which she does not deny, that she had, before her cohabitation with defendant, and even since, had improper relations with other men. Under such circumstances it is difficult to believe that an Indian woman would object to further relations except upon condition of marriage. The positive denial of the defendant is certainly sufficient to overcome this testimony under such circumstances. The matter must then depend upon the evidence of common repute, and no one would contend that the plaintiff did show a common, uniform, and undivided repute of marriage. But I think it evident that the court did not determine the question of marriage at the hearing. The judge doubtless adopted the views of plaintiff's counsel upon the subject, and concluded that it was only necessary to hold that plaintiff had, by her affidavits, made out such a case as would throw the burden of proof upon the husband. To justify alimony, marriage must be admitted or proven. Upon this subject there is no difference in the authorities. Plaintiff's counsel contends that it is proven, within the meaning of this rule, when the wife, upon her showing, makes a prima facie case, regardless of the denials or proof produced by the husband. He says it is a novel proposition that on the hearing for temporary alimony plaintiff must produce a preponderance of evidence. He claims this would be equivalent to saying: "Prove your case by a preponderance of evidence, and then you shall have an allowance to enable you to make such proof." He also says: "In this case the plaintiff made a prima facie case, and, if the defendant had produced a hundred witnesses in an attempt to overcome her affidavits, the result would be the same. Indeed, it would be only stronger reason for allowing her means sufficient to procure the evidence which she and her counsel, who had talked with the witnesses, say she can produce, if given the means to do so." And this, I think, is really the question in the case: Was it sufficient, to entitle the plaintiff to alimony and suit money, for her to make by her own showing a prima facie case? I believe there is no authority for that position. If the marriage were admitted, then, upon a showing of the wife's necessities and the faculties of the husband, the allowance is almost a matter of course. It is otherwise when the marriage is denied. Then, before alimony can be allowed, the marriage must be proved; and a prima facie showing made by the wife when there is a counter showing is not sufficient. The judge should be satisfied from the entire proof made of the fact of marriage. Unless upon that question the husband has had his day in court, and a hearing, if alimony is allowed, his property is taken without due process of law. This precise question has not been considered, or even suggested, in any case to which my attention has been called, except in McKenna v. McKenna, 70 Ill. App. 340. It was there said that in such case—when the marriage is denied—the order cannot properly be made "until a hearing has been had, and the court upon it finds that the relation of wife and husband exists." The hardships which might result from either doctrine is there very tersely stated. The learned judge quotes from Schonwald v. Schonwald, 62 N. C. 219, to the effect that it is better when a woman makes oath of the fact of marriage to make an allowance, although the oath may turn out to be false, than that a wife may be in danger of starvation "if a brutal husband makes oath denying the marriage, which may turn out to be false"; to which the Illinois judge replies that "the more accurate statement would be that it is better to compel any man to pay temporary alimony and expenses of suit to any woman who may see fit to make oath that he is her husband, however strongly he may deny the allegation, rather than to allow her to be in want of money which he has." Whatever hardships may result, the court cannot lawfully take by final decree money from A. and give it to B., whatever may be the necessities of B., when A. disputes the facts upon which his liability is made to depend, without a trial and a determination of the issues made. The hardship to B. cannot modify the imperative rule of law and the absolute constitutional guaranty. It is not such a trial, and there can be no such finding, when a man is merely called into court to see whether one claiming to be his wife has in her pleadings and affidavits made a prima facie case. He must be heard, and be allowed to submit evidence, which must be considered in determining as to the fact of marriage. But that opportunity need not be on the trial of the case itself. The application for alimony, though it cannot be considered a separate suit, is a proceeding for a separate judgment, which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it. It is a final judgment, from which an appeal may be taken. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

To satisfy the requirement of due process of law it is not always necessary that such a trial should be afforded as is had in ordinary suits in courts of justice. The hearing allowed must be such as is practicable and reasonable in the particular case. Cooley, Const. Lim. 434. See, also, Ex parte Ah Fook, 49 Cal. 406; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71. Cooley says the opportunity to be heard must be such as "the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." It has been the practice to determine, as to the allowance of temporary alimony, upon motion with notice and upon affidavits. The defendant is thereby afforded an opportunity to be heard. Many cases are cited by respondent's counsel which he contends hold that all that is required on the part of the wife to justify an allowance of alimony is that she, by her showing, shall make such a case as upon a trial of the issue would cast the burden upon the husband. It is not necessary to review all the cases, but the case of Brinkley v. Brinkley, 50 N. Y. 184, is much relied upon, and concerning it a few remarks may be made. That case has some likeness to this. A contract marriage was alleged, with subsequent cohabitation. The wife alleged that defendant on many specified occasions introduced her as his wife, that they were received as husband and wife by reputable acquaintances, and such was their common reputation. The husband denied the marriage, and that he had by word or act at any time or place given the least foundation for the supposition or charge that plaintiff was his wife. He denied that their cohabitation was matrimonial, but averred that plaintiff was of unchaste character and person, and her relation with defendant was libidinous, and unsanctioned by law. In other words, he admitted the cohabitation, but claimed that it was meretricious from the beginning. Judge Folger did not say that this was not a denial of a fact essential to constitute marriage, but the contrary. Cohabitation, and holding out to the world that the persons so cohabiting are married, and general reputation, though all admitted, do not of themselves constitute marriage. But they authorize the presumption of the other fact, to wit, that the cohabitation was with matrimonial intent. This last fact was denied by Brinkley. The court did consider the affidavits of defendant, but concluded that they did not overcome the case made by the plaintiff. The judge did say that the question was not whether the evidence would be sufficient to justify a final decree, but whether "the proofs of the parties give reason to apprehend that upon a trial of the issues between them there is the fair probability that the plaintiff will maintain her allegations"; that is, does the evidence submitted by both show that probably plaintiff will prevail? I do not understand how this could be unless there was upon that hearing a preponderance of evidence in favor of marriage, although, inasmuch as the trial was not as complete nor the evidence of as high a grade as upon the trial of the issues in the case, it would not justify a final decree, or a finding which would be an estoppel. Judge Folger evidently thought that when Brinkley admitted that they had cohabited as husband and wife in the face of the world, and had associated with intimate acquaintances who were reputable people, as though the relation was honorable, it raised a presumption of marriage, not overcome by the general denials of the defendant and his claim that the relation was meretricious. Innocence and morality are to be presumed, rather than the opposite. This is put very strongly by Judge Folger. He says the defendant admits facts and circumstances presumptive of marriage, but says of them "that, though apparently proper and rightful, they were but the cover for a meretricious and libidinous connection, begun and continued in impurity," and that the issue was whether the cohabitation was honorable and matrimonial, or "the unsanctioned foregathering of a lecher and a wanton." This view was taken of that case in Collins v. Collins, 71 N. Y. 269. There the wife made, beyond doubt, a prima facie case, but the husband averred that the de facto marriage, which he admitted, was void, and the court held that it was error to allow temporary alimony until that question was settled. The principal difference between this case now in hand and the Brinkley Case is that this defendant denies that he ever represented the plaintiff to be his wife, or that they were reputed to be such. In the Brinkley Case these facts were admitted. We are not called upon here to say that it is necessary, in order to justify the allowance of temporary alimony, that a marriage de jure must be shown. The rule upon this subject is discussed by Mr. Bishop in his work on Marriage, Divorce, and Separation (section 922 et seq.). All the evidence here tending to show marriage at all tends to prove a marriage de jure, and such was also the fact in the Brinkley Case, although counsel seem to have understood that case differently. I think the superior court did not intend to hold, upon all the evidence before it,—that of defendant as well as that submitted by plaintiff,—that there was a preponderance in favor of the fact of marriage; and, if it must be held that it did so adjudge, there was a plain abuse of discretion. Judgment and order reversed.

We concur: VAN DYKE, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment of reversal. It is only a wife who can claim alimony (Civ. Code, § 137), and, when the fact of marriage is in issue and unproved, there is no one in that position. To allow a woman alimony for the purpose of enabling her to prove that she is a wife seems to me to involve a glaring absurdity, and to allow it every time she makes a prima facie case of marriage by her pleading or affidavit would result in something more serious than an absurdity. If a husband sues for a divorce, alleging a marriage, of course there can be no question of the right to alimony, if he is able to pay and the wife is in need. If he sues to annul a marriage upon the ground that it was void ab initio by reason of fraud, precontract, insanity, etc., the granting of alimony pendente lite would be proper, because a formal marriage is alleged, and will remain a lawful and established marriage in the absence of affirmative proof by him of the existence of some fact or facts which will invalidate it. In such a case I concede the propriety and justice of allowing the wife (for until the fraud or other invalidating circumstances are established she is the wife) money to make her defense. But when a woman sues for a divorce, and is met at the very threshold of the proceeding by a denial that she ever was a wife, the case is entirely different. She must establish the marriage before she can claim alimony or suit money, and she must establish it at a trial, and by satisfactory evidence. Even if this conclusion involved the inconveniences and hardships which counsel have depicted in their arguments, it would be none the less inevitable; but, in my opinion, such instances of hardship will rarely, if ever, arise. In a case of this aspect the plaintiff is not limited to a bare allegation of marriage in general terms. She may allege the specific facts from which the inference of marriage arises, with all the circumstances of time and place, and the defendant, in order to put the fact of marriage in issue, will be compelled not only to deny marriage in general terms, but also to make specific denials of the facts which prima facie constitute marriage. To make such denials, he must expose himself to the danger of being convicted of perjury if the facts alleged are true. If it be said that this is not sufficient security to plaintiff, I answer that it is at least equal to any security the defendant or the court can have that the plaintiff's claim is not wholly fictitious. In this case the defendant makes a complete denial of the facts alleged by plaintiff as constituting a marriage; and until that issue is tried and determined by final judgment the plaintiff has no claim upon him as his wife. Undoubtedly there are numerous cases in this country which can be cited in opposition to this view, but the sounder reason and the more trustworthy authorities sustain it. In my opinion, it is sustained by the reasoning of Judge Folger in the case of Brinkley v. Brinkley, cited by Justice Temple, and still more fully sustained by the decisions to which Judge Folger refers. Of course, it has been assumed in what has been here said that there is no serious contention on the part of the respondent that the superior court has tried and finally determined the issue of marriage in her favor. There is, in fact, no such claim. The whole argument in support of the order appealed from is that it required only a prima facie showing by ex parte affidavits to sustain it, and that the issue of marriage is still to be tried.

HARRISON, J. (concurring). Further consideration upon the rehearing of the question involved herein has led me to the conclusion that the court erred in making the order appealed from. The question involved in the appeal is to be determined by the statutes of this state, irrespective of the decisions thereon by the ecclesiastical and chancery courts of other jurisdictions, however serviceable the opinions of those courts may be in arriving at a proper construction of the statutes. "The Code establishes the law of this state respecting the subjects to which it relates" (Civ. Code, § 4), and section 137 of the same Code provides: "While an action for divorce is pending the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." As such order can be made only in behalf of the wife, it is essential that the applicant for the order make it appear to the court that she is the wife of the respondent. In an action for divorce by the husband it would appear from his complaint that the defendant is his wife, and no further showing of this fact would be required; but in an action by the wife, if the defendant denies that the plaintiff is his wife, she must establish the relation between them to the satisfaction of the court before she can be entitled to the order. The existence of this relation would be the main issue in the action, and would need to be affirmatively established before any decree of divorce could be rendered; but I do not think that the mere denial by the defendant that the plaintiff is his wife ousts the court of power to make an order requiring him to provide her with means to prosecute the action, or for her support during its pendency. An application for alimony can be made only "while an action for divorce is pending," and to this extent it is dependent upon the issues involved in such action; but the granting or refusal thereof is not dependent upon the final determination of the issues in the action, or available in the determination of those issues. It is a collateral proceeding or episode within the action, authorized for a particular purpose, but dependent for its maintenance upon the existence of the action. It is to be heard and determined upon a record of its own, and the decision thereon may be made, and may be the subject of an appeal, before the determination of the issues in the action. The evidence offered in its support may or may not be the same as that which will be offered upon the trial of the issues presented by the pleadings. Being authorized for a special purpose, the decision thereon is limited to that purpose, and can be no more available for the determination of the issues in the action than is the preliminary determination upon an order for the publication of a summons that a cause of action is stated in the complaint, or than an order for family allowance to one claiming to be the widow of the decedent is available at the distribution of the estate. If, upon the application, the fact of marriage is denied by the defendant, it is to be determined, like any other question of fact, upon the evidence offered in its support, and should be denied unless the evidence thus offered would be sufficient to justify the court in granting a divorce, if the action were submitted upon that evidence at the final hearing.

Upon the hearing herein the defendant denied that there had ever been any intermarriage between him and the plaintiff, and there was no direct evidence of such marriage. I do not think that the deposition of the plaintiff was entitled to any consideration by the court for the establishment of this fact. The evidence contained therein consisted merely of her assent to statements of fact made by her counsel, and it sufficiently appeared, both by her own statement and by the character of her responses to the questions put to her, that she could neither speak nor understand the English language. The plaintiff sought to establish the marriage between them by evidence of repute, and for that purpose offered the affidavits of two persons to the effect that she was reputed to be his wife. In response thereto the defendant read the affidavits of several persons to the effect that the parties were never reputed to be married in the community in which they lived. Repute of marriage is but hearsay, and the fact of marriage is not established by reputation unless it appears that the reputation is uniform. Hearsay ceases to be entitled to any weight as evidence unless it is uniform, and it is only by reason of its uniformity that it will, in any instance, authorize the presumption of a fact. The court is not at liberty to determine the fact upon a preponderance of the hearsay, but, if it is divided, it must be rejected entirely. "Where reputation is relied on, that reputation, to raise the presumption of marriage, must be founded on general, not divided or singular, opinion; and, where reputation in such case is divided, it amounts to no evidence at all." Barnum v. Barnum, 42 Md. 297. Cohabitation of a man and woman gives rise to reputation of their marriage, because the presumption from one's conduct is in favor of innocence, and their cohabitation is presumed to be consistent with good morals, and therefore matrimonial; but, if their cohabitation is shown to have been illicit in its origin, the presumption of innocence is overcome, and the continuous cohabitation will be presumed to be illicit. If, during its continuance, their cohabitation is changed from an illicit to a matrimonial character, the burden of showing this fact is upon the one who would avail himself of the effect of the change. It clearly appears herein that the intercourse of the plaintiff with the defendant was illicit at its commencement, and so continued for many years, and there was no evidence except that of the plaintiff of any change in its character; but, as above stated, her evidence was not entitled to any consideration. Moreover, presumptions are resorted to for the establishment of facts only in the absence of direct evidence upon the facts sought to be established; and it is a rule in the consideration of evidence that when it is within the power of a party to produce direct evidence of the fact, and instead of doing so he produces evidence of an inferior character, it will be presumed that the direct evidence would be adverse to his claim.

The contention on the part of the respondent that when the fact of marriage is put in issue it is only necessary for the wife to make a prima facie showing in order to entitle her to alimony for the prosecution of the suit, as well as the contention by the appellant that if he is compelled to pay alimony to the plaintiff prior to the determination of the action, and while it may be finally determined that she is not his wife, he will be deprived of his property without due process of law, is fully considered in the opinion of Mr. Justice TEMPLE, and I concur in his views thereon. If the fact of marriage is denied by him, he is as much entitled to a hearing, and an opportunity to controvert the showing made by the plaintiff upon her application for alimony, as at the final hearing of the action; and in either case the issue thus presented is to be determined by the court upon a preponderance of the evidence thereon. If, upon her application, he is given such a hearing as is appropriate to the character of the controversy, or, as is usual in such cases, with the opportunity to controvert her claim as fully as he may desire, he receives all the protection to which he is entitled by law.

In view of the principles which should have governed the court in considering the evidence offered at the hearing of the plaintiff's application, I am of the opinion that there was no evidence before it tending to show a marriage between the parties, and that her application should have been denied.

McFARLAND, J. I dissent, and think that, for the reasons given in the opinion in department, the order appealed from was there properly affirmed, and should be adhered to. It seems to be admitted that in a divorce suit, although the marriage be denied, still an allowance for alimony to the wife may be rightfully made before the determination of the issue of marriage at the final hearing of the case. But that would be of little advantage to the plaintiff if at the preliminary hearing "the marriage must be proved" in the sense in which that proposition is meant in the opinion of the majority of the court. In the case at bar the issue of marriage or no marriage is the main issue in the case, and according to the majority opinion she cannot be allowed any aid for the purpose of procuring evidence on that issue unless, without such aid, she had already proved it. Although she may have no means at all, she must still rely entirely upon herself in obtaining evidence and procuring counsel in support of her side of that issue. Whether or not she has made sufficient proof at the preliminary hearing to warrant the court in allowing her aid in preparing herself for the final adjudication of that issue is a question in the first instance for the exercise of the discretion of the trial court, and in passing upon the conclusion of the trial court upon that point this court is estopped, in my opinion, from disturbing that conclusion if there be a fair and material conflict of evidence upon the issue. In the case at bar there is no doubt that the respondent produced evidence tending strongly to establish the fact that there was a marriage. It is true that appellant also produced evidence on the other side of that issue, but I do not think that, under the well-established rule touching conflicting evidence, we are warranted in disturbing the conclusion of the court below. Respondent was clearly entitled, in my opinion, upon the showing made by her, to have aid from the appellant in procuring evidence to be used upon the final determination of that issue.

Appellant seems greatly impressed with the danger of some well-to-do husband being compelled to contribute to the prosecution of a suit brought by some woman who falsely swears that she is his wife; but no fear seems to be entertained that a husband may prevent an injured wife from obtaining means to prosecute a just suit by simply averring that he is not her legal husband.

Appellant seeks to emphasize the fact that the plaintiff is an Indian, but it is entirely immaterial what race she belongs to. Appellant selected and enjoyed her as his chosen companion through the youth and prime of her womanhood. When he discarded her it was evidently not because she was an Indian, but because she was then an old Indian.

GAROUTTE, J. (dissenting). It is held in the majority opinion in this case that when alimony and suit money pendente lite is prayed for in an action for divorce, the marriage being denied, then upon the preliminary hearing the fact of marriage must be established by a preponderance of evidence, or the application should be denied. Upon the final hearing it is only necessary to establish the marriage by a preponderance of evidence. Hence, if the conclusion of the court be sound, the result is that in every case where the marriage becomes an issue of fact there can be no such thing as alimony and suit money; for, if the woman is able to establish the marriage by a preponderance of evidence without the money to assist her, she has no need of the money, and her application should be denied for that reason. If she can establish the fact of marriage upon the preliminary hearing by a preponderance of evidence, without money, she can as readily establish that fact upon the final hearing without money. If she be able to establish the fact of marriage by a preponderance of evidence without money, then she need not go to the trouble of establishing that fact until the final hearing. It is thus made plain that the entire reason of the rule—the principle upon which the rule rests—is all gone when it is held that the fact of marriage upon the preliminary hearing must be established by a preponderance of evidence. It may be admitted that the conclusion declared by Justice TEMPLE is supported by persuasive reasons, yet we find no court in this country sustaining the proposition, unless the decision in McKenna v. McKenna, 70 Ill. App. 340, is that case. In the leading case of Brinkley v. Brinkley, 50 N. Y. 184, Chief Justice Folger labored hard, but with somewhat indifferent success, to lay down the rule which should guide nisi prius courts in their determination as to when temporary alimony and suit money should be allowed the wife in cases where the marriage is denied. The New York court in that case, speaking by the mouth of the chief justice, says: "It may be said, too, that for the purposes of an application for temporary alimony there will not need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action." In the same opinion it is also said: "Yet if the matters contained in other papers or shown by legitimate proofs before the court make out, in the judgment of the court, a fair presumption of a fact of marriage, it has the power to grant alimony pending the action, and expenses of the action." It is again said in the same case: "The question now before us, however, is not whether, upon the proofs as shown by the parties, a final judgment should be rendered that there has been an actual valid marriage between the parties, and whether a limited divorce should be adjudged with a permanent separate maintenance for the plaintiff, to be provided by the defendant. The question now is, do the proofs of the parties give reason to apprehend that upon a trial of the issues between them there is a fair probability that the plaintiff will maintain her allegations?" In Collins v. Collins, 71 N. Y. 274, the same court that decided the Brinkley Case declares the Brinkley decision to be "that it was not necessary that the marriage be established as conclusively as would be required for the ultimate purposes of the action, but that the plaintiff must make out a reasonably plain case of the existence of the marriage relation, and she would then be furnished with the means of temporary support, and of conducting the suit until the truth or falsity of her allegations could be ascertained." In the Collins Case the rule is thus declared: "The plaintiff is bound to present a case to the court showing that she has a fair prospect of success in the action, and that she controverts and intends to litigate the matter set up by the defendant, and has reasonable grounds for so doing." In Vincent v. Vincent, 16 Daly, 534, 17 N. Y. Supp. 497, the court said: "But, as in other preliminary contestations, the fact is not to be established with the clearness and conclusiveness exacted of proof as the basis of a final adjudication upon the rights of the litigant parties; but it suffices if on an application for alimony the putative wife makes out a reasonably plain case of the existence of the marriage relation,"—citing Brinkley v. Brinkley. In Sharon v. Sharon, 75 Cal. 45, 16 Pac. 364, it is said: "In a suit for divorce, when the marriage is denied by the defendant's answer, three things must be made to appear on application for temporary alimony,—the marriage, by satisfactory evidence showing, at least prima facie, a marriage in fact." I cite the foregoing authorities to show that the rule of law declared by the majority opinion as to the quantum of evidence necessary to be produced by the wife at the preliminary hearing to support the fact of marriage is opposed to the great weight of authority. Yet I am free to say the true solution of the question presents difficulties of no small proportions,—difficulties that I am not willing to meet unless necessity demands it, and here I find no such necessity; for, even conceding the rule of law to be as stated by the learned writer of the majority opinion, namely, the marriage must be established by a preponderance of evidence, then, under such rule, this order should be affirmed.

The reasons for the affirmance of this order are these: Upon the trial of any issue of fact in a civil action it is not for this court to say, upon appeal, that the evidence preponderates in favor of the plaintiff, or that the evidence preponderates in favor of the defendant. This court has nothing to do with the preponderance of evidence. It has so decided times innumerable. It is even a rule universally invoked by this court against the defendant in criminal cases. Under all authority in this state it is for the trial court to say which way the evidence preponderates; and, when that court has so declared, the matter of preponderance of evidence is forever foreclosed from investigation by this court. Treating this proceeding for alimony and suit money with all the dignity of a civil action, conceding that it is to be tried and decided exactly by the same rules of law as any civil action, then the only question here is, does this record present a substantial conflict in the evidence as to the fact of marriage? And this question is not to be determined by the great number of witnesses upon the one side and the limited number upon the other, for it is often the case that the weaker side in number and in money is the stronger in right. Hence the fact that the plaintiff is an Indian woman, and her son an illegitimate son, furnishes no reason why this court may cast aside their evidence. Either as matter of law or matter of fact it cannot be said that an Indian woman or an illegitimate son is not to be believed under oath.

Let us pause a moment to look at the evidence. A great portion of it is without substantial conflict, as follows: Hite lived with this woman for 25 years. During that time he furnished her with all the necessaries of life. He gave her a house in which to live. He was the father of her child. His sister visited her at this house, and slept with her. His nephews visited her at this house, and addressed her as "Aunt Lucy." He sent her illegitimate son to school, and paid the expenses of his schooling. He treated this son as his own son, and he was always considered and reputed in the neighborhood to be the stepson of defendant, Hite. In addition to this uncontradicted evidence, we have the testimony of Thomas Gibbs, the illegitimate son, to the effect that the plaintiff is known far and near throughout the southern part of California as the wife of John R. Hite; that defendant has introduced plaintiff as his wife, and held her out to the world as his wife continuously; that defendant's relatives and friends have associated freely with plaintiff, and visited plaintiff as the wife of defendant. We also have the testimony of one Westfall, to the effect that plaintiff and defendant were known in that neighborhood and adjoining counties as husband and wife; that the plaintiff was everywhere called "Mrs. Hite" and "Lucy Hite, wife of John R. Hite"; and that plaintiff and defendant held themselves out to the world, and were always treated, as husband and wife. From this condensed statement of the showing made by the plaintiff I feel entirely satisfied in saying that she is entitled to alimony and suit money, in order that she may be able to meet the defendant squarely at the trial of the case upon the issue of marriage or no marriage.

I fail to comprehend how it may be said from the record that the trial judge decided this case upon a wrong theory. There is not a word in the record to indicate it. Upon the contrary, the fact that the hearing was had after notice to the other side, and that upon such hearing defendant introduced a great mass of evidence to support his claim of no marriage, indicates convincingly to my mind that the trial judge heard and decided the case upon the right theory, and that his conclusion was based upon all the evidence placed before him by both parties to the litigation. I think the order should be affirmed.

124 Cal. 437

FRENNA v. SUNNYSIDE LAND CO. et al.

(S. F. 1,362.)

(Supreme Court of California. May 18, 1899.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS —LIEN OF ASSESSMENT—ENGINEER'S CERTIFICATE—RECORD.

1. St. 1889, p. 167, § 9,—an amendment to the street-improvement act,—provides that the certificate of the engineer, inter alia, shall be recorded, and, when so recorded, the amounts assessed shall be a lien on the lands assessed. A certificate, signed by the city engineer, stated that a record in his office of a certain certificate showed certain things, but did not state that he had measured the work, or that it had been measured by any one, and the original certificate was signed by an employé who was not a deputy. *Held*, that the certificate was insufficient to create a lien.

2. Proof that the facts stated in a defective certificate of the city engineer, required (St. 1889, p. 167) to be recorded as a condition to the assessment becoming a lien, are true, does not cure the defect, in that it was not signed by the engineer or his deputy.

3. Section 11 of the street-improvement act, as passed in 1885, providing that no assessment shall be held invalid, "except on appeal to the city council," for any error, informality, or other defect in any of the proceedings prior to the "assessment," or in the "assessment itself," does not apply to section 9, as amended in 1889, in so far as it concerns the sufficiency of the certificate of the city engineer, required to be recorded as a condition to the assessment becoming a lien.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. P. Frenna against the Sunnyside Land Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. D. Shadbourn, for appellant. Morrison, Foerster & Cope, for respondents.

GRAY, C. Actions for foreclosure of liens for street work. Defendants had judgment, and the plaintiff appeals. Plaintiff's right to recover in these suits depends upon the validity of the lien which the suits were brought to foreclose. This lien is attacked by respondents on several grounds, only one of which it will be necessary to notice in this opinion. Section 9 of the street-improvement act, as amended in 1889, provides: "Said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots or portions of lots assessed respectively for the period of two years from the date of said recording, unless sooner discharged." It would seem from this that there can be no lien without a certificate of the city engineer being recorded. St. 1889, p. 167. The certificate here referred to is presumably the one mentioned in section 34 of the act (St. 1891, p. 206), which relates to surveys and estimates of work to be done under the act, and when signed by the city engineer in his official character is to be treated as prima facie evidence of the truth of its contents (Gray v. Lucas, 115 Cal. 430, 47 Pac. 354). The plaintiff put in evidence a certificate, which he contends fills the requirement of the statute, and which is in words and figures as follows:

"No. 1,729. San Francisco, April 3, 1896.

"I certify that a record in this office of certificate No. 596, date June 15, 1894 for grading, wooden curbs, and macadam on Circular Ave., between San Jose Ave. and Flood Ave., shows that the work was examined, and found to be practically to the official line and grade, average crown of Mac. 6" above official grade. Number of cubic yards of grading circular line:

	Cut.	Fill.
San Jose to Sunnyside	108	1,668
Crossing of Sunnyside	414	258
Sunnyside to Acadia	416	353
Crossing of Acadia	850	000
Acadia to Moulton	2,638	408
Crossing of Moulton	57	1,439
Moulton to Baden	0,000	1,916
Crossing of Baden	508	259
Flora to Baden	44	687
Total	5,035	6,988

"Jas. McCoy, C. S. Tilton,
"Cont. City Engineer."

Certificate No. 596, referred to in the foregoing certificate, was in the handwriting of C. H. Holcomb, an employé, but not a deputy, of the city engineer; and the name of the then city engineer was signed to such certificate No. 596 by said Holcomb. It was also shown that the surveying and measuring required by the act to be done by the city engineer was in fact performed by one E. J. Morser, another employé, and not a deputy, of the city engineer.

Upon the authority of Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339, and Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337, I think the conclusions reached by the learned judge before whom the cases were tried are correct, and I can find no better reasons for those conclusions than are contained in the following language of the opinions rendered by the court at the trial and on motion for a new trial, to wit:

"The document which, in Rauer v. Lowe, was held to be defective, was not signed by the engineer or by his deputy. For that reason it was held to be defective. In the cases at bar the certificate was properly signed by the engineer, but fails to state that he had measured the work, or that the work had been measured by any one. He merely certifies what a record of certificate No. 596 in his office states. That certificate was not signed by the engineer in office at its date, but by an enployé, who was not a deputy. It was just such a certificate as was held to be insufficient in Rauer v. Lowe. If the original certificate No. 596 was insufficient, it seems very clear that a certificate by the engineer that it states or shows certain things is equally so. It is at best but secondary evidence of the contents of the original certificate. The court, upon inspection of certificate No. 596, is quite as competent to determine what it shows as the engineer was, who certified to what it shows. The defective certificate is not cured by proof that the facts stated therein are true. It is necessary to the creation of a lien that a proper certificate of the engineer be recorded with the assessment and diagram. In Rauer v. Lowe, 107 Cal. 233, 40 Pac. 338, the court say: 'These certificates, so made and signed, are invalid, and insufficient as the basis of a lien upon property chargeable with the expense of the work, and therefore the evidence does not sustain the finding that the assessment is a lien upon the defendant's lot.' Plaintiff's counsel contend that, even assuming the engineer's certificate to be insufficient, yet by section 11 of the street law the objection can only be taken by an appeal to the board of supervisors. The portion of that section which is relied on reads as follows: 'And no assessment shall be held invalid except upon appeal to the city council, as provided in this section, for any error, informality or other defect in any of the proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the city council to order the work to be done, for which the assessment is made, has been actually published in any designated newspaper of said city for the length of time prescribed by law, before the passage of the resolution ordering the work to be done.' When section 11 was passed in 1885, it was not necessary to record the engineer's certificate. The amendment of section 9 requiring such recording was not passed until 1889. In passing section 11 the legislature could not have had in mind the certificate as being one of the proceedings which could only be attacked by appeal to the board of supervisors. The objection that the engineer's certificate was not recorded is not an objection to the assessment. The assessment is a different thing from the certificate. 'Said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded, etc. When so recorded the several amounts assessed shall be a lien, etc.' I still think that the certificate in this case is insufficient. It would seem to be a very foolish requirement of the statute that a certificate must be recorded if it is unnecessary for it to state anything. In Gray v. Lucas, 115 Cal. 430, 47 Pac. 354, Mr. Justice Harrison states that the certificate required is that referred to in section 34 of the street law. Assuming that the assessment itself was not invalid, but that the certificate of the engineer, required by law, was not recorded, plaintiff did not acquire any lien."

For these reasons I advise that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 504

COHEN et al. v. CITY OF ALAMEDA et al.

(S. F. 1,017.)

(Supreme Court of California. May 26, 1899.)

MUNICIPAL CORPORATIONS—STATUTES—OPENING STREETS—RESOLUTION—DESCRIPTION——SUFFICIENCY—SPECIAL ASSESSMENTS—ACTIONS TO SET ASIDE—VALIDITY—DESIGNATION OF OWNER—APPEAL—RECORD—AFFIDAVITS.

1. St. 1889, p. 70, authorizing the laying out and extension of streets within municipalities, and the payment of the cost thereof by special assessments on lands benefited thereby, is constitutional.

2. In a resolution of a city council of intention to open a street a description clearly defining the boundaries of the land deemed necessary to be taken for such street is sufficient, though excepting therefrom all land held by the city and state as open ways.

3. A resolution of intention to open a street in a city described the boundaries of the land to be taken, excepting therefrom lands held as open ways. Property owners sued to set aside the assessment, claiming the description was insufficient because of the exception. *Held*, that the admission of evidence to show that all the land within the lines of the proposed street was held in private ownership, though unnecessary, was not injurious to plaintiffs.

4. Where land owned by one railway company within a district benefited by the opening of a street is assessed to another company, and the assessment is paid, the assessment is not objectionable as not made on all the property within the district; St. 1889, p. 70, § 12, providing that error in designating the owner of any land shall not invalidate the assessment.

5. An affidavit, printed in the transcript on appeal, that appellant was induced to withhold certain testimony because of a remark of the court whose subsequent ruling contrary thereto was a legal surprise, cannot be considered where it is not contained in any bill of exceptions, and is merely certified by the clerk as having been used on the motion for a new trial.

Department 1. Appeal from superior court, Alameda county.

Action by Emilie G. Cohen and others against the city of Alameda and others to restrain the sale of plaintiffs' lots for payment of special assessments. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Alfred H. Cohen, for appellants. Geo. T. Wright, J. W. Goodwin, and Reed & Nusbaumer, for respondents.

HARRISON, J. The city of Alameda instituted proceedings April 23, 1894, under the provisions of the act of March 6, 1889 (St. 1889, p. 70), for opening and extending Lincoln avenue from its western terminus, as then laid out, to the eastern line of Versailles avenue, by passing a resolution of its intention to do so, describing the land deemed necessary to be taken therefor, and also specifying the exterior bounds of the district to be affected and benefited by said improvement. After passing the order for the improvement, commissioners to assess benefits and damages accruing therefrom were appointed, who afterwards made and filed a report of their assessment, accompanying the same with a plat of the assessment district, showing the lands to be taken for the improvement, and also the lands assessed therefor. The entire cost of the improvement was assessed upon 112 separate parcels of land within the assessment district. This report and assessment was afterwards approved and confirmed by the city council, and a certified copy thereof delivered to the superintendent of streets, who caused to be published a public notice thereof, and calling for the payment of said assessments. The assessments not having all been paid within the time limited in said notice, the superintendent of streets advertised the same as delinquent, and published a notice that on a certain day he would sell the land assessed in satisfaction thereof. Nine of the lots so assessed are owned by the four plaintiffs herein, and they instituted the present action to enjoin the sale threatened by the superintendent, and to have the assessment declared void. Judgment was rendered in the superior court in favor of the defendants, from which, and also from an order denying a new trial, the plaintiffs have appealed.

1. The constitutionality of the act of March 6, 1889, was fully considered by this court and upheld in Davies v. City of Los Angeles, 86 Cal. 37, 24 Pac. 771. Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, cited by the appellants, arose under a statute radically differing from the above act. In that case the ordinance under which the improvement was made provided that the entire expense thereof should be assessed "by the front foot" upon the lands abutting upon the portion taken for the street. The land taken for the street, as well as all of the land assessed, was owned by the same person, and in accordance with the ordinance the entire cost of the improvement, including the value of the land taken, together with the cost and

expense of the condemnation proceedings, were assessed against other portions of the tract of land through which the street was opened belonging to the same owner as that taken for the street and abutting upon the street, as opened, at an arbitrary rate per front foot, without regard to the benefits accruing to the lands assessed. In the present case the commissioners appointed to make the assessment reported that their assessment upon the lands within the district had been made by them in proportion to the benefit to be derived from the improvement, and this report and assessment was afterwards confirmed by the city council, without any objection thereto so far as appears from the record herein. The plaintiffs herein do not complain of the correctness of the amount awarded for the land to be taken, nor do they claim that the cost of the improvement has not been equitably apportioned upon the lands assessed therefor, or that their lands have not been benefited to the extent of the assessment thereon.

2. It is contended by the appellants that the description in the resolution of intention of the land to be taken for the improvement is insufficient as a basis for the subsequent proceedings, and that by reason thereof the city never acquired any jurisdiction to authorize the opening of the street and the assessment therefor. The objection to the description is that, after defining by specific boundaries the particular strip of land deemed necessary to be taken for extending and opening the street, there are added thereto the words, "excepting therefrom all land now held by said city or the people of said state, as open ways"; and it is urged that the lands to be taken must be capable of ascertainment from the description in the resolution itself, and that by reason of this exception the description is not complete, and can be ascertained only by evidence outside of the resolution. We are of the opinion, however, that the sufficiency of the description is not impaired by this exception. The boundaries of the space over which Lincoln avenue is to be opened and extended as a public street between the designated termini are clearly defined, and whatever land is held in private ownership within these boundaries is to be taken for that purpose. The main object of requiring a description of the land to be taken is to define the location of the improvement, and to give information to the owners of the land which is to be taken, as well as to those within the district to be assessed therefor, of the intended improvement. By this notice the owners of the land to be taken can determine whether to assent or object to the same, and the owners of the lands to be assessed therefor have the opportunity to object also to the extent of the district to be assessed therefor. The city council determines, in the first instance, whether the public interest demands the opening of the street, in view of the demand for such thoroughfare at that place, and without any regard to the ownership of the land within the proposed lines of the street. If, as a matter of fact, a portion of the land within these boundaries has already been appropriated to public use, or is held by the city or state "as open ways," the land deemed necessary to be taken is sufficiently described by designating in the resolution the outer lines of the proposed improvement, without any mention of such open ways, or by excepting the same without describing the exceptions. In either case the parties to be affected by the proposed improvement are fully notified of every fact necessary for the protection of their interests. As any land within the limits of the proposed street already appropriated to public use would not be 'taken" for the improvement, whether included or excepted from the description, the failure to include or except it does not impair the sufficiency of the resolution. The exception of such portion of the designated strip as is already held by the city or state "as open ways" is as complete as if the land to be taken had been described as that portion within the designated boundaries which is not already occupied as an open street. Street improvements which are assessed upon adjacent property are governed by the same principles as control the present case, and under the statute authorizing such improvements it has been held that the sufficiency of the description was not impaired by excepting from the street to be improved "that portion required by law to be kept in order by the railroad company having its tracks thereon" (Whiting v. Townsend, 57 Cal. 515), or that a street be paved with basalt blocks "where not already so paved" (Williams v. Bergin, 116 Cal. 56, 47 Pac. 877). Under these authorities it must be held that the description herein was sufficient. The amendment to the complaint, and the evidence offered in support thereof, for the purpose of showing that all of the property within the lines of the proposed street was held in private ownership, though unnecessary, was harmless, and wrought no injury to the appellants.

3. The objection by the appellants that the assessment was not made upon all the property within the district benefited by the improvement is based upon the fact that certain property within the district was owned by the Alameda, Oakland & Piedmont Electric Railway Company, and that no assessment was made to that corporation. It was shown, however, that this property was assessed to the Alameda & Oakland Electric Railway Company, and that the assessment therefor had been paid. All the property within the district was therefore assessed, and section 12 of the act provides that "error in the designation of the owner or owners of any land or improvements, or of the particulars of their interest, shall not affect the validity of the assessment, or of the condemnation of the property to be taken."

4. In the transcript on appeal there is printed an affidavit to the effect that by certain remarks of the court at the trial of the cause the appellants were induced to withhold certain testimony, and that the subsequent ruling of the court contrary to its statement constituted a legal surprise. This affidavit is not contained in any bill of exceptions, or in any wise authenticated as having been used at the hearing of the motion for a new trial, except by a certificate of the clerk, and therefore cannot be considered. Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491. It may be added, in addition thereto, that the appellants did not produce at the hearing of their motion for a new trial any affidavit of the evidence that they would have introduced, or make it appear that a different finding would have been made. See, also, Fisk v. Casey, 119 Cal. 643, 51 Pac. 1077. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(124 Cal. 468)

MAXSON et al. v. SUPERIOR COURT OF MADERA COUNTY. (L. A. 382.)

(Supreme Court of California. May 24, 1899.)

JUSTICES OF THE PEACE—APPEAL—SUPERIOR COURT—POWER TO REMAND.

Code Civ. Proc. § 980, provides that, on appeal on questions of law from a justice, the superior court may review all orders affecting the judgment appealed from, and may set aside or confirm or modify all other proceedings subsequent to and dependent on such judgment, and may order a new trial; and section 187 provides that, when jurisdiction is conferred on a court, all the means necessary to carry it into effect are also given. *Held*, that on an appeal from a judgment of a justice's court, on a question of law alone, to the superior court, it can review the rulings of the justice, and remand the cause with direction to proceed according to its decision.

In bank. Affirmed.

For opinion in department, see 54 Pac. 520.

McFARLAND, J. Petition for writ of certiorari. One Roberts brought an action against the petitioners herein, Maxson and Harris, in the justice's court. The petitioners, as defendants in said action, demurred to the complaint. The demurrer was overruled, and judgment entered for plaintiff, and the petitioners appealed from the judgment of the superior court "on questions of law alone." Upon the hearing of the appeal the superior court ordered "that the judgment of the lower court be, and the same is hereby, reversed, with directions to the said lower court to sustain the demurrer of the defendants to the complaint of the plaintiff, with leave to the said plaintiff to amend his complaint if so advised." In the present proceeding in this court the petitioners seek to have said order reviewed, and to have annulled all that portion of the order after the word "reversed," upon the ground that the superior court had no jurisdiction to make any of the latter part of said order.

The provisions of the Code touching procedure on appeals from the justice's court to the superior court in civil cases, where the appeal is taken "on questions of law" alone, are very brief and meager, and it is not surprising that decisions as to the power of the superior court on such appeals are not entirely harmonious. Where the appeal is taken "on questions of fact," or "on questions of both law and fact," the procedure seems to be plain. In that case no statement is required, "but the action must be tried anew in the superior court" (Code Civ. Proc. § 976), and the justice is required to transfer to the superior court certified copies of "his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal, and the undertaking filed" (section 977). On such appeal, therefore, the entire cause is transferred to the superior court, and thereafter the latter court has exclusive jurisdiction, and its judgment is final. There is, no doubt, some reason for the suggestion that the legislature intended this to be the result in all appeals, and that on an appeal on questions of law alone the cause should be considered as in the superior court for all purposes, and, if the trial of issues of fact should be found necessary, it should be had in the superior court. The legislature might have so provided, and as the superior court is also a trial court, and as, on an appeal after a trial of the issues of fact in the justice's court, the case must in the end be finally tried in the superior court, it probably would have been a wise course, and would have prevented much delay and expense, if the superior court had been given entire and final jurisdiction of the case, no matter how it had been brought into that tribunal. But the language of the Code and former decisions of this court preclude us from holding that such procedure has been provided. The decisions of this court to the point that an appeal transfers the whole cause finally to the superior court will be found, with perhaps one or two exceptions, to have been made in cases where the appeal was upon questions of "both law and fact." Such was the fact in the main case cited, of Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, where the court say: "When the effect of an appeal is to transfer the entire record to an appellate court, and to cause the action to be retried in that court as if originally brought therein, as is the case where appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not further available for any purpose." Such was also the fact in Rossi v. Superior Court, 114 Cal. 371, 46 Pac. 177.

When an appeal is taken on questions of law alone, the appeal goes to the superior court, upon "a statement of the case" (section 975), except, perhaps, that a statement is not necessary where the justice's docket or conies of papers required to be sent up by him, show upon their face the errors complained of. Southern Pac. R. Co. v. Superior Court Kern Co., 59 Cal. 471. And section 980 provides as follows: "Upon an appeal heard upon a statement of the case [which, of course, means an appeal upon questions of law alone] the superior court may review all orders affecting the judgment appealed from, and may set aside, or affirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew upon appeal, the trial must be conducted in all respects as other trials in the superior court." This provision might have been for "a trial" when the same was deemed necessary, but it is for a "new trial," and that when the action is tried "anew" it must be in the superior court; and this court has held many times that, a new trial being a reexamination of an issue of fact, there can be no new trial of the cause in the superior court on appeal, unless there has been a trial of issues of fact in the justice's court. Southern Pac. R. Co. v. Superior Court Kern Co., supra; People v. El Dorado County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328; Rickey v. Superior Court, 59 Cal. 661; Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648. Moreover, upon an appeal on questions of law alone the justice is not required to send to the appellate court anything more than "a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed." There is no provision for sending to the appellate court the pleadings or other papers in the case, without which the superior court would not have before it matters essential to a general trial and determination of the case. We think it clear, therefore, that upon an appeal on questions of law alone, like the one here under review, the superior court can merely pass upon the questions brought before it on the appeal, and has no jurisdiction to try and determine the whole cause as if it had been transferred to that court upon an appeal upon questions of both law and fact.

It is not the law, however, as claimed by petitioners, that after a judgment of reversal in the superior court, in a case like the one here involved, the case is no longer pending in the justice's court, the judgment of reversal is a dismissal of the action, and that there can be no further proceeding in it in either court. Under such a view, if a plaintiff should appeal from a judgment against him founded upon an erroneous view of the law,—as where a demurrer to the complaint was erroneously sustained in the justice's court,—the only effect of his appeal, although the superior court should hold his complaint to be good, would be a dismissal of his action. Such a defeat of justice is not to be tolerated unless there is no permissible construction of the law by which it can be avoided; and we think that a proper construction of the Code and the constitution leads to the conclusion that in this case the superior court had jurisdiction to correct the errors of the justice's court, and to direct further proceedings in the latter court.

There are three decisions of this court somewhat in point. In Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648, the action of the superior court on an appeal from a justice's court was reviewed on certiorari. In the justice's court a motion of defendant to dismiss the action had been granted, and judgment in his favor rendered for costs, and the plaintiff had appealed. The superior court tried the whole case, and gave judgment for plaintiff. This court, in bank, annulled the judgment upon the ground that there could be no trial of issues of fact in the superior court, because there had been none in the justice's court, and in its opinion said: "The superior court should have reversed that judgment, and sent the case back for trial on the issues tendered by the pleadings." This, of course, was a clear declaration of the power of the superior court to remand a cause; but there is some ground for the contention that it should not be received as direct authority on the point, because the language quoted was not necessary to the decision. In Larue v. Gaskins, 5 Cal. 508, the justice's court had erroneously transferred a forcible entry case to the district court, and the latter court had tried the case, and rendered judgment against defendant; and this court reversed the judgment, "with instructions to remit the case to the justice," and held that the illegal transfer did not defeat plaintiff's rights "by operating a discontinuance." But, although the case seems to be in point, the report of it is so meager that it cannot be very surely relied on as an authority. In Brown v. Superior Court, 72 Cal. 14, 13 Pac. 70, the demurrer of the defendant in a criminal prosecution in the justice's court to the complaint was sustained, and the people appealed. Afterwards the defendant appeared in the superior court, and confessed error, and asked that the cause be remanded to the justice's court, to be there tried upon a plea of not guilty which had been therein made. The court refused to remand, and ordered the defendant to plead in that court, and was about to proceed to try the case. This court issued a final writ of prohibition, and said: "In the case at bar the respondent should have remanded the action to the court below, with instructions to overrule the demurrer, but it has no jurisdiction to itself try the cause as it proposes to do." But this was a criminal case, and in the Penal Code the procedure on such an appeal is, no doubt, as shown in the opinion in that case, more fully stated than in the Code of Civil Procedure. However, some of the remarks of the court in that case as to the relations between the justice's court and the superior court in matters of appeal are applicable here.

If, however, the authorities above cited cannot be considered as definitely determining the point, still we think that, upon principle, the statements of the law therein made are correct. The main objection to the jurisdiction of the superior court to remand a cause to the justice's court is founded upon the suggestion that the Code does not provide machinery adequate to that purpose. But where, in the same judicial system, there is the relation of a subordinate and appellate court, the latter, in all cases where it has appellate jurisdiction, necessarily has the power to make such orders and render such judgments as are requisite to enforce its appellate power. The authority which confers its appellate jurisdiction might limit it as to the mode of exercising that jurisdiction, but where there is no such limitation it may use ordinary and necessary methods to enforce compliance with its mandates. The constitution provides that superior courts shall have appellate jurisdiction "in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law," and there is no doubt that the case involved here is one of the cases over which jurisdiction was given to the superior court by the legislature. Section 980, Code Civ. Proc., says that upon an appeal on questions of law alone "the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any and all other proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial." This language confers upon the superior court plenary appellate jurisdiction, and there are no other provisions which limit it in the exercise of that jurisdiction. In Elliott, App. Proc. par. 20, the author says: "It is not to be understood that an express statutory provision is required to confer upon an appellate tribunal authority to exercise auxiliary authority in aid of its appellate power, although such auxiliary authority may be in its nature original, for all courts in the rank of appellate courts proper have such general powers as are necessary to enable them to effectually exercise the jurisdiction conferred upon them." And in paragraph 21 the author says: "The general authority to review and revise necessarily includes the right to enforce the writ and administer justice. In the exercise of its authority an appellate tribunal may so mold its judgments as to secure the proper relief to the parties entitled to it. The fact that a question may be presented in a particular mode does not always restrict the appellate court to a particular course, for it may, upon an inspection of the whole record, pronounce such judgment as will secure justice to the parties." And in paragraph 22 he says: "The grant of appellate jurisdiction, whether made by the constitution or by statute, necessarily vests in the tribunal designated all powers of an incidental nature that are required to make the grant of jurisdiction effective. Upon this principle it is held that in every appellate tribunal resides the power to coerce obedience to its orders, writs, and mandates." In Bank v. Knoup, 6 Ohio St. 342, Bartley, C. J., says: "Appellate jurisdiction is the cognizance which a superior court takes of a case removed to it by appeal or writ of error from the decision of an inferior tribunal. The power of the appellate court necessarily includes the power, not only to reverse a judgment, but also to control and direct the subsequent action of the subordinate court." The foregoing quotations are fully supported by the general authorities, and for the purposes of this case the principle is sufficiently declared in section 187, Code Civ. Proc. We are therefore of the opinion that under the Code a superior court, on an appeal such as the one here under review, has jurisdiction to review the rulings of a justice's court, and to remand a cause with directions to the lower court to proceed in accordance with the decision of the appellate court. A certified copy of the judgment of the superior court affords sufficient machinery for the transmission of the judgment of the higher court to the lower court, and it is not necessary to consider whether or not the superior court could frame a more direct process, or transmit its directions in any other form. It is suggested that great delay might be occasioned, if, after a trial on issues of fact in the justice's court, an appeal might be taken on questions of law alone, which would simply present to the superior court alleged errors of the justice's court in ruling upon the admissibility of evidence, and other alleged errors occurring during the trial. It has been determined, however, in a number of cases, that an appellant cannot always control the character of the appeal by the mere form of his notice of appeal, and perhaps the superior court might have power to say that, after a trial of issues of fact in the justice's court, an appeal should not be allowed upon mere questions of law; but, if such delays and embarrassments are imminent, the remedy is with the legislature. The order sought to be reviewed in this proceeding is affirmed, and the proceeding is dismissed.

We concur: BEATTY, C. J.; TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.; VAN DYKE, J.; HARRISON, J.

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124 Cal. 495

In re LORENZ'S ESTATE. (Sac. 496.)

(Supreme Court of California. May 25, 1899.)

CONSENT JUDGMENT—CONCLUSIVENESS—APPEAL—TRUSTS—WAIVER OF INVALIDITY.

1. A judgment entered by consent will not be reversed, if the trial court had jurisdiction.

2. A cestui que trust consenting to a judgment modifying the trust is bound thereby, where the trust as modified is valid, though as originally created it was invalid because making the performance of the trust discretionary with the trustee, as prohibited by Civ. Code, § 857.

Commissioners' decision. Department 2. Appeal from superior court, Trinity county.

In the matter of the estate of Henry Lorenz deceased, Christina Smith and others appeal from an order of final distribution. Affirmed.

Reddy, Campbell & Metson, for appellants. James W. Bartlett, for respondent F. J. Lorenz. H. R. Given, for respondents W. D. Lorenz and others.

BRITT, C. Appeal by three married daughters of Henry Lorenz from the order or decree of the court below making final distribution of the estate of their deceased father. The decedent left a will, by the terms whereof he gave to his surviving wife an estate for her life in all the property, real and personal, of which he had power of testamentary disposition, with remainder over to his 10 children in shares and upon conditions stated in the will. The provision for appellants, so far as material to be stated here, was as follows: An undivided one-tenth of the remainder upon termination of the life estate was given to F. J. Lorenz, eldest son of the testator, "to hold in trust [such is the language of the will] for my daughter Christina Smith, such trust to continue during the life of her husband." The like disposition was made in favor of each of the other appellants by name. In case of the death or disability of said F. J. Lorenz, then John N. Lorenz, another son of the testator, was appointed trustee in his stead. The trustee was authorized to sell and convey such portions of the trust property as in his judgment the interests of the beneficiaries of the trust might require. He was also empowered to pay out of the profits of the trust property, or interest derived therefrom, such sums of money to said beneficiaries "as he deems necessary, advisable, and proper," and to expend such amounts out of the principal of the trust as the proper court might adjudge necessary to be expended for their support or the support of their children. Said F. J. Lorenz was named executor of the will, and upon probate thereof he received letters testamentary, and has administered the estate. Pending the administration, viz. on November 25, 1895, said Christina Smith and the other married daughters of the testator, and said F. J. Lorenz and John N. Lorenz, executed a written instrument, which is recited in the decree appealed from, whereby they mutually agreed that it should be provided in the decree of distribution of the estate, when thereafter rendered, that the trustee for the said married women "shall pay the profits or interest on the trust fund of each of the said parties [naming the appellants] to them semiannually, instead of paying the same to them as deemed necessary, advisable, and proper by the said trustee." And accordingly the decree in question was framed by the court so as to assign the shares of appellants in trust pursuant to the terms of the will, except that it commands the trustee to pay the profits or interest of the trust propery to the beneficiaries as agreed in said instrument of November 25, 1895, and deprives him of any discretion in that behalf.

Appellants contend that a valid trust in real property can be created only for some of the purposes mentioned in section 857, Civ. Code; that the trusts described in that section are all such as the trustee is imperatively required to perform in favor of the beneficiary; that by the provisions of the will here performance of the trusts which the testator attempted to create is left wholly discretionary with the trustee, and hence they are invalid. It is scarcely allowable, on the facts appearing, to decide whether either the statute or the will should receive the construction claimed by appellants. By the contract of November 25, 1895, appellants stipulated in effect that the decree of distribution should require the trustee to pay absolutely to them at stated intervals the income of the trust estate, and the decree was entered conformably to the stipulation. Had such a direction been inserted in the will, there can be no question but that it would have supplied the imperative element supposed by appellants to be lacking from the trust, and would have brought the devise within the terms of subdivision 3 of said section 857, Civ. Code, permitting the creation of a trust 'to receive the rents and profits of real property, and pay them to or apply them to the use of any person,' etc. In consenting to the said provisions of the decree, the appellants consented to the establishment of the trust in F. J. Lorenz; for, obviously, he could pay to them no profits or income of the trust property, unless he holds the property and can collect the income. The trustee must have an estate adequate to the execution of his duties. Morffew v. Railroad Co., 107 Cal. 587, 40 Pac. 810. It follows that to reverse the decree would be the reversal of a judgment entered by consent of parties. This will not be done. The decree was such as the court had jurisdiction to render, and if it contains error, as departing from the provisions of the will, it was yet error induced by appellants, and they cannot complain of it. Coryell v. Cain, 16 Cal. 572; Spinetti v. Brignardello, 53 Cal. 281; Erlanger v. Railroad Co., 109 Cal. 395, 42 Pac. 31.

Appellants advance as a reason why their agreement should not estop them that the court cannot establish an invalid trust even with the consent of the beneficiaries. It is sufficient reply to say that the trust expressed in the decree is not invalid. This is shown above. The order appealed from should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(6 Cal. Unrep. 274)

JOHNSON et al. v. GOODYEAR MIN. CO.

(Sac. 668.)

(Supreme Court of California. May 20, 1899.)

APPEAL—FAILURE TO FILE TRANSCRIPT—DISMISSAL.

An appeal will be dismissed for failure to file the transcript within the time limited by the rules of court.

In bank. Appeal from superior court, Sierra county.

Action by one Johnson and others against the Goodyear Mining Company. There was a judgment for plaintiffs, and defendant appeals. Dismissed.

Frank R. Wehe, for appellant. Frank D. Soward, for respondents.

PER CURIAM. Judgment in the above-entitled cause was entered in the superior court July 20, 1898, in favor of the plaintiffs and against the defendant. The appeal herein from said judgment was taken and perfected August 17, 1898. No transcript upon said appeal has been filed in this court, and the clerk of the superior court has certified that the appellant has not requested him to certify to any copy of the record in the case. The respondents now move to dismiss the appeal, under the provisions of rule 2 of this court, for failure to file the transcript within the time therein limited.

The motion is granted, and the appeal dismissed.

(124 Cal. 462)

PEOPLE v. DE CARLO. (Cr. 415.)

(Supreme Court of California. May 23, 1899.)

PERJURY—INFORMATION—JUSTICE OF THE PEACE—ELECTION—RIGHT TO QUESTION IN COLLATERAL ACTION—JURISDICTION.

1. Under Pen. Code, § 936, providing that an information for perjury must allege that the court or person before whom the alleged false oath was taken had authority to administer it, but that it need not set forth his commission or authority, it is unnecessary to state the facts giving him jurisdiction.

2. An information for perjury averred that the oath was taken in open court, before a justice of the peace, in a criminal case pending before him, on a complaint charging defendant with petit larceny, and that the justice was lawfully entitled to administer oaths in such matters and proceedings. *Held*, that since complaints for petit larceny are within the jurisdiction of a justice, the averment as to the authority of the justice to administer the oath in the proceeding in question was sufficient, under Pen. Code, § 966.

3. An information for perjury averring that the false testimony alleged was material to the issues tendered in the cause in which it was alleged to have been given sufficiently alleges its materiality, without specifying any particular issue on which it was material, or how it was so.

4. It will be presumed from the issuance of a certificate of election as justice of the peace that the holder complied with all the steps required by law for its issuance, and is entitled to hold the office and discharge its duties.

5. The validity of the election of a justice of the peace or his right to hold office cannot be questioned in a prosecution for perjury alleged to have been committed on a trial before him.

In bank. Appeal from superior court, Yolo county.

Walter De Carlo was convicted of perjury, and he appeals. Affirmed.

J. E. Strong and C. T. Jones, for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The appellant was convicted of perjury, and after the verdict moved for a new trial, which was denied, and then moved in arrest of judgment, upon the ground that the facts stated in the information do not constitute a public offense. This motion having been denied, judgment was pronounced against him, from which he has appealed.

The information against the defendant is as follows: "Walter De Carlo is accused by the district attorney of Yolo county, by this information, of the crime of perjury, committed as follows, to wit: That the said Walter De Carlo, on or about the 15th day of July, 1897, at Woodland, in the county of Yolo, state of California, then and there being, did, having taken an oath then and there by and before the Honorable A. C. Ruggles, a justice of the peace in and for Woodland township, Yolo county, state of California, duly elected, qualified, and acting, and being entitled under the laws of the state of California to administer oaths in such matters and proceedings, that he would then and there testify truly before said justice of the peace, willfully, unlawfully, and feloniously, and contrary to such oath, state as true [setting forth the testimony given by him]; but the said statement so made as aforesaid by said defendant was then and there false and untrue, and was at the time of the making thereof by said defendant known by said defendant to be so false and untrue. And said oath was so taken, and said false statement was taken and made in open court and during the pendency and as a part of the evidence in a criminal case then and there pending before said Judge Ruggles, entitled 'The People of the State of California versus Walter De Carlo,' upon a criminal complaint charging the said Walter De Carlo with petit larceny, and said false statement and oath was then and there material to the issues tendered in said cause,—contrary to the form," etc.

It is claimed by the appellant that this information is defective in that, as it is not averred in what county the larceny was committed for which the defendant was tried, it does not appear from the information that the justice's court had jurisdiction to try him for the offense, and, further, that it does not show that the alleged false testimony was material to the issues before the court.

Section 966 of the Penal Code is as follows: "In an indictment or information for perjury or subornation of perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and before whom the oath alleged to be false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed." This section is substantially the same as chapter 11 of the statutes of 23 George II., and is found upon the statute books of nearly every state in the Union, and under these statutes it is invariably held that it is not necessary to set forth in the indictment the facts giving jurisdiction to the court in which the false testimony was given. In People v. Phelps, 5 Wend. 16, it is said: "By the English decisions since the statute it is only necessary to state the substance of the offense, the name of the court, a simple averment of the court's authority to administer the oath, and proper averments of the falsity of the defendant's assertions. It was not necessary to set forth the facts which gave jurisdiction to the recorder to administer the oath. * * * Jurisdiction is sufficiently shown by the averment that the recorder had lawful and competent power and authority to administer the oath. The truth of such averment must appear on the trial." Mr. Bishop, in his New Criminal Procedure, says (section 904) that the averments in an indictment for perjury are of two classes,—those which disclose a foundation for the offense, which in pleading is called the inducement, and which includes the name as well as the jurisdiction of the court or person where the offense was committed, and those which charge the offense itself, the former of which may be stated in general terms, while the latter must be direct and specific. This statement corresponds with the language of the above section of the Penal Code wherein it is declared that "it is sufficient to set forth that the person before whom it [the oath] was taken had authority to administer it; * * * but the information need not set forth the authority of the court or person before whom the perjury was committed." In other words, the general statement of the jurisdiction is sufficient without setting forth the facts by virtue of which it exists.

In Com. v. Knight, 12 Mass. 274, the defendant was convicted of perjury in having sworn falsely in a justice's court upon the trial of an action for trespass upon certain land, and moved for an arrest of judgment upon the ground that it did not appear that the said justice of the peace had any jurisdiction of the cause on trial before him, since it was not stated in the indictment that the land upon which the trespass was committed was within his county. The court said: "Such an averment is not necessary nor usual." In State v. Newton, 1 Greene, 160, the indictment charged the defendant with having given false testimony on the trial of an issue before a justice's court, but did not in form allege that the justice's court had jurisdiction of the cause in which the oath was made, the only allegation being that the court had sufficient and competent authority to administer said oath; but it was held that the indictment sufficiently charged the offense. In State v. Peters, 42 Tex. 7, the court said: "That it is unnecessary to allege that the justice had jurisdiction by reason of the parties or the subject-matter of the suit being within the territory to which his jurisdiction extended is clear, and it has been often so held where the particularity of the former English precedents to which we have adverted is not required,"—citing several cases in support thereof. In Lavey v. Reg., 17 Q. B. 496, 5 Cox, Cr. Cas. 269, the defendant was indicted for perjury charged to have been committed at the trial of an action on contract before the county court; but the indictment did not aver that the action was one over which the county court had jurisdiction. It was held by the court in exchequer chamber that, as the indictment expressly averred that an action was pending in that court, presided over by the judge who administered the oath, and that such action was one of contract, a species of action of which that court might have cognizance, that the case came on to be tried before him, that the defendant was examined as a witness upon the hearing, and sworn by the judge, with an averment of competence of authority in the judge to administer the oath, it appeared that the oath was administered in the course of a judicial proceeding, and that by necessary implication it was a proceeding over which the judge who administered it had jurisdiction; for, says the court, "unless he had jurisdiction he could not have had power to administer the oath so as to be valid and binding, which is the true meaning of the phrase." In Reg. v. Dunning, L. R. 1 Cr. Cas. 290, the defendant was convicted of perjury upon an indictment which charged that the offense was committed on the trial at the quarter sessions of "a certain indictment for misdemeanor," but which did not state what the misdemeanor was, or that the quarter sessions had jurisdiction to try it. Upon motion in arrest of judgment the indictment was held sufficient, upon the ground that it appeared therefrom that in a judicial proceeding the defendant swore to the truth of certain facts set forth therein, which at the time of so swearing he knew to be false, and that the court had competent authority to administer the oath. See, also, Halleck v. State, 11 Ohio, 400; Rex v. Callanan, 6 Barn. & C. 102.

The information herein states that the oath was taken in open court, before a justice of the peace, in a criminal case then pending before him, upon a complaint charging the defendant with petit larceny, and that the justice of the peace was then and there entitled under the laws of this state to administer oaths in such matters and proceedings. Complaints for petit larceny are within the jurisdiction of the justice's court, and the averment that the justice before whom the oath was taken was entitled to administer oaths in such matters and proceedings was a sufficient averment of his authority to administer the oath in this proceeding. If, under the laws of this state, he was entitled to administer the oath to the defendant in the proceeding then pending before him, the proceeding was within his jurisdiction, since otherwise he would not have been entitled, under the laws of this state, to administer the oath. Whether he did have such authority was a fact to be established by the people at the trial. There is some language in People v. Howland (incorrectly reported as People v. Howard) 111 Cal. 655, 44 Pac. 342, which, taken by itself, may seem at variance with what is above said; but what was said in that case must be read in connection with the matter then before the court. In that case the defendant had moved at his arraignment to set aside the information upon the ground that he had not been legally committed by a magistrate, and the court was commenting upon the sufficiency of the complaint before the magistrate, and not upon the information upon which he was subsequently tried, and which it is stated in the opinion of the court was sufficient in form. To the extent that the opinion in that case is at variance with what is here said with reference to the sufficiency of an information it is mere dictum, and cannot be regarded as authority.

The objection that the information fails to show that the false testimony given by the defendant was material to any issue by the court is without merit. The averment that it was material to the "issues tendered in said cause" was a sufficient averment of its materiality, without specifying any particular issue upon which it was material. It was not necessary to show by averment in the information how the false testimony was material.

At the trial, the complaint before the justice of the peace was offered in evidence, and it appeared therefrom that the offense was claimed to have been committed in the county of Yolo. The election and the qualification of the justice, and his authority to hear the complaint before him, were sufficiently shown. The issuance to him of a certificate of election carried with it the presumption that he had complied with all the steps required by law for its issuance, and was entitled to hold the office and discharge its duties. The validity of his election or his right to hold the office could not be called in question by the defendant upon the trial herein. It was also fully shown at the trial that the evidence given by the defendant was material in determining the issue before the justice's court. The judgment is affirmed.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

6 Cal. Unrep. 283

FAIR v. ANGUS et al. (S. F. 1,155, 1,156.)

(Supreme Court of California. May 23, 1899.)

APPEAL—SETTING ASIDE SUBMISSION.

Where a justice has not heard the argument, and it is deemed important that all the justices should participate in the decision, the submission of the appeal will be set aside, with leave to counsel to stipulate to resubmit the case on the briefs and printed arguments already on file.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Charles L. Fair against James S. Angus and others. From a judgment for plaintiff, defendants appeal. Submission set aside, and resubmission ordered.

G. W. McEnerney, for appellant Goodfellow. Van R. Paterson, for appellants Guardian and others. Lloyd & Wood, for appellants Theresa Oelrichs and Virginia Fair. Knight & Heggarty, for respondent.

PER CURIAM. In the above-entitled appeals, one of the justices of this court not having heard the arguments, and therefore being disqualified to participate in the decisions thereof, and it being deemed important that all of the justices should so participate, it is ordered that the submission of said appeals be set aside, and that they be resubmitted to the full court. As the briefs on these appeals are very elaborate, and as several of the oral arguments made at the hearing have been printed and are on file, counsel for the several parties may stipulate, if they so desire, to immediately resubmit the cases on the briefs and printed arguments now on file; otherwise, they will be placed for argument on the next July calendar.

124 Cal. 460

GRAY et al. v. RICHARDSON. (S. F. 941.)

(Supreme Court of California. May 23, 1899.)

MUNICIPALITIES—STREET IMPROVEMENTS—ASSESSMENTS—CONTRACTS.

1. A contract provided that the contractor should construct certain concrete sidewalks in accordance with the specifications annexed to, and made a part of, the contract. When the contract was offered in evidence there were no specifications annexed, and it was not shown that any had ever been prepared; and one witness testified that, shortly after the contract was executed and filed in the office of superintendent of streets, he examined it, and no specifications were annexed. *Held* to sustain a finding that no valid contract was ever entered into.

2. The failure to annex the specifications rendered the contract invalid as the foundation of an assessment.

In bank. On rehearing. Affirmed.

For opinion in department, see 55 Pac. 603.

HARRISON, J. The plaintiffs applied to the superior court for a writ of mandate compelling the defendant, as superintendent of streets of the city of San Rafael, to issue to them an assessment for certain work done in the improvement of a street in said city under a contract alleged to have been entered into between them and the predecessor in office of the defendant. In his answer to their petition, the defendant, in addition to other defenses set forth by him, alleged that no valid contract for doing the work named in their petition had ever been entered into by the superintendent of streets of said city with the plaintiffs' assignor, or with any other person. Upon this issue the court found in favor of the defendant, and denied the plaintiffs' application for the writ. The plaintiffs moved for a new trial upon the ground that this finding was not sustained by the evidence. Their motion having been denied, they have appealed therefrom, and also from the judgment denying their application.

The contract for doing the work for which the plaintiffs sought an assessment was offered in evidence at the trial, and provided that the contractor (the assignor of the plaintiffs) should do and perform, under the direction of the superintendent of streets, and furnish materials therefor, all the work necessary to be done to construct concrete sidewalks upon a portion of Fifth street, in said city, "all in strict accordance with the specifications hereunto annexed, and made part of this contract." There were no specifications annexed to the contract, nor was it shown that any specifications had ever been prepared for signature or annexed thereto; and there was testimony that, shortly after the contract was executed and filed in the superintendent's office, it was examined by the witness, and that no specifications were then annexed thereto. This evidence was ample to sustain the finding of the court that no valid contract for doing the work for which the assessment was sought was ever made between the superintendent of streets and the plaintiffs' assignor, or any other person. The failure to annex the specifications to the contract rendered the contract invalid as the foundation of an assessment (Schwiesau v. Mahon, 110 Cal. 543, 42 Pac. 1065); and, if no valid contract had been made for doing the work, the defendant was justified in refusing to issue an assessment therefor, and the court correctly denied the application of the plaintiffs.

As this finding requires an affirmance of the judgment of the superior court, a discussion of the other propositions presented upon the appeal is unnecessary. The judgment and order are affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

124 Cal. 492

WINDSOR v. MINER et al. (S. F. 1,238.)

(Supreme Court of California. May 25, 1899.)

CONTRACTS — SPECIFIC PERFORMANCE—CONSIDERATION AND REASONABLENESS—PLEADING—PROOF.

1. Under Civ. Code, § 3391, refusing specific performance if defendant has not received adequate consideration for his contract, and if it is not just and reasonable, plaintiff must aver and prove the consideration and reasonableness of the contract.

2. Failure to do so is not cured by averment and proof as to improvements placed by plaintiff on the land in suit.

3. It is not cured by denial in the answer of adequate consideration.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county.

Suit by Richard N. Windsor against Virginia A. Miner and Elizabeth C. Windsor. There was a decree for plaintiff, and from an order denying a new trial defendants appeal. Reversed.

Remsen & Jones, for appellants. S. F. Geil, for respondent.

GRAY, C. The defendants appeal from an order denying their motion for a new trial. The action was to enforce specific performance of an option to purchase, given in a lease from defendants to plaintiff, of a certain 85.45 acres of land.

The complaint alleges that on July 6, 1891, plaintiff owned a certain 390 acres of land in Monterey county; that defendants had a mortgage on said land to secure an indebtedness of plaintiff to them of $20,898.71; that on said date plaintiff executed to defendants a deed of said land; that the consideration of said deed was, among other things, the satisfaction of said mortgage and the debt secured thereby, together with the execution by defendants of a written lease of 85.45 acres, part of the said 390-acre tract, to plaintiff for the term of his natural life at an annual rental of $510, and an option to purchase the same or any part thereof; that defendants on July 8, 1891, made to plaintiff said lease, as agreed, with option to purchase; that on April 4, 1895, plaintiff tendered defendants $2,461, and demanded a deed to a certain 24.61 acres of land, being a portion of said 85.45-acre tract, but defendants refused to make the deed. The part of the lease referring to the option to purchase reads as follows: "And it is further mutually covenanted and agreed by and between the parties thereto that said party of the second part does now and shall at all times during the continuance of the said term hereby demised, to wit, during his lifetime, have the privilege and option of purchasing all or any portion of said 85.45-acre tract above described at and for the rate and sum of one hundred ($100) dollars per acre, and the said parties of the first part, in consideration of the covenants on the part of the said party of the second part herein contained, and for other valuable considerations, hereby agree to sell and convey unto the said party of the second part at any time during the continuance of this lease, and of said term hereby demised, upon the demand of said party of the second part, all or any portion of said 85.45-acre tract above described at and for the rate and sum of one hundred ($100) dollars per acre." The complaint also alleges that plaintiff has placed improvements on said 24.61-acre tract to the value of $1,500, and some other allegations necessary in an action for specific performance are contained in the complaint; but there is no allegation therein as to the value of the whole or any portion of the lands described; nor is there any statement in the complaint to show that the contract sought to be enforced is just and reasonable, and founded upon an adequate consideration; nor was there any evidence given on these subjects at the trial. At the close of plaintiff's case defendants moved for a nonsuit on the ground: "First. It is not shown that defendants, or either of them, received an adequate consideration for the option and privilege of purchase sued on. Second. It is not shown that the contract sued on is as to the defendants just and reasonable." The motion for a nonsuit was denied, and the court subsequently found "that defendants, and each of them, have received an adequate consideration for the option and privilege of purchase contained in the lease." There seems to be no evidence at all to support this finding, and, in the absence of such evidence, the motion for a nonsuit should have been granted. Section 3391 of the Civil Code contains the following language: "Specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract. 2. If it is not, as to him, just and reasonable."

Specific performance is an equitable remedy, and it is incumbent upon the plaintiff in an action of this character to show both in the averments of his pleading and in the evidence at the trial that he is entitled to the equitable relief which he seeks. In the absence of any averment or evidence as to the value of the land involved in the controversy, either as to the whole of it or as to any portion of it, with nothing stated upon which to base any estimate of the value or worth of the option and privilege to purchase, how is the court to determine whether defendants have received an adequate consideration, or whether the contract is as to them just and reasonable? It may be that the 24.61 acres, for which a deed is sought in this case, is worth twice as much as the balance of the 390 acres. If so, the contract sought to be enforced is not just and reasonable as to the defendants. It may be that this land is worth $500 an acre. If so, $100 per acre is not an adequate consideration for it. The following cases seem to support the conclusions reached in this case: Bruck v. Tucker, 42 Cal. 346; Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778; Morrill v. Everson, 77 Cal. 114, 19 Pac. 190; Agard v. Valencia, 39 Cal. 296; Arguello v. Bours, 67 Cal. 451, 8 Pac. 49.

The allegations and evidence as to improvements being placed upon the land by plaintiff do not tend to obviate or cure the defects in plaintiff's case already pointed out. The allegation in the answer that there was no adequate consideration to support the option contract fails to supply the want of any affirmative allegation on that subject in the complaint, and certainly cannot be held to cure the entire absence of evidence as to a consideration. On the strength of the foregoing conclusions it would be an act of supererogation to notice the numerous other points and subdivisions of points contained in the briefs herein. I advise that the order denying the new trial be reversed.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the new trial is reversed.

(124 Cal. 509)

NEWHALL v. SHERMAN et al. (S. F. 1,022.)[1]

(Supreme Court of California. May 26, 1899.)

TRUST DEED — FORECLOSURE—LIMITATIONS—COMPLAINT — SUFFICIENCY—LOAN—MATURITY—PRESUMPTION — MORTGAGE DEBT—EFFECT OF BAR—TIME OF PAYMENT.

1. A suit to foreclose a deed intended as a mortgage, given to secure a loan presumed to be due immediately or on demand, and not evidenced by any written promise to pay, is barred in four years from the execution of the deed, by Code Civ. Proc. § 337, providing that an action on any contract, obligation, or liability founded on a written instrument shall be brought within four years.

2. Where it does not appear that any time was fixed for the payment of a loan, it will be presumed to be due immediately or on demand.

3. A complaint to foreclose a deed intended as a mortgage, which does not show that the debt was due and that action could have been maintained for its collection at the time of the execution of the deed, fails to show that it became due at any subsequent time, and does not state a cause of action.

4. Where the debt secured by a mortgage is barred, the mortgage is also barred.

5. By the defeasance to a deed it was recited that it was intended as a mortgage to secure a loan, and the grantee bound himself to reconvey at any time on the payment to him of the amount loaned, and a demand for a deed. *Held* not to fix a time, either certain or uncertain, for the payment of the debt.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Suit by George A. Newhall against Sherman, Clay & Co. and another. Defendants Sherman, Clay & Co. demurred to the complaint, and from a judgment for said defendants the plaintiff appeals. Affirmed.

E. W. McGraw, for appellant. T. C. Judkins and Craig & Craig, for respondents.

GRAY, C. The appellant brought suit against A. T. Hatch and others on the 3d day of February, 1897, to foreclose a deed intended as a mortgage, and joined the respondents as defendants because, as stated in the complaint, "the said Sherman, Clay & Co. claim some interest or lien upon the lands and premises hereinbefore described, but that said claim is subsequent to and subordinate to the mortgage aforesaid." Respondents demurred on the grounds, among others, that the complaint failed to state a cause of action, and that the cause of action therein stated was barred by the provisions of section 337, Code Civ. Proc. This demurrer was sustained. Plaintiff declined to amend, and appealed from the judgment against him. The defeasance which was executed with the deed is set out in the complaint, and, after reciting the deed and the property conveyed thereby, said defeasance reads as follows: "And whereas said deed is absolute in form, yet in fact is intended as security for the payment of the sum of four thousand dollars loaned by said Newhall to said A. T. Hatch: Now, this defeasance witnesseth that the said George A. Newhall, for himself, and for his heirs, executors, administrators, and assigns, hereby binds himself and agrees to reconvey the hereinabove mentioned and described property unto the said A. T. Hatch, his heirs, executors, administrators, or assigns, at any time, upon the payment to him of said sum of four thousand dollars, and his demand for a deed to said property. In witness whereof the said George A. Newhall has hereunto set his hand and seal this fourth day of November, A. D. 1892. [Signed] Geo. A. Newhall."

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[1] Rehearing denied June 24, 1899.

The complaint shows that the suit was begun more than four years after the execution of the deed and defeasance upon which the suit is based. There appears to be no promise in writing subscribed by the defendant as to the payment of the amount loaned; and, though his obligation to pay may be founded in parol, yet the suit for foreclosure is deemed to be founded upon the written instruments, consisting of the deed and defeasance, which constitute the mortgage, and the statute of limitations will not bar such suit until four years after the execution of these instruments. And for the purposes of the foreclosure suit the debt itself is not barred until the end of four years, because its payment is secured by the same written instruments. Wood v. Goodfellow, 43 Cal. 185; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621. Respondent therefore relies upon the proper statute of limitations when he pleads section 337, Code Civ. Proc., in his demurrer. Whether plaintiff's cause of action is barred depends upon when the money loaned, for which the mortgage was given as security, was due and collectible. It not appearing from any of the written instruments upon which the suit is based, nor from any allegation of the complaint, that any time was given or fixed for the payment of the loan, "the presumption would therefore necessarily arise that it was due immediately or upon demand, and therefore was barred at the time this action was commenced." Espinosa v. Gregory, 40 Cal. 58; Holmes v. West, 17 Cal. 623; Civ. Code, § 1657; In re Galvin, 51 Cal. 215; Dorland v. Dorland, 66 Cal. 189, 5 Pac. 77. If the complaint does not show that the claim sought to be enforced was due, and that suit could have been maintained for its collection, at the time of the execution of the mortgage herein, then it certainly fails to show that it became due at any subsequent time, and is amenable to the first ground of demurrer stated. Doyle v. Insurance Co., 44 Cal. 264. We must therefore treat the complaint as showing that the money loaned was due immediately upon such loan, and it would then appear that the claim for such money was barred, by the statute pleaded, about three months before the commencement of this action. The debt secured by the mortgage being barred, it necessarily follows that the mortgage is also barred. Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 496; Heinlin v. Castro, 22 Cal. 100; Wormouth v. Hatch, 33 Cal. 121; Wells v. Harter, 56 Cal. 342; Civ. Code, § 2911.

The appellant is mistaken in his assumption that the defeasance fixes a future time, either certain or uncertain, for the payment of the indebtedness secured by the mortgage; and the authorities cited in his brief are therefore either irrelevant to the case made by the pleadings, or are in conflict with the decisions of this court cited in this opinion. For the foregoing reasons, I advise that the judgment be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(124 Cal. 475)

SOUTHERN PAC. R. CO. v. WOOD et al.

SAME v. JACK et al.

(L. A. 445.)[1]

(Supreme Court of California. May 26, 1899.)

RAILROAD GRANT—CONSTRUCTION—INDEMNITY LANDS—SELECTION—LIABILITY TO PRE-EMPTION.

1. Under Act Cong. July 27, 1866 (14 Stat. 292), certain lands were granted to the Atlantic & Pacific Railroad Company. By the act the odd sections within 40 miles of the road in certain territories, and where the road passed through any state, 10 alternative sections per mile were granted, making the primary limits within the territories 40 miles, and within the states 20 miles, on each side of the road; the grant being of lands to which the United States had full title. The act also provided that whenever, prior to the time the line of said road was designated by a plat, any sections of such grant should have been sold or otherwise disposed of, other lands might be selected, under direction of the secretary of the interior, not more than 10 miles beyond the limits of said alternate sections. *Held*, that the lands granted by the act are those as to which the grant is in præsenti, and only lands within the primary limits are covered, and as to the indemnity lands the title, when they are selected, relates back, not to the date of the act, but to the date of selection.

2. A map of the general line of the railroad filed in 1867 did not fix the limits of the indemnity lands nor operate as a withdrawal of them.

3. Where, under the act of July 27, 1866 (14 Stat. 292) indemnity lands were granted to supply deficiencies in the primary grant, and it is not alleged that all the sections within the indemnity grant are required to make up deficiencies within the primary limits, the allegation is insufficient to show that no formal selection of

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[1] Rehearing denied June 24, 1899.

indemnity lands was necessary to confer title in the road.

4. Under the act of congress of July 27, 1866 (14 Stat. 292), making the primary grant to the Atlantic & Pacific Railroad Company, and also providing for an indemnity grant to cover deficiencies in the primary grant, the provisions of the act that the lands "hereby granted" shall not be liable to sale or entry or pre-emption, except by such company, apply only to the lands in the primary grant, and the provisions of section 6 extending pre-emption rights "to all other lands on the line of said road" include the indemnity lands the title to which, when selected, relates to the date of the selection.

Commissioners' decision. Department 1. Appeal from superior court, Kern county.

Action by the Southern Pacific Railroad Company against Frank A. Wood and others and against Frederick B. Jack and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. Singer, Jr., and H. V. Reardon, for appellant. W. B. Wallace, for respondents.

HAYNES, C. These cases depend upon the same facts and are submitted together. They involve a contest as to certain lands lying within the indemnity limits of the grant to plaintiff by act of congress of July 27, 1866; the plaintiff claiming under said grant, and the defendants claiming under patents issued to them as settlers under the land laws of the United States. The defendants demurred to the complaints in both cases, the demurrers were sustained, and these appeals are taken by the plaintiff from the judgments thereupon entered against it. Said act of congress, upon which the plaintiff bases its claim to said lands, is entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast." 14 Stat. 292. Said act incorporated the Atlantic & Pacific Railroad Company, and by the third section granted certain lands to aid in its construction. It provided that where the road passed through the territories of the United States the odd sections within 40 miles of the road, and where it passed through any state 10 alternate sections per mile, designated by odd numbers, were granted, making the primary limits within the territories 40 miles, and within the states 20 miles, on each side of the road; the grant being of lands to which "the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limit of said alternate sections, and not including the reserved numbers."

Section 6 of said act is as follows: "And be it further enacted: That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

Section 18 of said act authorized the Southern Pacific Railroad Company (the appellant here) to connect with said Atlantic & Pacific Railroad at such point near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco, "and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

The complaint alleged the substance of said section 18, and referred to said entire act as printed in said statutes, and made it part thereof. It then alleged that before January 3, 1867, plaintiff "fixed the general route" of the entire line of railroad it was authorized to construct, and on that day filed a map thereof in the general land office; that the same was approved by the commissioner; that on March 22, 1867, said commissioner, pursuant to the order of the secretary of the interior, withdrew all the odd-numbered sections of land lying within 30 miles of the line of said road, as shown upon said map, from sale or location, pre-emption or homestead entry; that the same have ever since remained so withdrawn; that on June 28, 1870, a joint resolution was passed by congress (16 Stat. 382), authorizing appellant to construct its road as near as may be on the route indicated by its map of 1867; that prior to November 8, 1889, and within the time allowed by law, it completed its entire road along the line designated by said map; that its road was accepted; and that on and prior to November 8, 1889, it filed with the secretary of the interior a map of each of the sections of said road "as the same had been definitely located and constructed," and the same were accepted and approved by said secretary. The fifth paragraph of the complaint described certain lands, parts of odd sections within the 20-mile or place limits, which were lost to it, and the sixth paragraph described the lands now in controversy, which are situated within the indemnity limits described in said act, and alleged that they are opposite to and coterminous with the section of said road extending from Huron to Alcalde, "the map of definite location and construction of which was filed in the office of, and duly accepted and approved by, the secretary of the interior, on October 8, 1889." The complaint further alleges that at the time the act of July 27, 1866, was passed the lands here in controversy were vacant and unappropriated public land of the United States, not mineral, and not reserved, etc., and that they have ever since so remained, except only as they have been affected by said act of congress, the said withdrawals, and the acts of the parties to this suit; that said lands were surveyed and plat filed May 1, 1874; that "on October 19, 1891, the plaintiff filed its list No. 44 in said land office, selecting the lands described in the sixth paragraph hereof in lieu of the lands described in the fifth paragraph"; that it thereby became entitled to a patent from the United States to the lands in question; that at that time, and ever since, plaintiff has demanded the issuance of such patent, but the United States and every officer thereof have at all times refused to issue it; that, disregarding the rights of the plaintiff, a patent was issued to defendant Wood on October 30, 1888, conveying the legal title to him; that he took the legal title in trust for the plaintiff; and that a conveyance has been demanded, etc. The prayer is that plaintiff be adjudged to be the owner, and that defendants convey the title to it.

Defendants' demurrer stated three grounds: (1) That said complaint does not state facts sufficient to constitute a cause of action; (2) that plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338 and sections 318 and 343 of the Code of Civil Procedure; and (3) that plaintiff has been guilty of gross laches in delaying to bring suit after the issuance of the patent to Wood, and after filing its selection.

Appellant, in its brief, states its first point thus: "The facts stated in the second amended complaint show the legal title to be in the plaintiff." If that were true, there could be no reason why it should resort to equity to compel a conveyance. But in the complaint it is alleged that the defendants have the "legal title," and, upon the theory that plaintiff has a prior and better right, seeks to compel a conveyance. Whatever right the plaintiff asserts or may have is based upon said act of congress of 1866 and its own acts thereunder, while defendants' rights are based upon the pre-emption laws of the United States, and their compliance therewith; and, as defendants' patent was issued prior to the selection of the same lands by the plaintiff, they must have the better right, if said lands were subject to pre-emption; and that they were so subject, unless withdrawn from pre-emption by the act of 1866, or by executive action thereunder, is not questioned.

Section 6 of said act, above quoted, provides: "And the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act." But it is further provided that the pre-emption act of 1841, and the homestead act of 1862, and the acts amendatory thereof, "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company." If it be true, as contended by the learned counsel for plaintiff, that the "odd sections of land hereby granted" include the odd sections within the indemnity limits, there could have been no reason for the provision that the homestead and pre-emption laws should extend "to all other lands on the line of said road," since the even-numbered sections were in no wise affected by the grant. But aside from this provision of the act, it is well settled that the words "hereby granted" do not include the odd sections within the indemnity limits, and therefore it cannot be true that upon selection the title relates back to the date of the act. As to lands within the place or primary limits, it is uniformly held that the words "be and is hereby granted" import a grant in præsenti, and, when the lands are ascertained by fixing the line of the road in the manner prescribed in the act, the title of the grantee relates back to the date of the act, but does not attach to lands to which the United States did not have full title at that date, or were otherwise excepted from the operation of the grant, even though they should afterwards be freed from the claim or possession which excluded them under the terms of the grant. Newhall v. Sanger, 92 U. S. 761. But, as to indemnity lands, it is sufficient if they are free from private claim at the time of their selection by the railroad company. Ryan v. Railroad Co., 99 U. S. 382. In Newhall v. Sanger an odd section within the place limits was covered by a Mexican grant which was sub judice at the date of the act, but shortly afterwards the Mexican grant was adjudged void, and it was held that the land did not pass under the grant to the railroad company. In Ryan v. Railroad Co. the land in question was within the indemnity limits of the grant to the railroad company, and was also covered by a Mexican grant which was afterwards declared void, and was selected by the company as indemnity land, and was afterwards settled upon by Ryan as a pre-emptioner. It was held that, the railroad company's selection having been approved by the secretary of the interior, it was entitled to the land, and the distinction between that case and Newhall v. Sanger was pointed out, the court saying: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not, and could not have, any claim to it until specially selected, as it was, for that purpose." These cases settle the proposition that the lands granted by the act are those as to which the grant is in præsenti, and refer only to the lands within the primary limits, and as to the indemnity lands that the title, when they are selected, does not relate back to the date of the act, but to the date of selection.

In Railroad Co. v. Herring, 110 U. S. 27, 3 Sup. Ct. 485, the above quotation from Ryan v. Railroad Co. was repeated with approval, and, in addition, the court said: "It is only when the line and route of the road is definitely fixed that any right of selection exists. This must necessarily be so, because until then the quantity of land lost cannot be known, and the number of sections to be selected can only then be ascertained." The court also said (page 38, 110 U. S., and page 493, 3 Sup. Ct.): "It is obvious, however, that the right to these odd sections, and the right to others in lieu of such odd sections as had previously been disposed of, depend upon very different circumstances, and it is not easy to see how rights can be vested in any particular section or sections of the latter class until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised his right of selection. This latter, unlike the odd-numbered sections within the six-mile limit, are not ascertained and made specific by the protraction of the established line through the maps of the public land. They are not, and cannot be, made specific until the grantee's right of selection has been exercised." This authority disposes of appellant's contention that the map of the general route, filed in 1867, fixed the limits of the indemnity lands, or operated as a withdrawal of them.

In St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 732, 5 Sup. Ct. 341, the court said: "It is true that in some cases the statute requires the land department to withdraw the land within these secondary limits from the market, and in others the officers do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits." If therefore it be true, as above stated, that the withdrawal of indemnity lands does not imply a vested right to them in the railroad company, it must be that they are not, and cannot be, included in the term "hereby granted." But congress itself has placed a construction upon said act of July 27, 1866, or at least recognized the distinction observed by the courts between granted and indemnity lands. In the act passed July 5, 1886 (24 Stat. 123), entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company," etc. (referring to the act here in question), the lands declared forfeited are described thus: "Which are adjacent to and co-terminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of said act of July 27, 1866."

It is argued on behalf of appellant that the grant to it was one of quantity. But this will not bear investigation. It is clear that congress intended to grant all the odd-numbered sections within 20 miles of the road, except those that were excepted from the grant, and the privilege was given the company to select odd sections within an additional 10 miles in lieu of those that were lost to it within the primary limit. But congress did not intend either to grant 10 sections on each side of the road unconditionally, or to grant all the odd sections to which the United States had full title, and which were not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, within the additional 10 miles, since if that had been the intention all the unappropriated odd sections within 30 miles of the road would have been granted; and hence the act requires the grantee to select the lieu lands within the indemnity limits to the extent only that lands were lost within the primary limits. And therefore the act requires that the selection of indemnity or lieu lands shall be made by the grantee under the direction of the secretary of the interior, or, as expressed in some other acts granting lands in aid of railroads, subject to his approval. In either case the secretary acts judicially. He must determine whether the alleged loss within the primary limits has in fact taken place, and whether the land selected is subject to selection. That the secretary acts judicially, see Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341, and, for a fuller discussion as to his powers, see Knight v. Association, 142 U. S. 161, 176, 12 Sup. Ct. 258. The complaint, it is true, alleges that appellant's selection of the land in controversy was under the direction of the secretary of the interior; but it is further alleged that plaintiff has demanded that a patent issue to it for said lands, and that the United States and all its officers (which includes the secretary) have refused to issue it, and that on October 30, 1888, the United States conveyed the legal title to the defendant Wood by a patent then issued to him. The refusal to issue a patent to the plaintiff, though persistently demanded, and the further fact, distinctly alleged, that at a date some three years prior to plaintiff's selection the same land was patented to defendant Wood, is wholly inconsistent with the allegation that the selection was made under the direction of the secretary of the interior, and, in effect, is an allegation that the selection was not made under his direction, or approved by that officer. It is said, however, that at the date of the act (July 27, 1866) the United

States had then full title, that it was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights; but that was before the plaintiff filed its map of the general route of its road, and said allegation is not made as of any other date than that of the act; nor is the date of defendants' settlement on the land in question alleged. Non constat that it may have been before the alleged withdrawal of the land from sale by the order of the secretary made in March, 1867, or after its revocation on August 15, 1887. It is true it is further alleged that "said sections have ever since remained so withdrawn by virtue and force of said withdrawal"; but this allegation is a mere conclusion of law that, having been once withdrawn, it so remains "by virtue and force of said withdrawal," and is not the equivalent of an allegation that the withdrawal had not been revoked, while the allegation that a patent was issued to the defendant shows that, as to the land so conveyed, the withdrawal was revoked. The withdrawal, however, was in fact revoked on August 15, 1887, by executive order after a rule to show cause was served upon the Atlantic & Pacific Company and the Southern Pacific Company, and after each of said companies had filed answers thereto. For the proceedings and action of the secretary of the interior in relation thereto, see Atlantic & P. R. Co., 6 Land Dec. Dep. Int. 77–93. This is a public record, of which the court takes judicial notice, and such action, being within the power of the department of the interior, is conclusive, and might be properly considered even if the complaint had alleged that the withdrawal had not been revoked.

It is said by counsel for appellant that, "where all the undisposed of odd sections within the exterior limits of the grant are insufficient to make up the quantity granted, there need be no selection; and by definite location the grantee perfects the same title to the lands within the secondary or indemnity limits as to those in the primary limits,"—citing St. Paul & P. R. Co. v. Northern P. R. Co., 139 U. S. 19, 11 Sup. Ct. 389.

As to the first part of this statement the case cited held that, as all the lands within the indemnity limits only made up in part for the deficiencies, there was no occasion for the exercise of the judgment of the secretary in selecting from them, for they were all appropriated. The controversy there was as to the respective rights of two different railroad corporations claiming under different grants the same indemnity lands, and not as to the right of either company to a specific parcel, as against a claimant under the homestead or pre-emption laws; and therefore it was only necessary to determine whether all the odd sections within the indemnity limits were required to indemnify the company having the prior right for its losses within the place limits, these lands having been withdrawn by the land department for the benefit of the Northern Pacific Company; and the language used by the court must be read in the light of these facts; and in a later case (U. S. v. Colton Marble & Lime Co., 146 U. S. 616, 13 Sup. Ct. 163) the above case (139 U. S. 19, 11 Sup. Ct. 389) was cited, and the court said: "The ordinary rule with respect to lands within the indemnity limits is that no title passes until selection. Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, it has been held, in a contest between two railroad companies, that no formal selection was necessary to give them to the one having the older grant, as against the other company." But, however that may be, in the case at bar it is not alleged that all the odd sections within the indemnity limits are required to make up appellant's deficiencies within the primary limits, or that there are no other lands available for that purpose than those in controversy.

As to the second branch of appellant's contention, viz. that by the map of definite location the grantee perfects the same title to the indemnity lands as to those within the primary limits, but one case is cited which sustains that contention. That is the case of Railroad Co. v. Barnes, 2 N. D. 310, 51 N. W. 386, a case which was expressly overruled in Grandin v. La Bar, 3 N. D. 446, 455, 57 N. W. 241, in an able opinion, to which we refer in support of our conclusions in this case. In that case (page 453, 3 N. D., and page 243, 57 N. W.) it was said: "But it required something more than the existence of the grant, and the location and construction of the road in accordance with the terms of the grant, to vest the title to such additional lands in the company. It required a legal selection; and until such selection was made, and the legality of the selection in some manner established, the company could claim no right or interest whatever in any specific tract within the indemnity belt,"—citing Ryan v. Railroad Co., 99 U. S. 382; Grinnell v. Railroad Co., 103 U. S. 739; Railroad Co. v. Herring, 110 U. S. 27, 3 Sup. Ct. 485; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341, and other cases.

In a supplemental brief appellant cites the case of Railroad Co. v. Groeck, decided by the circuit court of appeals, Ninth circuit, and reported in 31 C. C. A. 334, and 87 Fed. 970. That case arose under the same grant which is the basis of appellant's claim in this case, and in most of its features is entirely similar, and it is urged that as the case before us involves federal questions the decision of the circuit court of appeals should be followed by this court; but I think that the opinion in that case is not sustained by the decisions of the supreme court of the United States upon vital questions involved in it, even if it were not distinguishable from the case before us in certain of its features. For example, it is there said: "A careful consideration of other decisions of the supreme court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of *the terms of the grant itself* the indemnity lands *are withdrawn* from settlement from the moment when a map of the general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than a mere right to initiate a title by selection, and that the lands in the indemnity limits are as truly *granted lands*, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted,"—citing St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 5 Sup. Ct. 334, and St. Paul & P. R. Co. v. Northern Pac. Co., 139 U. S. 1, 11 Sup. Ct. 389. (The italics are ours.) The latter case has been already noticed, and the facts which make it broadly distinguishable from the Groeck Case and the one at bar need not be repeated. In St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. the controversy arose under a grant to the territory of Minnesota for the benefit of several roads, both parties claiming under the same grant; and it was held that title to the lands within the primary limits relates, after the road is located according to law, to the date of the grant, while as to indemnity lands neither priority of grant, nor priority of location or of construction, gives priority of right, but this is determined by priority of selection, where the selection is made according to law. In the opinion (page 732, 112 U. S., and page 341, 5 Sup. Ct.) the court said: "The plaintiff in error insists that the map of its line of road was filed in 1859. The court of original jurisdiction finds that, up to the time of the trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by that company, or any one for it. Was there a vested right in this company, during all this time, to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation?"

In Barney v. Railroad Co., 117 U. S. 232, 6 Sup. Ct. 656, Mr. Justice Field, after noticing "the well-established distinction observed between granted lands and indemnity lands," said: "It is these 'granted lands' of the prior grant falling within the six-mile limit that in our opinion are reserved, and not the possible indemnity lands which might be subsequently acquired."

The case of Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. 100, cited by the court of appeals in the Groeck Case, has no application to that case or this. There the controversy related solely to lands within the primary limits of the grant, which in that case was of all the odd sections within 40 miles on each side of the road, and all of which were withdrawn by the statute from sale or pre-emption.

In the case of Northern Pac. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co., 168 U. S. 604, 18 Sup. Ct. 205, also cited in the Groeck Case, the sole question was "whether the withdrawal from sale by the land department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff," which was made after the withdrawal; and it was held that the act of the secretary withdrawing the lands from settlement was, in effect, a reservation, within the terms of the later grant to the plaintiff, and excepted them therefrom; but this does not support the holding in the Groeck Case that the terms of the grant here under consideration operate of themselves to withdraw the indemnity lands from settlement "from the moment when a map of the general route is made and filed," or that "the lands in the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits." In support of the same proposition, viz. that the grant itself withdraws the lands within the indemnity limits, the circuit court of appeals also quoted from U. S. v. Southern Pac. R. Co., 146 U. S. 600, 13 Sup. Ct. 158, the following: "When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing a map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted." This, however, was not the language of Mr. Justice Brewer, but was quoted from Buttz v. Railroad Co., 119 U. S. 71, 72, 7 Sup. Ct. 107, where the primary or place limits were 40 miles on each side of the road, and had no reference to indemnity lands; nor did the case of U. S. v. Southern Pac. Co. have any reference to indemnity lands; but, as shown by the statement of facts, "the lands in controversy are within the granted or place limits of both the Atlantic & Pacific and the Southern Pacific Companies at the place where these lines cross"; and it was this fact that made the quotation from the Buttz Case applicable.

The case of Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. 336, cited by appellant, has no application here. In the statement of facts it is said: "The lands in dispute are within ten miles of the road as built and of the line as delineated on the map." They were in the place limits, and not indemnity lands.

In the Groeck Case the court said: "After such lands have been once set aside by congressional act, no authority is vested in the secretary of the interior, or in any officer of the land department, to restore them or open them to settlement." That is conceded; but it is clear that the indemnity lands were not set aside by "congressional act." As to the lands within the place limits, section 6 of the act provided that "the odd sections of land hereby granted shall not be liable to sale or entry," except by the company; but the same section further provided that the homestead and pre-emption laws "shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company." It has been often decided, as we have seen, that the words "hereby granted" import a grant in præsenti, which vests the title in the grantee as of the date of the grant. The expression "all other lands" must therefore include the indemnity lands, the title to which, when selected and approved, relates to the date of selection; and as to these lands the pre-emption and homestead laws were expressly extended. The only debatable question, therefore, is whether the land department had authority to withdraw said indemnity lands from settlement; and upon this question Mr. Secretary Lamar expressed the opinion that the act deprived the department of that power. See Atlantic & P. R. Co., 6 Land Dec. Dep. Int. pp. 87–91. But it is not necessary to a decision of the present case to decide that question; for as these lands were not withdrawn by force of the act of congress, and the withdrawal having been revoked, and as the complaint does not allege that Wood's settlement was made before the revocation, or while they were withdrawn, it is not shown that his settlement was illegal or unauthorized, or that the patent was improperly issued.

In a supplemental brief filed by respondent our attention is called to the case of Moore v. Cormode (decided by the supreme court of Washington Dec. 5, 1898) 55 Pac. 217). That case arose under the grant to the Northern Pacific Railroad, the language as to the indemnity lands being the same as in the grant to the appellant, and the general facts being the same as here. The plaintiff was the grantee of the railroad company, and the action was brought to cancel defendants' patent, and to obtain possession. We should like to quote largely from the opinion, but must content ourselves with a single sentence: "After a consideration of the numerous cases cited in the briefs, we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement."

In view of the conclusion reached upon the first ground of demurrer, it is not necessary to consider either the second or third ground. I advise that the judgment appealed from be affirmed.

We concur: BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(6 Cal. Unrep. 284)

LOTHROP v. GOLDEN et al. (Sac. 386.)

(Supreme Court of California. May 25, 1899.)

TROVER AND CONVERSION—ACTIONS—PARTIES—MISJOINDER—PLEADING—EXEMPLARY DAMAGES—EVIDENCE—INSTRUCTIONS—APPEAL—REVERSIBLE ERROR.

1. A judgment will not be reversed for alleged ambiguity in the complaint, where it appears from defendant's answer that he was not thereby misled to his prejudice.

2. Where a complaint does not show that a party is improperly joined as a defendant, his remedy is by answer, and not by a demurrer for misjoinder of parties.

3. Where, in an action for conversion, plaintiff claims damages for malicious acts of defendants in tearing down fences and buildings where the property was situated, there is not a misjoinder of causes of action; complainant's intention being to bring the case within Civ. Code, § 3294, allowing exemplary damages where defendant has been guilty of oppression and malice.

4. In an action for the conversion of grain, there was evidence that it was forcibly taken in the absence of the owner, and over the protest of his wife; that defendants were twice arrested to prevent their taking it, but they obtained their release and returned to the premises. *Held*, that a verdict allowing plaintiff damages for grain taken, for time and money expended in pursuit thereof, and for the malicious taking, was proper, there being sufficient evidence as to the amounts of such damages given.

5. In an action for conversion, it is not error to deny defendant an instruction as to the doctrine of commingling of goods, where there was no evidence thereof.

6. In an action for the conversion of grain, a part of which plaintiff alleged to have been recovered, and as to which he sought relief only for money expended in pursuit, an instruction that the jury, in estimating the damages, should find the value of the grain at the time of the taking, is not erroneous, as misleading them into believing that damages for the value of the grain returned could be recovered.

7. In an action for conversion, an erroneous instruction authorizing the jury to award exemplary damages if the taking was unlawful is not reversible error where the jury specially found damages for the malicious taking of the property.

8. Plaintiff in an action for the conversion of grain alleged that a part had been returned prior to the suit, but sought, under Civ. Code, § 3336, to recover compensation for the time and money expended in its pursuit. *Held*, that the actions were not improperly joined, since all the grain converted was taken at the same time, and the acts complained of constituted one and the same wrong.

9. Error, in an action for conversion, where plaintiff claimed damages for malicious acts of defendant in tearing down his fences to obtain access to the property, in an instruction that if defendants did such acts they were trespassers,

and were liable therefor to plaintiff, is harmless, where the special verdict awarded no damages for trespass.

Commissioners' decision. Department 2. Appeal from superior court, Glenn county.

Action for conversion by M. H. Lothrop against M. Golden and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Ben. F. Geis and H. M. Alberry, for appellants. Chas. L. Donohoe, for respondent.

CHIPMAN, C. Action for the conversion of certain 585 sacks of barley, and for damages. A fourth amended complaint alleges the malicious, forcible, and unlawful taking from plaintiff by defendants, and the conversion, of certain 1,388 sacks of whole barley about July 26, 1894, of which plaintiff recovered 803 sacks before this action was commenced. Damage is claimed of $600 and interest for the value of 585 sacks of barley not recovered, "and one hundred dollars damages by reason of the malicious, forcible, oppressive, and unlawful acts of defendants towards plaintiff." It is alleged that "plaintiff has been damaged, in time and money properly expended in the pursuit of said eight hundred and three sacks of barley, in the sum of two hundred dollars." It is also alleged that plaintiff has been damaged, in time and money properly expended in the pursuit of said 585 sacks of barley, in the sum of $100. The prayer is for judgment against defendants for the sum of $1,000, and for costs of suit. The complaint is verified. Defendants demurred on several grounds: (1) Insufficiency of facts; (2) several causes of action improperly united; (3) uncertainty and ambiguity; (4) misjoinder of parties defendant. The demurrer was overruled, and defendants answered, specifically denying the material allegations of the complaint. For further answer it is alleged that the barley, the subject of the action, was grown upon land belonging to and cultivated by one T. J. Kirkpatrick, who had theretofore mortgaged the crops grown and to be grown thereon to defendants, other than O'Brien, to secure the payment of the sum of $1,182.68 owing to defendants Hochheimer & Co. by said Kirkpatrick; that the barley in question was grown upon these mortgaged premises, and was a part of the crop subject to said mortgage, and that said mortgagees were entitled to the possession thereof; that defendant O'Brien was in the employ of and acting for said Hochheimer & Co., and under their direction, during all the times mentioned in the complaint. It is further alleged in the answer that plaintiff claims the barley in question under a pretended purchase from said Kirkpatrick after the execution of said mortgage, and that said sale or transfer was not accompanied by an immediate delivery of the barley, nor followed by an actual and continued change of possession thereof; that no consideration was paid therefor, and said sale was made to defraud the creditors of said Kirkpatrick, and especially defendants, and was fraudulent and void. The cause was tried by a jury, and plaintiff had a verdict for $91.33 "for the value and the interest on the value of ninety-seven sacks of barley," and $163.37 "as money and compensation for time expended in the pursuit of the eight hundred and three sacks of barley," and $34.20 "for money and time properly expended in the pursuit of ninety-seven, number of sacks of barley not returned to plaintiff," and $33.75 "for the malicious taking of the barley." Judgment was accordingly entered for $322.65, the amount of said verdict. The appeal is from the judgment, and from an order denying defendants' motion for a new trial.

1. The complaint is sufficient upon general demurrer. As to the alleged ambiguity and uncertainty, the rule as laid down by this court in numerous cases was stated in the recent case of Hardware Co. v. Brownstone (S. F. 870) 56 Pac. 468, and need not be repeated here. An examination of defendants' answer, not to mention the evidence at the trial, clearly shows that defendants were not misled to their prejudice by the alleged ambiguity or uncertainty in the complaint, in which case the judgment will not be reversed. If O'Brien was not a party to the alleged unlawful taking and conversion of the property, his remedy was by answer, and not by demurrer for misjoinder of parties. Nothing in the complaint shows that he was improperly joined as defendant. Plaintiff had the right to join all who participated in the alleged taking and conversion. Nor do we think that the complaint necessarily discloses a misjoinder of causes of action. The claim of misjoinder is based upon the following allegations: "And by reason of the malicious, forcible, oppressive, and unlawful acts of defendants towards plaintiff, plaintiff has been damaged in the sum of one hundred dollars," and allegations charging defendants with "tearing down fences and buildings where the barley was situated," and having "maliciously, forcibly, and unlawfully entered upon the premises of plaintiff." These allegations all point to the gravamen of the complaint, which was that defendants "took and carried away said thirteen hundred and eighty-eight sacks of whole barley, and converted and disposed of the same to their own use and benefit." The evident purpose of the pleader was to bring the case within section 3294, Civ. Code, which allows exemplary damages "where the defendant has been guilty of oppression, fraud or malice, actual or presumed," etc. There may be some ambiguity and uncertainty in the pleading as to whether the malice and force alleged related exclusively to the manner of taking the barley, but we have seen that defendants were not for this reason misled to their prejudice.

2. It is claimed that the evidence does not

sustain the verdict. To determine the question we cannot look where the preponderance of the evidence lies, nor can we accept or reject the evidence of this or that witness, as the jury had the right to do. We can only search to find sufficient evidence to support the verdict upon the questions of fact submitted to the jury. It appears that on August 26, 1893, said T. J. Kirkpatrick was farming sections 1, 2, 11, 12, and 24, township 22 N., range 4 W., in Glenn county. Being indebted to defendants Hochheimer & Co. in the sum of $1,182.68, he gave them a crop mortgage on the crops growing and to be grown on sections 11 and 24 for the crop season of 1893 and 1894. The barley in question was harvested in July, 1894. Plaintiff testified that about July 4, 1894, he entered upon negotiations with Kirkpatrick, who was his father-in-law, for the lease of the land being farmed by the latter; and plaintiff began moving his furniture to the place, and his family occupied the premises on the 9th. His father-in-law and family still occupied the house with plaintiff, and continued to do so. He testified further that the bargain for the lease was made early in July, but was not put in writing until July 24th. He had been in possession before that date, but took possession under the written lease July 24th. The lease does not appear in evidence. On that date Kirkpatrick made a written bill of sale to plaintiff of some farming implements, 900 sacks of barley, and 60 tons of hay in barn, "all situated on the ranch known as the 'Kirkpatrick Ranch,' near Orland, Glenn county" (the land above described). He gave two notes to Kirkpatrick,—one for the lease and one for the personal property,—and these notes, he testified, he afterwards paid. It appears from the evidence of E. C. Kirkpatrick, son of T. J., that he (witness) hauled the barley in question from the field to the granaries on the ranch, whence it was taken by defendants; that he hauled 1,518 sacks to these bins, part of which was put in loose and part in sacks; that he assisted in hauling 130 or 140 sacks of this barley to Chico on July 23d. When this barley was taken out he "nailed the granaries up," and there remained in the bins all the barley, less 130 sacks. When he returned from Chico in the afternoon of the 24th, the barley was in the same condition as he left it. The dwelling and granaries were on section 12. He testified that sections 11 and 24 (the mortgaged land) produced 512 sacks, and the other sections 1,518 sacks; that he delivered all the barley grown on sections 11 and 24 to Hochheimer & Co., and there were but 512 sacks of it; that there was no barley hauled to the granaries from sections 11 and 24. The evidence tends to show that under the personal direction of defendant Golden, one of the members of Hochheimer & Co., defendants went with several large freighting teams to where this barley was stored, on July 25th, with the purpose of hauling it away, and while attempting to do so the wife of plaintiff—plaintiff being absent at Sacramento—told Golden the barley belonged to plaintiff, and forbade his taking it. Upon his persisting, which he did by causing the loose barley to be sacked and the wagons loaded, plaintiff's wife secured warrants for the arrest of the entire party, and they were arrested. She had the barley put back in the granaries, and the teams taken out to the public road. The party, however, were all released, and returned to remove the barley, and were a second time arrested, and a second time returned, and this time hauled away the barley. The evidence tended to show that 803 sacks were delivered to Hochheimer & Co. at their Orland warehouse, and 271 sacks were delivered to them at Greenwood Switch, or at their Germantown warehouse, of all of which plaintiff succeeded in recovering 803 sacks, and no more. The jury gave a verdict for 97 sacks of barley, which, added to the 803 previously recovered, make 900 sacks, the number mentioned in the bill of sale. There was ample evidence to show at least this many sacks taken by defendants in addition to the 803 sacks. The jury found plaintiff entitled to $163.37 expended in the pursuit of the 803 sacks. Plaintiff testified upon this point that he paid out $15 for keeper's fees in Orland; $40 for the rent of a building to which he moved the barley, and $15 for cost of moving it; $50 to haul the barley back to the ranch; and for seven different trips to Willows and expenses, $30. He testified that he spent 10 or 15 days "in looking up this eight hundred and three sacks of barley," and he valued his time and expenses at $5 per day. The jury allowed $34.20 for time and money expended in the pursuit of the 585 sacks, for 97 sacks of which the jury gave a verdict. Plaintiff testified that he spent $20 in money and 15 or 20 days' time in searching for the 585 sacks claimed, and that it was worth $1 a day for a man to take his place and drive a team. We cannot say that the jury were not justified in the conclusion they reached as to these items. The item of $33.75 "for the malicious taking of the barley" finds sufficient support in the evidence, and is authorized under section 3294, Civ. Code. The evidence shows that the barley was taken with considerable display of violence, in the absence of the one who claimed to own it, and against the protest of his wife; that the defendants were twice arrested to prevent their taking the barley, and as often obtained their release and returned to the premises of plaintiff, and finally by force obtained access to the premises and granaries, and worked nearly the entire night of the 26th of July to accomplish their purpose. It may be that defendants thought they had a right to the barley. But they do not justify under any legal process, and were not warranted by any claim of title through their crop mortgage in resorting to so extraordinary a course to obtain possession.

3. Defendants introduced evidence tending

to show that sections 11 and 24 produced more barley than 512 sacks, as testified to by E. C. Kirkpatrick, and it is claimed that this evidence tended to show that some of the mortgaged crop was hauled to the granaries; and was mingled with plaintiff's barley, and hence was involved the rule as to mingled goods, as to which defendants asked several instructions, which were refused. There was no evidence which, as we view it, in any way tended to show that any of the mortgaged barley was removed to the granaries, and the direct evidence of Kirkpatrick was that none went there. As we regard defendants' evidence, it tended to contradict Kirkpatrick, who testified that all the mortgaged barley was delivered to defendants, but it did not tend to show that any of it was hauled to the granaries, and therefore it was not error to refuse instructions as to the doctrine relating to commingling goods. There was no evidence calling for instructions upon that subject.

4. The correctness of several instructions given by the court is challenged.

(a) The court instructed the jury as follows: "In estimating the damages sustained by the plaintiff, you will find the value of the property at the time of the conversion as shown by the evidence," etc. The objection is that, using the term "the property," the instruction included "property not sued for as well as property sued for." We suppose defendants refer to the 803 sacks of barley recovered before this suit was brought. The action was for the conversion of all the barley, a part of which had already been found and taken back. As to this latter the only relief sought was for money expended in its pursuit. The instruction could not have misled the jury into believing that a verdict for the value of any part of the 803 sacks could be recovered.

(b) The jury were instructed that if they should find from the evidence that the barley was taken from plaintiff by defendants, "and that such taking was malicious and unlawful and fraudulent, or was malicious or unlawful or fraudulent, that you may find for the plaintiff damages * * * by way of punishment to the defendants for their malicious and unlawful acts." The objection is that the jury were told they might award exemplary damages if they found the taking to have been unlawful. We think the instruction was erroneous. Yerian v. Linkletter, 80 Cal. 135, 22 Pac. 70. But the jury found specially that plaintiff was damaged "in the sum of thirty-three dollars and seventy-five cents for the malicious taking of the barley." It thus appears that the instruction, though erroneous, did not mislead the jury, and was without injury. There was evidence justifying the verdict that the taking was malicious.

(c) An instruction was given that plaintiff was entitled to recover for time and money expended in the pursuit of the 803 sacks of barley. The objection is that this barley had already been recovered, and plaintiff could not have damage in this action for its pursuit. Plaintiff claims under section 3336, Civ. Code, which provides that "the detriment caused by the wrongful conversion of personal property is presumed to be: * * * (2) A fair compensation for the time and money properly expended in pursuit of the property." The complaint shows that defendants originally took this 803 sacks with the other barley, and, although the complaint also shows that plaintiff recovered the 803 sacks before this suit was brought, it does allege "that plaintiff has been damaged in time and money properly expended in the pursuit of said eight hundred and three sacks of barley." We can perceive no good reason why plaintiff should be put to his separate action in order to recover this damage. If he had not succeeded in getting possession of this portion of the barley, and had included it in the complaint as converted, he clearly could have recovered the damage given by the statute. All the barley was taken at the same time, and the acts complained of constituted one and the same wrong. The damage to plaintiff in time and money expended in pursuit of the property grew out of this wrong. The law gave him his action to recover the property or its value, and also damage for money expended in its pursuit. The remedy to recover possession or the value did not become necessary as to the 803 sacks, but it did become necessary as to the time and money expended to get possession. For this the law affords a remedy, and we think, under the circumstances of this case, it was proper in this action. The reasoning in Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656, we think, supports this view.

(d) Instruction 7, in effect, declares that, if defendants did the acts complained of and mentioned in the instruction (coming upon the premises, and tearing down fences and tearing down the doors of the granaries), "then they and their agents were mere trespassers, and for such acts are liable to plaintiff in damages." This was erroneous, and, if there had been a general verdict, would call for a reversal of the judgment. But the verdict is special, and clearly shows that no damages were awarded for trespass, and hence defendants were not injured.

(e) Instruction 10 is that defendants admitted in their answer the taking of 1,388 sacks of barley from plaintiff, and instruction 11 is that the answer admitted taking 1,074 sacks of barley in question on July 26th, and that 803 sacks were recovered by plaintiff, and 271 were never returned, and that, if the jury find that plaintiff was the owner of the 271 sacks, they should find in favor of plaintiff for the value thereof. The answer admits the value of the barley to be $1,100, and that defendants took from plaintiff 1,074 sacks. By failure to deny, defendants admitted the return of 803 sacks, and that there were 271 sacks not returned. Conceding that it was not admitted that they took 1,388 sacks, and that the instruction was unwarranted, still the admission covers 174 sacks more than the jury found were not recovered, and defendants were not injured by the instruction.

Error is claimed as resulting from many other instructions given by the court, but it would greatly prolong this opinion to notice them in detail. It may be remarked that the jury, by its special verdict, cured many of the errors complained of, and others involve questions already noticed. We have discovered no error which could have resulted in injury to defendants. Discovering no reversible error, it is advised that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

124 Cal. 591.

CULL v. SAN FRANCISCO & FRESNO LAND CO. (S. F. 1,107.)

(Supreme Court of California. June 1, 1899.)

PLEADING—BREACH OF CONTRACT—VALUE OF SERVICES.

A plaintiff cannot recover under a complaint which alleges that defendant employed him to do certain work, the alleged value of which he seeks to recover, where the evidence shows that the work was done by him pursuant to an agreement to farm defendant's land on shares, and that defendant, after he had performed the work, refused to carry out the agreement.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county.

Action by S. T. Cull against the San Francisco & Fresno Land Company. From a judgment in favor of plaintiff, defendant appealed. Reversed.

H. H. Welsh, for appellant. Geo. E. Church and W. D. Tupper, for respondent.

BRITT, C. Plaintiff alleged in his complaint that defendant employed him to summer fallow certain land, between 400 and 500 acres in area, and to plow and sow in wheat another parcel of 80 acres; both tracts being the property of defendant. He prayed judgment for the alleged value of such services. By its answer, defendant denied that plaintiff did any of said work under its employment.

As nearly as we can ascertain from the evidence in the record the following facts appeared at the trial, without conflict: For several years next prior to and including the cropping season of 1895–96 plaintiff farmed, "on shares," it seems, a tract of some 2,000 acres of land owned by defendant, which included the parcel of 80 acres last mentioned in the complaint. In February, 1896, he entered into an agreement with defendant whereby he undertook to summer fallow the 400 acres and upward, first described in his complaint, lying outside of the tract he had previously farmed, and defendant agreed to advance certain cash towards paying the wages of men and for the feed of teams to be engaged in the work. Other conditions of this arrangement were stated in the testimony of plaintiff himself as follows: "I was to do the summer fallowing for my own benefit, and they [meaning the defendant] were to advance me the money to do that summer fallowing. I was to give them one-fifth of the crop. I did this summer fallowing for my own benefit, and with the expectation of receiving my pay entirely from the crop [referring to the crop which he expected to plant on the fallowed ground in the fall of 1896]." He further testified that he accordingly fallowed the outside land, completing the work in April, 1896; that the defendant advanced for the expenses thereof certain cash, which subsequently he repaid; that the plowing and seeding of the 80-acre parcel was done by him in September, 1896, "under a renting, * * * providing I farmed the land and planted the seed, I was to receive a certain part of the crop, * * * three-fourths, and one-fourth would be the property of" the defendant. It further appeared that in October following plaintiff and defendant had some dispute, and in consequence plaintiff declared his intention to abandon the lands, or the greater part thereof, he had previously farmed, but refused to surrender possession, except on terms to which defendant would not agree. He claimed, however, the right to retain and seed the summer-fallowed land in any event. Defendant then brought an action against him, and in December, 1896, obtained judgment therein for possession of all the land, including the fallowing of the previous spring. On January 12, 1897, this action was begun. Plaintiff recovered a verdict and judgment, and defendant appeals.

The cause of action alleged in the complaint was not sustained by any evidence. Allowing that the action brought by defendant to recover possession of all the land, and the judgment obtained in that case, was a violation of defendant's agreement relative to the summer fallowing, yet what was the obligation violated? At most, only a contract for the cropping of land on shares where the owner agreed to contribute to the joint adventure the use of his land. There is no element of a contract of employment in it. Defendant had no direction of the time or the manner or the means of doing the work, it advanced some money to plaintiff in furtherance of the mutual design, but this is shown to have been merely a loan, and is a false quantity in the case. It was not defendant's crop—at least not defendant's crop solely—which was to be grown on the fallowed land. In plaintiff's view, he fallowed the ground "for his own benefit." The subsequent wrongful refusal of defendant to allow him to proceed with the contract—if there was such refusal—gave him the right to recover the value of the contract at the time of breach, which might have been more or less than the value of the labor he had performed. As remarked in a case of the same character, "If the plaintiff was not a servant or employé of the defendant by the terms of the contract, he does not become such by the breach thereof." Bowers v. Graves & Vinton Co., 8 S. D. 385, 66 N. W. 931. To somewhat similar effect is Walls v. Preston, 25 Cal. 59. See, also, on the subject of damages, Taylor v. Bradley, 39 N. Y. 129; Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801.

Plaintiff's case is in no better position as concerns the 80 acres which he plowed and seeded,—perhaps not as good. He seems to have done this work for his own purposes either as a tenant of the land or in expectation of renewing his previous tenancy, and afterwards declined to proceed on that footing. Whether this declination was with or without sufficient cause, a matter which cannot be determined from the record, there is yet no evidence from which to infer a contract of employment between him and defendant for the doing of the work. The judgment and order denying a new trial should be reversed, with leave to plaintiff to amend his complaint, should he be so advised.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed, with leave to plaintiff to amend his complaint, if he be so advised.

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124 Cal. 442

NICHOLSON v. TARPEY et al. (S. F. 329.)

(Supreme Court of California. May 19, 1899.)

REFORMATION OF INSTRUMENTS—LOST DEEDS—PROOF OF CONTENTS—DECLARATIONS OF GRANTOR—FRAUD—LIMITATIONS.

1. In a suit for specific performance of a land contract, involving the reformation of the description in a lost deed, its contents cannot be shown by declarations of the grantor made after execution, as to what land he had conveyed.

2. A grantee sent his wife with a deed to a lawyer to examine it carefully, and ascertain what land was described in it. The lawyer testified that the wife showed him the deed, saying that there was a controversy between her husband and the grantor as to certain land, and the deed contained a description of it, and that they had it surveyed, and there was less than stated therein. The grantee had returned the land to the tax assessor according to the survey. *Held*, that the grantee could not claim, in a suit to reform the deed for fraud, that he did not learn that the deed conveyed less land than stated therein until just before the suit, and thus avoid the bar of limitations.

3. The fact that one seeking to enforce specific performance of a land contract which included more land than was conveyed has been in continuous possession of the land does not prevent the bar of limitations.

Department 1. Appeal from superior court, Monterey county.

Suit by Murdock Nicholson against Winifred C. Tarpey and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

D. M. Delmas, for appellants. H. V. Morehouse and H. D. Tuttle, for respondent.

VAN DYKE, J. This is the third appeal of this case. The undisputed facts are these: In 1867, Matthew Tarpey was in possession and claimed to be the owner of the Carneros rancho, in Monterey county, near the town of Watsonville, consisting of 4,400 acres. Murdock Nicholson was at the time living in

San Francisco. In May or June of that year Nicholson came to Watsonville with a view of finding and buying some desirable piece of land. After some negotiations, an understanding was reached between the parties, whereby Nicholson was to purchase for $1,500 a piece of the rancho, which both parties assumed to contain about 400 acres. The conveyance was to be executed upon completion of the payment. The tract lay in the northeast corner of the rancho, fronting on the south side of the public road leading from Watsonville to San Juan. About 150 acres, more or less, adjoining the road, was susceptible to cultivation. After the agreement to purchase, Nicholson returned to San Francisco, leaving the land purchased in charge of Tarpey, who agreed to take care of it and see to the payment of the taxes. Under this arrangement, Tarpey for four years, from 1867 to 1871, looked after the property. He yearly returned to the assessor 400 acres of the land to be listed to Nicholson, and 4,000 acres, consisting of the remainder of the rancho, to himself. In 1868, Nicholson having completed the stipulated payment, Tarpey delivered to him a deed, which he represented to be in conformity with the agreement, and which was accepted as such by Nicholson. The instrument was at once sent to Monterey county, where it was recorded. In February, 1872, Nicholson, with his family, moved down and built a home upon the arable tract adjoining the public road. He at once caused a survey to be made, and ascertained the location of the lines of his deed upon the ground, and found that the description, instead of covering 400 acres, as supposed, included something less than 200. Tarpey owned and was occupying the land all around him, and the relation of the two parties seems to have remained friendly as before. Immediately after making the discovery that the land fell short of what was supposed, Nicholson gave in 200 acres for the purpose of assessment, instead of 400 theretofore given by his agent, Tarpey, and thereafter he gave in 200 acres as the land belonging to him. In 1872, when Nicholson first gave in the land belonging to him as 200 acres, it seems to have occurred to the assessor that the 200 additional acres theretofore assessed to him should be put on Tarpey's assessment, as the latter was still the owner of the rest of the rancho. He accordingly called Tarpey's attention to the matter, who replied: "Well, the land has been surveyed, and, of course, you can put that on my assessment,—the two hundred acres. You can add it to my assessment." Accordingly, from that time on, Nicholson was assessed for 200 acres, and Tarpey for 4,200 acres. Tarpey died in 1873. Thenceforth, until the spring of 1879, the land outside the tract covered by the deed "remained uncleared, uncultivated, unimproved, and uninclosed, * * * open to the cattle grazing on the adjoining lands, and the cattle from the adjoining lands, including the cattle of Matthew Tarpey during his lifetime, and after his death of the defendants in this action, frequently roamed and grazed upon the said uninclosed portion." In 1879, Nicholson fenced in the land outside of his deed, and which is claimed in the action to have been included in this agreement of purchase, and in March, 1880, brought this action against the widow and children of Matthew Tarpey. The action is for specific performance of the alleged agreement between the plaintiff and Matthew Tarpey, and which it is alleged the deed of conveyance of 1868 failed to fully perform, in reference to the quantity of the land to be conveyed.

On the first appeal (70 Cal. 608, 12 Pac. 778), the judgment was reversed on the ground of error in the admission of testimony on the part of the plaintiff as to what he told the assessor when he gave in the property for assessment. On the second appeal (89 Cal. 617, 26 Pac. 1101), the judgment on the second trial was reversed on the ground also of error in the admission of testimony in reference to a conversation between the parties at the time of entering into the agreement, which was offered and received for the purpose of proving the contents of said agreement. On this appeal, the first point made by the appellant is that the court below erred in the admission of testimony which seems to have been offered for a similar purpose to that referred to on the second appeal. On the trial the plaintiff asked the witness Gilkey the following: "Q. Did you in June, 1867, have a conversation with Matthew Tarpey, in which he said he had made a sale of the land in controversy to the plaintiff? and, if so, state what that conversation was." After objection being properly made and noted on the part of the defendants, plaintiff's counsel stated that he offered to prove by the witness, as tending to prove the agreement between Nicholson and Tarpey, as set out in the complaint, that he had a conversation with Tarpey in June, 1867, in which Tarpey stated to him that he had sold the land to Nicholson, pointing out the boundaries substantially as stated in the complaint. Thereupon the court overruled defendants' objection, and admitted the testimony. The witness said that he was talking to Tarpey about buying a piece of land, and Tarpey replied: "I have sold that piece of land already to a man in San Francisco,"—describing the land, and saying that it was some 600 or 800 acres, but that the greater part of it was not worth anything. Thereupon the defendants moved to strike out the testimony upon the grounds stated in the objection, and also that it appeared from the answer that it would shed no light whatever upon the contents of the writing between Nicholson and Tarpey, referred to in the complaint, nor upon the terms of the agreement for the sale of the land mentioned in the complaint. The motion was denied, and exception duly taken. On the former appeal this court used the following language in reference to the testimony then offered, which was held to be erroneously admitted: "The material question was as to the language of the written contract. Whether lost or not, there could be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms. Code Civ. Proc. § 1856. The Code expressly provides, in case of lost instruments, for oral evidence of its contents. Code Civ. Proc. § 1855; Id. § 1870, subd. 14. Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In U. S. v. Britton, 2 Mason, 464, Fed. Cas. No. 14,650, Justice Story remarked: 'If no such copy exists, the contents may be proved by parol evidence by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents.'" The same rule which declares incompetent the statements of one of the contracting parties made before or contemporaneously with the execution of the written agreement equally declares incompetent his declarations made after such execution. The reason in both cases is the same. In neither are the declarations evidence of the contents of the paper, the only thing which, the paper lost or at hand, the law allows to be proven. The rule that no contract for the sale of land is valid unless embodied in a writing signed by the party to be charged has, since its promulgation in the reign of Charles II., been adopted and embodied in the jurisprudence of every English speaking community. Greenleaf says: "All oral testimony of a previous colloquium between the parties, or of conversation or declaration at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." 1 Greenl. Ev. § 275. In Edwards v. Noyes, 65 N. Y. 127, it is said: "Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed, with the formalities required by law. It should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices, which it was the object of the statute of frauds to prevent, would be encouraged." The testimony of the witness Gilkey did not purport to give the contents of the written agreement, and did not show that he had ever seen the written agreement between Tarpey and the plaintiff, or read it or heard it read. It is simply the expression of Tarpey that he had sold a part of his rancho to a man in San Francisco, without even giving the name of the man to whom he had sold it. Under well-settled rules, the testimony was clearly inadmissible.

Appellants also rely upon the statute of limitations as a bar to the action. The gravamen of the complaint is the fraud alleged to have been practiced by Tarpey upon the plaintiff in 1868 by imposing upon him, by means of premeditated deception, a deed which was intended and accepted as a fulfillment of the contract, but which in fact did not cover one-quarter of the land therein described. As the action was not brought until 12 years afterwards (1880), the plaintiff seeks to avoid the plea of the statute of limitations by averring that he did not discover the fraud until just before the beginning of the action. He says in his complaint "that the plaintiff was wholly unsuspicious of any attempt or design on the part of the said Matthew Tarpey to deceive or defraud him, and implicitly relied on his statements and representations, and, he himself being unable to read said deed, the same was laid away and unthought of until said month of April, 1879"; and that "in the latter part of said month of April, 1879, or in the following month of May, he was for the first time informed and advised that his said deed from the said Matthew Tarpey did not include or embrace within its calls the whole of the lands * * * which the said Matthew Tarpey had agreed to convey to him, * * * but that the same included or described only 191.14 acres; * * * that up to that time last aforesaid he had never thought, believed, or suspected that said deed described a less, other, or different parcel of land from that herein first above described." These averments are made by the plaintiff under oath, yet in his testimony on the trial he is compelled to admit that in 1873 he directed his wife to "take the deed to Mr. Craig's [a lawyer's] office," and adds: "I wanted him to look if this land was specified in the deed that I have got from Tarpey. I wanted my wife to ascertain what land was described within the boundaries of my deed,—to examine it carefully. My wife could not find Mr. Craig, so she went to Mr. Barham's office." And he further admits, on such examination in court, that after he came to live upon the land, in February, 1872, he gave in the property to the assessor for assessment, and the assessor's testimony and the assessment itself shows that he gave in 200 acres, and no more, as already shown. Mr. Barham, to whom, by direction of the plaintiff, his wife went for advice, testified that, after showing him the deed, she said "there was a controversy between herself or her husband and Mr. Tarpey about certain land, and that paper contained a description * * * of the land." She stated during the course of the conversation that Mr. Tarpey had sold them or conveyed to them 200 acres of land. The assessor testifies that the wife told him that they "had it [the land described in the deed] surveyed, and there was less than 200 acres." In fact, the court is obliged to find from the testimony at the trial, in the face of the averments in the complaint sworn to by the plaintiff, that "as early as the beginning of the year

1872 said Nicholson ascertained and knew that the description contained in said conveyance did not include all the land described in said agreement, and did not comprise more than 200 acres thereof, and knew the location on the ground of the lines and boundaries described in said conveyance." It is clear, therefore, that the plaintiff knew as well, in 1872 or 1873, all of the alleged facts and circumstances connected with the transaction upon which the alleged fraud and misrepresentation are based, as at the time of beginning the suit.

It is claimed, however, on the part of the respondent, that the statute of limitations is not properly pleaded. The following is the portion of the answer containing the pleading: "And these defendants aver and say that the said pretended cause and causes of action of the plaintiff are each and all thereof barred by section 337, c. 3, tit. 2, pt. 2, Code Civ. Proc. Cal., and also by section 343 of same chapter and title and part of said Code of Civil Procedure, and also by section 319 of chapter 2 of said title and Code." Our Code of Civil Procedure changes the old rule in reference to pleading the statute of limitations. It is as follows: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section ——— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." Code Civ. Proc. § 458. The plea of the statute in this case is according to the requirements of the Code, and is sufficient. Hageley v. Hageley, 68 Cal. 348, 9 Pac. 305; Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

But inasmuch as the court found that the plaintiff had, since 1871, exclusively occupied and possessed the premises described in the written agreement, it is contended by the respondent that the statute of limitations does not apply. This, however, is not an action based upon the right of possession, or to recover possession, but its purpose is to obtain the legal title to the premises in controversy by enforcing the alleged written agreement between Tarpey and the plaintiff,—in other words, the specific performance of said alleged contract; and therefore the possession of the plaintiff, if it were a fact, would not avail to defeat the bar of the statute in the present action. This case is one, as shown by the testimony and all the surrounding circumstances, where it is justifiable to invoke and apply the bar of the statute of limitations, if ever. Under the old rule, the testimony of an interested party was not received, but now all parties, with certain exceptions, are allowed to give testimony, the credibility of such testimony to be left to the court or jury. One of the excepted cases is that "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person," cannot be witnesses. Code Civ. Proc. § 1880, subd. 3. To escape this wholesome provision of the law, the action in this case is not against the estate of the deceased, Tarpey, but it is against those who succeeded to his title and estate after the settlement and distribution of said estate. It gives the plaintiff full sweep to testify,—and the character of his testimony has already been noticed,—whereas the other party to the contract had been dead some seven years before the action was commenced.

The plea of the statute set up in the answer presented an issue upon which the court should have found, and the failure to so find is assigned as error, and now urged by the appellant. As already stated, the court finds that since 1871 the plaintiff has been in the actual and exclusive possession, adverse to all the world, of the premises in controversy, whereas the record shows that "it was proved by competent testimony that the piece of land stated in the complaint herein to have been described in the agreement alleged in the complaint to have been executed in June, 1867," was located as already stated, and that, outside of the inclosed part of about 200 acres, the rest was "rough, uncleared, uncultivated, and unimproved, consisting mostly of dense chapparel hills, with a few grassy canyons, and a little timber; that this part of the land remained uncleared, uncultivated, unimproved, and uninclosed up to March, 1879; that during the whole of this time, to wit, from 1867 to 1879, this uninclosed portion of said tract was open to the cattle grazing on adjoining lands, and the cattle from the adjoining lands, including the cattle of Matthew Tarpey during his life, and after his death of the defendants in this action, frequently roamed over and grazed upon the said uninclosed portion; that no other use was made of this uninclosed portion, except for grazing purposes, except that the plaintiff cut wood therefrom." The court finds that Tarpey was the owner in fee of the Rancho las Carneros at the time of entering into the contract. The pleadings admitted and conceded that Tarpey was the owner of only seven-eighths of the rancho, and the respondents' counsel concedes that these admissions are according to the fact, and that the finding in this respect is erroneous; but he suggests that, if the judgment is sustained in all other particulars, the court below be directed to amend its decree accordingly, instead of ordering a new trial. For the reasons, however, given in reference to other parts of the case, the judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; HARBISON, J.

(124 Cal. 546)

LAMPE v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 982.)[1]

(Supreme Court of California. May 31, 1899.)

CITIES—STREET GRADING—SURFACE WATER—DAMAGES.

A city is not liable for damages caused by the obstruction of the flow of surface waters from land abutting on a street, occasioned by the necessary and lawful grading of the street.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles Lampe against the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

T. M. Osmont and Frank J. French, for appellant. Harry T. Cresswell, for respondent.

COOPER, C. Action to recover damages from defendant. Demurrer sustained to complaint. Plaintiff declined to amend, and judgment was entered for defendant. This appeal is from the judgment. The complaint, after alleging that defendant is a municipal corporation, states that defendant in accordance with law established the official grade of Sanchez street, between Liberty and Twenty-First streets, and thereafter proceeded to fill in and raise said Sanchez street about five feet above its natural and original grade, and about five feet above the natural level of plaintiff's lot, thus causing an embankment about five feet high in front of the lot of plaintiff. It is stated in said complaint: "That, by reason of said embankment so raised in said street, the natural flow of the surface and other waters from plaintiff's lot is impeded, and the waters from the premises above and adjoining plaintiff's said premises flow upon plaintiff's aforesaid lot; that by reason thereof the basement of plaintiff's said dwelling has become and remains damp and unwholesome, and the water does not flow off as freely as it had done prior to the grading of said street, but accumulates on plaintiff's said lot, and the healthfulness and comfort of said house and premises as a dwelling has been greatly impaired, to plaintiff's great injury and damage." The complaint further alleges damage by reason of a sewer and foul odors therefrom. The demurrer was upon three grounds: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that it is ambiguous, uncertain, etc.; and, third, that there is a misjoinder of causes of action united in the same count, and not separately stated. Counsel for appellant in their brief say that no damage is claimed and no relief is asked on account of the sewer, and that the allegations of the complaint as to the sewer may be treated as surplusage. We will, in discussing the case, adopt this view, and thus the only question left is as to whether or not the complaint states facts sufficient to constitute a cause of action. The portion of the complaint before quoted is the material part. As we understand it, damages are claimed because the grading of the street, which is the property of defendant, prevents the surface water from flowing off the lands of the plaintiff and onto the lands of defendant, as it had been wont to flow. The question is as to whether or not defendant is liable for damages caused by the obstruction of the flow of surface waters from the lands of plaintiff, occasioned by the necessary and lawful grading of defendant's street in front of plaintiff's said lands. Upon the solution of this question depends the result as to whether or not this judgment shall be affirmed.

In 2 Dill. Mun. Corp. § 1039, the rule is stated: "As to surface water, quite different principles apply. This the law very largely regards (as Lord Tenterden in an analogous case phrased it) as a common enemy, which every proprietor may fight or get rid of as best he may. The reports contain many instances in which it has been sought to make municipal corporations liable for damages caused in various ways by surface water to private property. Reference will first be made to cases in which the work of grading or improving the streets has been the cause of the injury. Where the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, it falls within the principles already discussed, and there is no implied liability therefor." Section 1042: "We agree to the doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street." The authority quoted is supported by a long line of decisions both in this country and in England. Gould, Waters, §§ 263, 269; Clark v. City of Wilmington, 5 Har. (Del.) 243; Waters v. Village of Bay View, 61 Wis. 642, 21 N. W. 811; Lynch v. Mayor, etc., 76 N. Y. 60. It was expressly so held by this court in Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798; Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 467, 37 Pac. 375. In the latter case it is said: "The doctrine of the civil law, in reference to a servitude in the lower tenement in favor of the upper or dominant tenement, for the flow of surface water, has no application to lots held in cities and towns, where changes and alterations in the surface were essential to the enjoyment of such lots, and this rule has been very generally adopted in this country."

There is in some of the books an apparent exception to the general rule in that class of cases where the surface water, owing to the conformation of the country, has found for itself a definite channel in which it is accustomed to flow, in which class of cases it is said that the municipal corporation in making an embankment while grading its streets should erect a culvert or waterway so as not to obstruct the flow of the surface waters in their well-defined channel; but the case under discussion is not one of that class. Counsel for appellant, with apparent confidence, in their brief say: "That the complaint states facts sufficient to constitute a cause of action is settled in Stanford v. City and County of San Francisco, 111 Cal. 198, 43 Pac. 605." We have carefully examined that case, and find nothing in it in conflict with what is herein stated. The question in that case was as to whether or not the city was liable for damage caused by the accumulation of surface water which was the necessary consequence of paving the streets. It appeared that by reason of the grading of the street large quantities of surface water accumulated and broke over the curbing, and ran into the basement occupied by the plaintiff. In the opinion, after discussing the principle upon which the city was held liable, it is said: "Nor is this case within that numerous class of cases where it is held with almost entire unanimity that a municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street." In this case there is no allegation that the grading of the street caused surface waters to accumulate in unusual quantities, and that such surface waters were turned upon the lands of plaintiff. From these views it follows that the judgment should be affirmed, and we so advise.

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[1] For dissenting opinion, see 57 Pac. 1001.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 525

PACIFIC BANK et al. v. MADERA FRUIT & LAND CO. et al. (Sac. 484.)

(Supreme Court of California. May 27, 1899.)

RECEIVERS—SETTLEMENT OF ACCOUNT—JURISDICTION—DISMISSAL OF ACTION.

After a receiver has been appointed in an action, and he has taken possession of the property, the court is not deprived of jurisdiction to hear and settle his accounts by plaintiff's dismissing the action before issuance of summons or appearance of defendant.

Commissioners' decision. Department 2. Appeal from superior court, Madera county.

Action by the Pacific Bank and others against the Madera Fruit & Land Company and others. A receiver was appointed, and from an order refusing to dismiss his account and petition for a settlement plaintiffs appeal. Affirmed.

Sawyer & Burnett and Wm. Grant, for appellants. A. Everett Ball, for respondents.

COOPER, C. On January 31, 1894, the plaintiff filed its complaint, and, among other things, asked for the appointment of a receiver to take charge of a large amount of real and personal property. One S. Ephraim was thereupon, and at the request of the plaintiff, appointed receiver of all the property described in the complaint. He gave the proper bond, took the oath, and thereupon took charge of said property as such receiver. Thereafter, on March 6, 1895, before the issuance of any summons or the appearance of any defendant, the plaintiff filed with the clerk a written dismissal of the case, and judgment of dismissal was accordingly entered by the clerk. Thereafter the said receiver filed his account and petition, and asked the court to settle the same, fix his compensation, etc. The plaintiff thereupon made a special appearance, and filed a written motion to dismiss the account and petition of the receiver on the ground that by the judgment of dismissal of the said action the court had lost jurisdiction to settle the account of the receiver. The court overruled the said motion, and proceeded to hear the account of the receiver, and, after hearing evidence, made an order settling the said account. From this order the plaintiff has appealed.

The only question argued or presented on this appeal is as to whether or not, after the plaintiff had dismissed the action, the court had jurisdiction to hear and settle the account of the receiver. The court below held that it had such jurisdiction, and we think its conclusion correct. In Beach, Rec. § 796, the author lays down the rule as follows: "The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not, ipso facto, effect his discharge. which results only from an order or decree of court so directing. After the settlement of the suit the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership. * * * The dismissal of the action does not discharge the receiver from accountability to the court which appointed him. He is an officer of the court, and subject to its orders in relation to the property placed in his hands as receiver until discharged by the court." The same rule is given by High, Rec. § 833, and is thus stated: "It is to be observed, however, that the abatement of the action, or the entry of final judgment therein, does not have the effect of discharging the receiver ipso facto. And although, as between the parties to the litigation, his functions have terminated with the determination of the suit, he is still amenable to the court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership."

In State v. Gibson, 21 Ark. 140, it appeared that the action was compromised and dismissed during a vacation of the court. It was claimed that, the action being dismissed, the court had no further jurisdiction in the premises. The supreme court said: "But the dismissal of the bill did not discharge the receiver from accountability to the court of chancery from which he received his appointment. He was an officer of the court, and subject to its orders in relation to the partnership effects placed in his hands as receiver until discharged by the court." To the same effect are Ireland v. Nichols, 40 How. Prac. 85; Whiteside v. Prendergast, 2 Barb. Ch. 471. The same practice was followed in the lower court in Garniss v. Superior Court, 88 Cal. 415, 26 Pac. 351, and the practice was not questioned in this court. The only case cited by appellants in regard to receivers is the case of Field v. Jones, 11 Ga. 415; but that case is against the proposition contended for, and directly in line with the authorities cited. The court said: "The bill, by virtue of which Mr. Schley was appointed receiver and came into the possession of this fund, was dismissed upon demurrer, the legal consequence of which was to dispense with the functions of the receiver as a depositary of the parties litigant. His duties ceased with the termination of the litigation between the parties, and that ceased when it went out of court upon the demurrer. But his relations to the court of chancery from which he received his appointment did not determine. His amenability to that court as receiver continued. That is to say, he was still an officer of the court. His possession of the fund was the possession of the court." If the court below lost jurisdiction of the case by virtue of the dismissal, so that it could not settle the accounts of the receiver, nor make any disposition of the funds in his hands, how would the account be settled or the funds disposed of? The money on hand and collected by the receiver is, in contemplation of law, in the hands of the court, to be disposed of as the law directs. The expenditures made by the receiver for the preservation of the property, and under the orders of the court and at the request of the parties, should be repaid by some one. If the court in which the receiver was appointed cannot, after the dismissal of the case, settle and adjust the accounts of the receiver, to what jurisdiction will he resort? The dismissal of the case was the end of it as between the parties; but we think the court still retained the power to settle the accounts of its receiver, and to direct the application of the funds in his hands. We advise that the order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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124 Cal. 577

BEATTIE v. CREWDSON et al. (S. F. 1,631.)

(Supreme Court of California. June 1, 1899.)

VENDOR AND PURCHASER—NOTICE OF OCCUPANT'S TITLE—BONA FIDE PURCHASER—BURDEN OF PROOF—EJECTMENT—EVIDENCE—HARMLESS ERROR.

1. A purchaser is bound to know who is in possession, and is chargeable with notice of the occupant's title.

2. A purchaser having actual or constructive notice before payment of a third person's title is not a bona fide purchaser.

3. The burden is on a purchaser to show that he did not have notice of a third person's title.

4. Merely to refuse, in an action of ejectment, to permit answers to the questions, what did plaintiff's grantor say when the deed was executed? and what occurred at the time it was delivered? cannot be held error unless it affirmatively appears that the evidence to which the questions related was competent and relevant, and not hearsay.

5. Where a judgment for defendant in ejectment is sustained on other grounds than that of his adverse possession, error in finding that he had paid the taxes on the land during the time he was in possession is harmless.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county.

Ejectment by A. Beattie against G. F. Crewdson and others. From a judgment in favor of defendant Crewdson, and from an order denying a new trial, plaintiff appeals. Affirmed.

D. R. Gale and John T. Campbell, for appellant. T. J. Butts and J. M. Thompson, for respondents.

CHIPMAN, C. Ejectment. The property consists of certain lots in Hewitt's addition to the city of Santa Rosa. Trial by the court without a jury. Defendant Crewdson claimed title to the lots in question, and by way of cross complaint asked to have his title quieted. Defendant Michaels answered that he is not and has not been in possession since June 1, 1897 (the complaint was filed December 7, 1897), and defendant Pollini claims that he occupies the premises as tenant of defendant Crewdson. Judgment was given in favor of Crewdson that he is the owner and entitled to possession, and quieting his title. Plaintiff appeals from the judgment and from an order denying his motion for new trial.

The court found the following facts: That one Behmer, in April, 1885, being the owner of the lots, sold the same for full value to defendant Crewdson by deed of conveyance, which said deed was not recorded, and was afterwards lost. Soon after receiving his deed, Crewdson took possession of the property under his deed, and immediately began improving the same, and erected a dwelling thereon, costing $800, which was completed by the first of the year 1886, and he has ever since been in the actual and continuous possession of the premises, and is now in possession of the same. Crewdson has never sold or conveyed said property, or any part thereof, and has paid all taxes levied and assessed upon the property "for the five years next prior to the commencement of the action." Said Behmer had no interest in the property since April, 1885. On May 27, 1893, said Behmer and wife made and delivered their deed to the property to one Julia E. Riley, which was duly recorded, but said Behmers did not then own the property, nor were they in actual possession thereof, but defendant Crewdson was then "in the actual, open, and notorious and exclusive possession of said property, and said Riley at said time had notice of the right, interest, and equities of said Crewdson in and to said premises." There is "no evidence that said Riley paid any valuable consideration for said property, or that she was a bona fide purchaser of said property." It is further found that said Riley deeded the property to one Angelina Hutton, June 26, 1896, and this deed was duly recorded, and that Mrs. Hutton conveyed by deed to plaintiff November 21, 1896, which was duly recorded, and that neither Mrs. Riley nor Mrs. Hutton owned the property at the time, and that Mrs. Hutton and plaintiff had notice of Crewdson's possession of and interest in the lot when they took their deeds, and that Mrs. Hutton paid no value for said premises, and was not a purchaser in good faith, and that there is no evidence that plaintiff was a purchaser in good faith, without notice, or that he ever paid any valuable consideration for said premises.

1. The principal error assigned is that the court adjudged plaintiff's deed to be void because he failed to prove that he was an innocent purchaser, for value, without notice of Crewdson's possession. We are cited to section 1614, Civ. Code, where it is provided that "a written instrument is presumptive evidence of a consideration"; to section 1615, Id., which provides that "the burden of showing want of consideration sufficient to support the instrument lies with the party seeking to invalidate it"; and to section 1214, Id., which provides that "every conveyance of real property is void as against any subsequent purchaser or mortgagee * * * in good faith and for a valuable consideration whose conveyance is first recorded,"—citing also numerous cases from our reports. But section 1217 of the Civil Code declares that "an unrecorded instrument is valid as between the parties and those having notice thereof." One who purchases real estate is bound to know who is in possession thereof, and is chargeable with notice of the occupant's title (Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713); and if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser (Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641), and the burden is upon such purchaser to show that he had not such notice (Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325).

2. But it is claimed that the findings as to defendant's purchase, improvements, possession, and payment of taxes above stated are unsupported by the evidence. The evidence tends to show that defendant Crewdson received a deed to the property from Behmer, as found by the court, and that he went into possession under the deed, and improved the property, and has ever since, except at short intervals, occupied the premises by himself, or members of his family, or by tenants. At the time Behmer's deed was delivered to Crewdson another deed of the property from Behmer's sister to Behmer was also delivered to Crewdson. This latter deed was recorded, but for some reason the former deed was not. Crewdson took it to his home, and put it away in a bureau drawer. He did not discover its loss until about the time this action was brought, and he has not been able to find it upon search made. He had no actual notice of any of the deeds to plaintiff, and did not know that he or any other person made any claim to the property, until shortly before this suit was brought. Plaintiff introduced in evidence a deed from Behmer and wife to Mrs. Riley, dated May 27, 1893; also deed from Mrs. Riley to Mrs. Hutton, dated June 26, 1896; also deed from Mrs. Hutton to plaintiff, dated November 31, 1896. Mrs. Riley was Mrs. Hutton's mother, and Mrs. Hutton, prior to March 25, 1895, was Crewdson's wife. On August 1, 1890, while Mrs. Hutton was wife of Crewdson, she made a deed of the lots to Mrs. Riley without the knowledge of Crewdson, and without consideration. Mrs. Riley then made a mortgage of the lots to plaintiff to secure a loan of $250 to Mrs. Riley. Afterwards plaintiff (May 27, 1893) procured the deed to be made from Behmer to Mrs. Riley. After Mrs. Hutton was divorced from Crewdson, Mrs. Riley, without consideration, deeded the property to Mrs. Hutton, and on the same day Mrs. Hutton deeded it to plaintiff, and the deeds were recorded at the same time. Crewdson knew nothing of these various transactions. Mrs. Hutton testified that she never owned the lots, and never had any interest in them; that she never received anything or paid anything for them; that she conveyed them to her mother with the understanding that her mother would reconvey them to her. Plaintiff also introduced a deed from one McCann to himself, dated July 26, 1897, to two of the lots. McCann held certain tax deeds to these lots, given for delinquent taxes for the years 1889, 1890, and 1891. Plaintiff bought this title from McCann shortly before suit brought. For eight or nine years previous to this suit plaintiff lived in a neighboring town about seven miles distant from Santa Rosa. The circumstances surrounding all these transactions, as disclosed by the evidence, show that he knew, and, if he did not, that he had ample means of knowing, that Crewdson was in possession and claiming ownership of these lots; and at no time while on the witness stand did he disclaim knowledge of Crewdson's rights, and he admitted that he paid no consideration to Mrs. Hutton. He claims, however, that he indirectly paid a consideration by reason of the loan of money to Mrs. Riley, but there is no evidence that he has canceled the mortgage given by her, and, besides, it appears that he had the same notice of Crewdson's claim when he took the mortgage that he had when he took the deed from Mrs. Hutton. He did not undertake to get possession or ask for it until six months after Mrs. Hutton deeded the lots to him, and his conduct throughout the transactions with which he was connected points strongly to

the conclusion that he was endeavoring to get a paper title with a view to defeat Crewdson's claim.

3. Certain errors of law occurring at the trial are assigned. When plaintiff testified, he explained how he came to take the deed from Mrs. Hutton, and, after stating that she said "she would sooner give me a deed than to have me foreclose," he was about to state what further she said at that time, whereupon defendant's objection on the ground of incompetency, and that the evidence was hearsay, was sustained. We cannot say, from anything the record discloses, that this was error. If plaintiff had stated what he wished to prove, it is possible that its relevancy and competency would have appeared. Merely to refuse an answer to the question, "What did she say?" cannot be held error without the record showing affirmatively that the evidence was competent and relevant, and not hearsay. The same may be said of the alleged error in refusing to allow the witness Mrs. Beattie (plaintiff's wife) to answer the question, "What occurred at the time of the delivery of these deeds, if you know?" referring to the deed of Mrs. Riley to Mrs. Hutton and the deed of Mrs. Hutton to plaintiff. It is claimed that the evidence does not sustain the finding that defendant Crewdson paid the taxes assessed on the property for five years immediately preceding the action. There is some evidence tending to show payment of taxes by him during this period. It is rebutted as to the year 1895 by a certificate of tax sale dated June 28, 1896, showing sale to the state for nonpayment of taxes, indorsed, "Redeemed Nov. 14, 1896, by A. Beattie." Defendant objected to the introduction of this certificate as incompetent and irrelevant. No proof was offered of the official position of the person purporting to have issued the certificate, or of any other fact as to its issuance. It was not authenticated in any way, and plaintiff did not testify that he paid any money for redemption. The judgment is sustained upon grounds other than the adverse possession of Crewdson, as already shown, and, if the finding referred to was not supported, it was error without injury.

It is not necessary to consider the claim that the court erroneously held the tax deeds of McCann to be void. Plaintiff obtained that title with notice of Crewdson's claim of title and possession. Plaintiff could not strengthen his position in this way, and, as to Crewdson, it was proper to hold the McCann deeds to be void. Furthermore, these deeds were not printed in the record, and the court may have found in them some fatal defects of which we have here no knowledge.

Numerous other assignments of error are made, but upon examination they appear to depend more or less upon questions already disposed of, and do not call for special notice. It is advised that the judgment and order should be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(124 Cal. 452)

PEOPLE v. WESTLAKE (Cr. 491.)

(Supreme Court of California. May 23, 1899.)

TAX COLLECTOR—EMBEZZLEMENT—INSTRUCTIONS—EVIDENCE—WITNESSES—CROSS-EXAMINATION.

1. Where a tax collector was indicted, under Pen. Code, § 504, for embezzlement in fraudulently misappropriating public money, it was error to instruct that defendant was guilty, if, after receiving public money, he willfully omitted to pay it over to the county treasurer.

2. An instruction plainly erroneous is not cured by a correct instruction in some other part of the charge.

3. In a prosecution of a tax collector for embezzlement, his successor testified that at his first settlement as collector his attention was called to the condition of the retail liquor license book, from which he had procured his retail liquor license. *Held*, that he could not then be asked what he discovered unusual about the book, since it did not appear that the book was ever in defendant's possession, nor where it had been kept, and that it was in the same condition as when the witness received it.

4. In a prosecution of a tax collector for embezzlement, a deputy testified to issuing liquor licenses to the amount thereof, identified licenses as issued by defendant, and stated what was done in the office with money received for licenses and taxes, and that she issued licenses, as deputy auditor, to defendant during one month; and examined, and expressed her opinion as to, a stub book. *Held*, that defendant was entitled to cross-examine her in relation to her duties as deputy, and generally as to how the business of the collector's office was conducted.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county.

Charles L. Westlake was convicted of embezzlement, and he appeals. Reversed.

C. F. Lacey and G. A. Dougherty, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. The defendant was indicted by the grand jury of Monterey county for the crime of embezzlement, charged to have been committed by him while tax collector of said county. The charging part of the indictment is: "Did then and there, to wit, on said 7th day of July, 1897, and in the county of Monterey, fraudulently and feloniously, and not in the due and lawful execution of his trust, employment and duty as aforesaid, convert, appropriate, and embezzle the said public moneys to his own use, contrary to the form," etc. The amount of money alleged to have been so embezzled was $371, received between the 1st day of June and the 7th day of July, 1897. Defendant was found guilty as charged, and sentenced to a term of 10 years in the state prison. He made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying his motion.

Pen. Code, § 503, defines embezzlement as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Section 504 is as follows: "Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk or servant of any such officer, and every officer, director, trustee, clerk, servant or agent of any association, society or corporation (public or private), who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." The indictment was drawn under section 504. The court, in its instructions to the jury, said, "The defendant is charged with the crime of embezzlement. Section 424 of the Penal Code, under which this prosecution is made, reads as follows," and then proceeded to read all of section 424. Section 424 contains 10 subdivisions in regard to the definition of crime by a public officer, and the portions of the section necessary to be discussed herein are as follows: "Each officer of this state, or of any county, city, town or district of this state, and every other person charged with the receipt, safe keeping, transfer or disbursement of public moneys who either, (1) without authority of law appropriates the same, or any portion thereof, to his own use or to the use of another, or, * * * (10) willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same, is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state." The court further in its charge to the jury told them that if, after receiving public money, the defendant "willfully omitted to pay over the same to the county treasurer,—such money, or any part of it,—no matter whether it be the sum named in the indictment or some smaller sum, he is guilty as charged." The court, by reading section 424 to the jury, and by telling them that defendant was being prosecuted under said section, and that, if he willfully omitted to pay over money to the county treasurer, he was guilty as charged, evidently defined embezzlement by a public officer to consist in willfully refusing to pay over public money to the county treasurer after receiving it. We think the instruction and the views given to the jury by the court below erroneous. The defendant, no doubt, could have been prosecuted under section 424, but he was charged under section 504. If the instruction given by the court stated the law correctly, then the willful omission of a public officer of a county to pay over to the county treasurer money which has been received by him in his official capacity is embezzlement. The money might be claimed by the officer as due him for commissions, or under other bona fide claim; and yet, under the instructions of the court, if he willfully refused to pay over the money he would be guilty of embezzlement. The omission to pay over money by a public officer is not necessarily embezzlement. In People v. Carrillo, 54 Cal. 63, the defendant was charged with fraudulently and without authority of law and willfully and feloniously appropriating money to his own use which had come into his possession as tax collector. The court below instructed the jury that if they found the facts to be that defendant received the money, and failed to pay over the same as required by law, this, if unexplained, raised a presumption of felonious appropriation, which would authorize a verdict of guilty. This court held the instruction erroneous, and reversed the case, using this language: "The instruction is clearly erroneous, in that the jury are told that the failure of the prisoner to pay over the money, if unexplained, raises a presumption of a felonious appropriation, which will authorize a verdict of guilty. The alleged felonious appropriation was the ultimate fact to the solution of which the deliberations of the jury were to be addressed. It was the ultimate and important fact to be found by their verdict before judgment of conviction could properly go against the prisoner. To tell them, therefore, that, if they should find some other and merely probative fact, then the principal fact of guilty appropriation was to be reached by mere presumption, was an unwarrantable interference with the functions of the jury." In the case just quoted the judge of the lower court told the jury that the failure to pay over the money raised a presumption of felonious appropriation. In the case at bar the judge told the jury that the willful omission to pay over the money of itself made the defendant guilty as charged. If the judge in this case had told the jury that the willful omission to pay over the money by defendant was sufficient to raise a presumption of his guilt, it would clearly have been error, under the ruling in the case of People v. Carrillo. To tell them that the willful omission to pay over the money was conclusive of his guilt is certainly more injurious to defendant and more clearly erroneous. In the Carrillo Case the presumption was open to explanation, and the judge so told the jury. In the case at bar, under the instruction of the court, there was no room for explanation; and, if the jury found that the defendant willfully omitted to pay over the money, they either had to find the defendant guilty, or disobey a plain mandate of the court.

Defendant could have been indicted under subdivision 10 of section 424 of the Penal Code, and in such case the indictment would have to state that defendant received public money, and refused or omitted to pay the same to an officer authorized by law to receive it, under a duty imposed by law upon him to pay over the same. The indictment in this case contains no allegation as to any one being authorized by law to receive the money, and no allegation as to any duty imposed by law upon defendant to pay over the same. If the willful omission to pay over money to the county treasurer is a crime, under subdivision 10 of section 424, the indictment certainly should have stated that the county treasurer was the person authorized by law to receive the money, and that it was the duty of defendant, under the law, to pay it to the treasurer. The defendant might not have known to whom the money should have been paid. But here we have the defendant charged with embezzlement in fraudulently appropriating money to his own use, and the law given to the jury, that, if he willfully refused to pay the money to the county treasurer, "he is guilty as charged." The instruction is the equivalent of saying to the jury, "If the defendant has willfully omitted to pay the money to the county treasurer, I charge you, as a matter of law, that he is guilty of having fraudulently and feloniously appropriated it to his own use, as charged in the indictment." The statement of the proposition carries with it its own refutation. In People v. Hamilton, 103 Cal. 489, 37 Pac. 629, the defendant was informed against by the district attorney, under section 424 of the Penal Code, for the crime of omitting and refusing to pay over public moneys received by him in his official capacity to his successor. The court in its opinion said: "The gravamen of the charge in the information is that it was the duty of the defendant, imposed by law, to transfer the money in question to his successor in office; that he willfully, fraudulently, and feloniously neglected and refused to pay the same to his successor," etc.,—and then, after discussing the case further, used this language: "Defendant could not, under the information, be convicted for a failure to pay these moneys to the county treasurer for the reasons: (1) He was not charged in the information with any neglect or refusal so to do. * * *" In this case defendant is not charged with any such neglect, refusal, or omission, and yet the jury are told that such omission would make defendant guilty as charged.

It is claimed that, if the instruction given was error, the court gave the law correctly in other parts of its instructions. It is the rule that when a single instruction, standing alone, does not contain all the conditions and limitations which it should, and is thus subject to legal criticism, the giving of it will not be error, if it can be read in connection with other instructions, and thus make all the instructions harmonize as a whole, and if, being read together, supplemented by each other, they all together fairly and correctly state the law; but this rule does not apply when the instruction contains a plain statement of an incorrect principle of law. An instruction plainly erroneous is not cured by a correct instruction in some other part of the charge. People v. Wong Ah Ngow, 54 Cal. 151; People v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Marshall, 112 Cal. 422, 44 Pac. 718.

One Elmer Alexander, who had succeeded the defendant as tax collector of the county August 2, 1897, was called as a witness by the prosecution, and stated that at his first settlement as tax collector his attention was called to the condition of the retail liquor license book from which he had procured his retail liquor license. It will be noted that the witness does not fix the date of making his first settlement. The witness was then asked by the prosecution the following question: "Q. What did you discover about that book unusual?" To this question the defendant objected upon the ground that the question related to a time subsequent to the time the defendant left the office, that there was no proof that the book was in the same condition it was in when defendant left the office, and upon the ground that the book itself is the best evidence. The court overruled the objection, and the witness answered: "There was more stubs than I had received licenses for." We think the objection to this question should have been sustained, and that the answer may have materially injured the defendant before the jury. It is not at all clear what the answer meant, but it is susceptible of such interpretation as would cause the jury to believe that defendant had taken out licenses from the book without accounting for them. It does not appear that the book was ever in the possession of defendant, nor where it had been kept, nor that it was in the same condition as it was in when Alexander first received it. The book might have been in the hands of a dozen different persons after August 2, 1897, and before the witness made his first settlement as tax collector. Where the liberty and rights of a defendant are being tried, the ends of justice are better subserved by rejecting all incompetent or doubtful testimony.

Mrs. Baker, a witness for the prosecution, testified that she was employed in the auditor's office during 1897, while the defendant was tax collector, and that she was familiar with the method of issuing licenses to the tax collector; that between the 1st day of January and the 2d day of August, 1897, she issued to defendant various licenses, amounting in the aggregate to $294; that she was also employed in the tax collector's office (being the office held by defendant) during the whole of his incumbency. The witness identified a large number of licenses as being issued by defendant, and testified that they were in defendant's handwriting. She further testified in her direct examination that, when she issued licenses from the defendant's office, she put the money in the safe, as a rule, but sometimes in the cash drawer; that the tax money was put in the cash drawer; that in the month of May, 1897, she issued licenses from the auditor's office to the tax collector. The witness, after examining a stub book, said that she believed that all the licenses issued were from the book of new-style licenses. The witness on cross-examination testified that she was deputy auditor and deputy tax collector at the same time, and that she went to work in defendant's office about March 1, 1897, and continued there until August 2, 1897. The following questions were asked of the witness by the defendant in cross-examination: "(1) Q. What was the extent of your duties there? (2) Q. What did you do in your capacity as deputy tax collector? (3) Q. During this period of time, from the 1st of March until the 2d of August, 1897, who in the tax collector's office attended to the business of collecting money orders, post-office orders, and such as that? (4) Q. Who besides yourself had the combination of the safe? (5) Q. Did you have the combination of the safe? (6) Q. While you were in charge of the tax collector's office, or employed there as deputy, from the 1st of March until the 2d of August, how often was the cash settled and balanced?" There were several other questions asked, of the same general character, but the above will be sufficient for the purposes of this decision. To each of these questions the prosecution objected upon the ground that it was not proper cross-examination, and the objection was sustained, and to each ruling the defendant excepted. We think the court below confined the cross-examination within too narrow limits. The witness was testifying against the defendant, who was being tried for embezzling public moneys. She had been a deputy in the office, and in charge of many important details in connection with it. It was for the jury to determine whether the defendant was himself the party who had fraudulently appropriated public money. The power of cross-examination is one of the most efficacious tests which is known to the law for the discovery of truth. To deprive the defendant of this right in a proper case, and in regard to material matter, and when the cross-examination is confined within the general scope of the direct examination, is error for which a judgment of conviction should be reversed. It is always proper to cross-examine a witness fully as to all facts and circumstances connected with the matters stated in his direct examination. 1 Greenl. Ev. § 445. This rule, in substance, has been adopted by this court in many cases. In People v. Gallagher, 100 Cal. 476, 35 Pac. 83, the court said, "The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute." In City of Santa Ana v. Harlin, 99 Cal. 545, 34 Pac. 227, the court said, "Great liberality is properly extended in such cross-examinations, and for the purpose of testing the knowledge, judgment, or bias of the witness the liberality is wisely exercised." Applying the above rules, the questions asked appear to us to have been within the general scope and pertaining to the direct examination. We advise that the judgment and order be reversed.

We concur: BRITT, C.; HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

124 Cal. 429

MERCHANTS' AD-SIGN CO. v. STERLING.

(L. A. 588.)

(Supreme Court of California. May 18, 1899.)

CONTRACTS IN RESTRAINT OF TRADE—ESTOPPEL.

1. A contract between a stockholder who is active manager of a corporation, and one to whom he sold his stock and the good will of the corporation, restraining the vendor from carrying on a like business, is void, as in restraint of trade.

2. Where a stockholder in a corporation sells the good will of the business, the fact that he received a valuable consideration therefor does not estop him to deny that he had a vendible interest in such good will.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Merchants' Ad-Sign Company against Thomas M. Sterling. Judgment for defendant sustaining a demurrer to the complaint, and plaintiff appeals. Affirmed.

Fuller & Burnett, for appellant. Davis & Rush, for respondent.

CHIPMAN, C. Injunction to restrain defendant from engaging in the business of advertising. It is alleged that plaintiff is a corporation engaged in the business of bill posting and other methods of advertising in the city and county of Los Angeles; that about August 20, 1896, defendant owned 80 shares of the capital stock of plaintiff company, and was actively engaged in the management of plaintiff's said business; that about September 15, 1896, he transferred, without consideration, 60 of said 80 shares to his wife, in trust for himself and his sole use and benefit, and for the purpose of concealing the true ownership of said 60 shares; that on August 12, 1897, he sold, by written contract, for a good and valuable consideration, to one Wilshire, "all his interest, direct and indirect, in the plaintiff, and his interest in the good will of the business of plaintiff, and said defendant in said contract, for a good and valuable consideration to him in hand paid by said Wilshire, agreed to and with said Wilshire that he would not conduct nor assist in the conduct of bill posting in said city of Los Angeles so long as said Wilshire, or any person deriving title to said good will from him, should carry on a like business therein"; that on

January 20, 1898, Wilshire transferred the contract of August 12th to plaintiff. The complaint then alleges the formation of the Los Angeles Bill-Posting Company, a corporation, about January 17, 1898, in said city and county, its business in part being similar to that of plaintiff's, and that since said date it has been so engaged; that defendant, in violation of his said agreement, helped to form the Los Angeles Bill-Posting Company, and became a stockholder therein, and conducted and assisted to conduct its business, and is its principal manager, and said company has thereby been enabled to enter, and has so entered, into successful competition with plaintiff in the bill-posting business in said city, and that without the services of defendant said company could not have been able successfully to compete with plaintiff in its said business. Plaintiff seeks damages, and to restrain defendant from conducting, or assisting in conducting, the business of the Los Angeles Bill-Posting Company. A demurrer to the complaint for insufficiency of facts and for ambiguity and uncertainty was sustained, and the court gave judgment for defendant without leave to amend, from which this appeal is prosecuted. Respondent has filed no brief.

The principal question presented by appellant is as to the validity of the contract between defendant and Wilshire. The allegation of the complaint is that defendant sold his interest in the good will of the business of plaintiff corporation, in consideration of which he agreed not to conduct, or assist in conducting, the business of bill posting, in which plaintiff was engaged. There is no allegation that defendant had any interest in such good will, except, as the owner of certain shares of the corporation, it may be so inferred. Section 1673, Civ. Code, reads as follows: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Section 1674, Id., provides as follows: "One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the good will from him carries on a like business therein." Section 992, Id., defines the "good will" of a business to be "the expectation of continued public patronage"; and section 993, Id., says it "is property, transferable like any other property." "One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers." Section 1776, Id. "A partner, as such, has not authority to do any of the following acts, unless his co-partners have wholly abandoned the business to him, or are incapable of acting: * * * (2) To dispose of the good will of the business." Section 2430, Id. But "partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof." Section 1675, Id. These constitute all the statutory provisions upon the subject of good will and restraint of trade which bear upon the question.

It is conceded by appellant, what is obviously true, that a stockholder cannot transfer the good will of the corporation. In the case of Waterworks v. Schottler, 62 Cal. 69 (at page 118), it was said: "It is contended that good will enters into and forms an element in the value of the shares of stock. No case has been produced to us, nor have we been able to find any, holding, or even intimating, that this is so. We find no such element of value in the least hinted at by any one who has written on the subject, nor has any such been called to our attention. We cannot recognize any such element as giving value to shares in a trading corporation. It would be strange to predicate good will as pertaining to, or extending to, an abstraction, to an 'artificial being, invisible, intangible, and existing only in contemplation of law.'" Apparently conceding the correctness of these views, counsel for appellant insist that, "where a stockholder has been actively engaged in the management of the business of the corporation, he surely has the privilege of increasing the vendibility of his stock by being able to agree with the buyer that he will refrain from carrying on a similar business to that heretofore engaged in by himself and the corporation which he managed, of course within the time and territorial limits allowed by the Code." We are cited to the following well-considered and instructive cases, as showing that the statute should be given a liberal construction: Brown v. Kling, 101 Cal. 295, 35 Pac. 995; Carpet Works v. Jones, 102 Cal. 506, 36 Pac. 841; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662. In the case now before us there seems to be no room for construction. Defendant, as a stockholder, did not and could not transfer the good will of the corporation, assuming, what we do not consider it necessary to decide, that good will, as property, pertains to a corporation. The element of good will, therefore, is not present in the transaction. The statute says that "one who sells the good will of a business may agree," etc.; but the statute also says that "every contract by which one is restrained from exercising a lawful * * * business of any kind, otherwise than is provided by the next two sections [in which the above provision is stated], is to that extent void." Reading the sections 1673 and 1674 together, they may be briefly paraphrased as follows: Every contract by which any one is restrained from exercising a lawful business is to that extent void, except where he has sold the good will of a business, in which case, as to that or similar business, he may agree not to engage therein so long as the buyer carries on a like business, within specified limits. It is not a question whether the holder of shares of a corporation should be permitted to enhance their vendibility by agreeing to abstain from carrying on business similar to that of the corporation, within the limitations prescribed, but it is a question whether such an agreement is not by law declared to be void. We are pointed to Carpet Works v. Jones, supra, where it was said that "the Code introduces no new principles; it simply eliminates from the controversy arising upon such restrictions the question as to what is a reasonable territorial limit." And so we are told that the Code commissioner's note shows that this one question of territorial restriction is the only departure from common-law principles sought to be effected by the Code provisions. We think the Code provision was intended to and in fact went further than is here suggested. In Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, the rule at common law, even as finally relaxed and applied, was said to be "uncertain, and led to much perplexing legislation, and the law upon the subject in this state is now declared in section 1673 of the Civil Code." Referring to the next two sections, it was said that they merely provide that "one who sells the good will of a business may agree not to carry on a similar business within a specified county or city; and that, in anticipation of a dissolution of a partnership, a partner may agree not to carry on a similar business within the city or county where the partnership business is transacted." These latter sections were held not to apply, because the case did not fall within either one of the exceptions, i. e. being the sale of a business and its good will or a dissolution of a partnership. The case was determined wholly under section 1673. The contract there involved was held to be void as in restraint of trade. The cases cited by appellant from our Reports and other cases not cited, where these sections have been referred to, are cases where the business and good will were sold, and the liberal construction given the sections was in aid of agreements coming within the exceptions of, and permitted to be made by, the Code. It seems to me that the only question here is, as it was in the Vulcan Powder Company Case, was the contract in restraint of trade? The language of the Code is unmistakable: "Every coutract by which one [i. e. any person] is restrained from exercising a lawful * * * business of any kind * * * is to that extent void." The allegation is that defendant agreed not to engage in the business of bill posting, which is a lawful business. This was an agreement in restraint of trade, and therefore void.

2. But it is said that defendant, having represented by his conduct that he had such an interest in the business and good will of plaintiff as would support the restraining covenant, and having accepted a valuable consideration therefor, he is now estopped from denying the existence of such interest; citing Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388. In the case cited the contract purported to dispose of the business and good will of manufacturing and vending certain articles of merchandise. No question arose as to the right of the parties to dispose of the good will. Being clothed with ownership and power to sell, the defendants were clearly estopped to deny their interest in what they purported to sell. In the case here, however, it is conceded that defendant could not dispose of the good will of the corporation. Defendant had no vendible interest in that good will within his disposition, and this the plaintiff must be presumed to have known, and defendant is therefore not estopped. The contract being void as in restraint of trade, and it so appearing from the face of the complaint, the defense is available on demurrer. The maxim, "Ex turpi causa non oritur actio," applies. It is advised that the judgment should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(124 Cal. 551)

PEOPLE v. LEWIS. (Cr. 488.)[1]

(Supreme Court of California. May 31, 1899.)

HOMICIDE—VERDICT—INSTRUCTION—DEATH HASTENED BY DECEASED—STATEMENTS BY PROSECUTING ATTORNEY—ORDER OF TRIAL.

1. The verdict of a jury in a criminal case, based on conflicting evidence, will not be disturbed on appeal.

2. No exception lies to the refusal of a trial judge to advise the jury to acquit defendant under Pen. Code, § 1118, which provides that the court may, if it deems the evidence insufficient to support a conviction, advise the jury to acquit defendant, but that the jury shall not be bound thereby.

3. Defendant inflicted a mortal wound on the person of deceased by shooting him. After the shooting, and while in great pain, deceased cut his own throat, thereby hastening his death. *Held*, that if the wound inflicted by defendant contributed, concurrently with the wound inflicted by deceased, to cause death, defendant is guilty of the homicide.

4. A prosecuting attorney, in his opening to the jury, stated that he would prove a certain act contributory to the death of deceased to have been done by defendant. There was no evidence introduced which tended to prove the act. *Held*, that such statement, if made in good faith, and with intent to attempt its proof, was not an abuse of his position.

5. The remark was not prejudicial, as it tended to raise in the minds of the jury the belief that proof thereof was essential to the prosecution's case.

6. Permitting the calling of a witness by the state, after the defense has closed its case, to testify to matters not prejudicial to defendant, is harmless error.

7. Where it appears that deceased, after he was mortally wounded by defendant, inflicted upon himself a wound which would necessarily cause his death sooner than the wound inflicted by defendant, an instruction that, if it is impossible to tell whether deceased died from the wound inflicted by himself or the one inflicted by defendant, they must acquit defendant, is

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[1] Rehearing denied June 30, 1899.

erroneous, as excluding the theory that both wounds might have concurrently contributed to cause death.

Department 2. Appeal from superior court, Shasta county.

Frank A. Lewis was convicted of manslaughter, and appeals. Affirmed.

H. E. Highton and Theo. J. Roche, for appellant. Atty. Gen. Ford, for the People.

TEMPLE, J. The defendant was convicted of manslaughter, and appeals from the judgment and from an order refusing a new trial. It is his second appeal. The main facts are stated in the decision of the former appeal. 117 Cal. 186, 48 Pac. 1088. Since, however, it is now claimed that the people failed to overcome the presumption of innocence upon the last trial, it may be noted that the jury, in the proper exercise of their functions, may have found the facts to be much less favorable to the defendant than the statement contained in the opinion on the former appeal. It was within their province to reject some testimony, and to accept such as to them seemed credible. For instance, they may have rationally concluded from the evidence that Lewis did not, in the altercation, say that he did not question the veracity of Farrell, but that, on the other hand, when asked by Farrell whether his word was not good, replied, "No, not with me," and that when this was resented he jumped up from the table, and drove Farrell from the house; that Farrell fled before him until, out of doors, he took up a singletree, and challenged Lewis to come out and fight, and did not advance or threaten to strike otherwise than by such challenge; and that thereupon Lewis, being in no danger whatever, raised his rifle to his shoulder, and with the remark, "Damn you, I'll teach you to fight me," fired the fatal shot, and soon after, when his wife asked some one to go for a doctor, he said: "Don't go for a doctor. Damn him, let him die." All contradictory evidence may well have been discredited. As has often been stated, this court has no jurisdiction of criminal cases on questions of fact, and, consequently, I fail to see why there should have been a hundred pages of printed brief carefully reviewing the testimony, witness by witness, showing what contradictory statements were made by some of them, that some had evidently been drilled, or for various reasons the testimony of some of the witnesses for the prosecution was entitled to less credence than the testimony for the defense. Even if, at the conclusion of the evidence for the prosecution, the defense asked the court to advise the jury to acquit, and the request was refused, and such refusal could be reviewed here, such review would only go to the extent of determining whether there was an absence of any substantial evidence as to some fact that the prosecution was bound to prove. I know of no mode by which it can be made proper for this court to enter upon such a minute inquiry as to the value of the testimony and the credibility of the witnesses as we are invited to in this case. But I think no exception is authorized to a refusal of the court to give such advice. Had it been given, the jury would not be bound to obey it. If the defense was satisfied that there was a total lack of evidence upon some essential issue, it could have submitted the case upon the evidence of the prosecution. But, as it did not do so, it was proper for the court on just terms to allow the defect to be supplied at any time before the final submission of the case. Sec Pen. Code, §§ 1118, 1170, et seq.

Upon a motion for a new trial questions of law may be presented in regard to the legal sufficiency of the evidence, and such questions may be reviewed here. In fact, in this case the only substantial questions presented are so presented, but their consideration does not require this elaborate consideration and discussion of the evidence. The evidence upon which these points are based is not conflicting, and, of course, there is no substantial disagreement in regard thereto. But for the considerations presented in these few propositions, really constituting but one point, we may assume, and the fact is, that the evidence abundantly sustains the verdict. Defendant and deceased were brothers-in-law, and not altogether friendly, although they were on speaking and visiting terms. On the morning of the homicide the deceased visited the residence of the defendant, was received in a friendly manner, but after a while an altercation arose, as a result of which defendant shot deceased in the abdomen, inflicting a wound that was necessarily mortal. Farrell fell to the ground, stunned for an instant, but soon got up, and went into the house, saying: "Shoot me again. I shall die anyway." His strength soon failed him, and he was put to bed. Soon afterwards,—about how long does not appear, but within a very few minutes,—when no other person was present except a lad about 9 years of age, nephew of the deceased, and son of defendant, the deceased procured a knife, and cut his throat, inflicting a ghastly wound, from the effect of which, according to the medical evidence, he must necessarily have died in five minutes. The wound inflicted by the defendant severed the mesenteric artery, and medical witnesses testified that under the circumstances it was necessarily mortal, and death would ensue within one hour from the effects of that wound alone. Indeed, the evidence was that usually the effect of such a wound would be to cause death in less time than that, but possibly the omentum may have filled the wound, and thus, by preventing the flow of the blood from the body, have stayed its certain effect for a short period. Internal hemorrhage was still occurring, and, with other effects of the gunshot wound, produced intense pain. The medical witnesses thought that death was accelerated by the knife wound. Perhaps some of them considered it the immediate cause of death. Now, it is contended that this is a case where one languishing from a mortal wound is killed by an intervening cause, and therefore deceased was not killed by Lewis. To constitute manslaughter, the defendant must have killed some one, and if, though mortally wounded by the defendant, Farrell actually died from an independent intervening cause, Lewis, at the most, could only be guilty of a felonious attempt. He was as effectually prevented from killing as he would have been if some obstacle had turned aside the bullet from its course, and left Farrell unwounded. And they contend that the intervening act was the cause of death, if it shortened the life of Farrell for any period whatever. The attorney general does not controvert the general proposition here contended for, but argues that the wound inflicted by the defendant was the direct cause of the throat-cutting, and therefore defendant is criminally responsible for the death. He illustrates his position by supposing a case of one dangerously wounded, and whose wounds had been bandaged by a surgeon. He says, suppose, through the fever and pain consequent upon the wound, the patient becomes frenzied, and tears away the bandage, and thus accelerates his own death, would not the defendant be responsible for a homicide? Undoubtedly he would be, for in the case supposed the deceased died from the wound, aggravated, it is true, by the restlessness of the deceased, but still the wound inflicted by the defendant produced death. Whether such is the case here is the question. The attorney general seems to admit a fact which I do not concede, —that the gunshot wound was not, when Farrell died, then itself directly contributing to the death. I think the jury were warranted in finding that it was. But, if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant, in the natural course of events. If the relation was causal, and the wounded condition of the deceased was not merely the occasion upon which another cause intervened, not produced by the first wound, or related to it in other than in a casual way, then defendant is guilty of a homicide. But, if the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of a homicide, even though he had inflicted a mortal wound. In such case, I think, it would be true that the defendant was thus prevented from killing.

The case, considered under this view, is further complicated from the fact that it is impossible to determine whether deceased was induced to cut his throat through pain produced by the wound. May it not have been from remorse, or from a desire to shield his brother-in-law? In either case the causal relation between the knife wound and the gunshot wound would seem to be the same. In either case, if defendant had not shot the deceased, the knife wound would not have been inflicted. Suppose one assaults and wounds another, intending to take life, but the wound, though painful, is not even dangerous, and the wounded man knows that it is not mortal, and yet takes his own life to escape pain, would it not be suicide only? Yet the wound inflicted by the assailant would have the same relation to death which the original wound in this case has to the knife wound. The wound induced the suicide, but the wound was not, in the natural course of things, the cause of the suicide. Though no case altogether like this has been found, yet, as was to have been expected, the general subject has often been considered. In 1 Hale, P. C. 428, the law is stated. So far as material here, his views may be thus summarized: (1) If one gives another a dangerous wound, which might, by very skillful treatment, be cured, and is not, it is a case of homicide. (2) If one inflicts a dangerous wound, and the man dies from treatment, "if it can clearly appear that the medicine, and not the wound, was the cause of the death, it seems it is not homicide; but then it must appear clearly and certainly to be so." (3) If one receives a wound, not in itself mortal, and fever or gangrene sets in because of improper treatment or unruly conduct of the patient, and death ensues, it is homicide, "for that wound, though it was not the immediate cause of his death, yet it was the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is causa causati." (4) One who hastens the death of a person languishing with a mortal disease is guilty of a homicide, for the death is not merely by a visitation of Providence, but the hurt hastens it, and the wrongdoer cannot thus apportion the responsibility, etc. It would make no difference, I presume, if the person killed was languishing from a mortal wound, rather than from an ordinary disease. In State v. Scates, 50 N. C. 420, a child was found dead, badly burned, and with a wound from a blow on the head. The burning was admitted by defendant, but the blow was not, and it was not proven who inflicted it. The medical witness thought the burning was the primary cause of death, but the blow may have hastened it. The jury was told that, if it was doubtful which was the immediate cause of death, they must acquit, but if they found that the burning was the primary cause of death, and the blow only hastened it, they could convict. The case was reversed, the appellate court holding that the blow might have been the independent act of another, and, if it hastened the death, it, and not the burning, was the cause of death. In Bush v. Com., 78 Ky. 268, the deceased received a wound not necessarily mortal, and, in consequence, was taken to a hospital, where she took scarlet fever from a nurse, and died of the fever. The court said: "When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound, and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound, the death is by visitation of Providence, and not from the act of the party inflicting the wound. * * * If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility." The last case, in my opinion, so far as it goes, correctly states the law. The facts of this case do not bring it strictly within any of the propositions found in 1 Hale, P. C. 428. The second and third propositions both predicate a wound not necessarily mortal. What the law would have been in the second case, had the wound been mortal, and the applications had hastened the death, is not stated. It seems to me, however, the case of a person already languishing from a mortal wound is precisely that of one suffering from a mortal disease. Certainly, the willful and unlawful killing of such a person would be a felony, and it cannot be true that the first offender and the last can each be guilty of murdering the same man, if they had no connection with each other, and both wounds were not actively operating to produce death when it occurred.

But why is it that one who inflicts a wound not mortal is guilty of a homicide, if through misconduct of the patient or unskillful treatment gangrene or fever sets in, producing a fatal termination, when, if it can be clearly made to appear that the medicine, and not the wound, was the cause of the death, he is not guilty of a homicide? In each case, if the wound had not been, the treatment would not have been, and the man would not then have died. In each case the wound occasioned the treatment which caused or contributed to the death. The reason, I think, is found in the words advisedly used in the last sentence. In the one case the treatment caused the death, and in the other it merely contributed to it. In one case the treatment aggravated the wound, but the wound thus aggravated produced death. In the other the wound, though the occasion of the treatment, did not contribute to the death, which occurred without any present contribution to the natural effect of the medicine from the wound. Take, for instance, the giving of a dose of morphine, by mistake, sufficient to end life at once. In such case it is as obvious that the treatment produced death as it would have been had the physician cut off his patient's head. But see People v. Cook, 39 Mich. 236. In this case it appears that defendant had inflicted a dangerous wound, but it was contended by the defense that death was caused by an overdose of morphine. Defendant asked an instruction as follows: "If the jury believe that the injury inflicted by the prisoner would have been fatal, but if death was actually produced by morphine poisoning, they must acquit." The instruction was refused, but the jury were told that if the wound was not in itself mortal, and death was caused solely by the morphine, they must acquit. The action of the trial court was sustained on the ground that a mortal wound had been given, which necessitated medical treatment; that the physicians were competent, and acted in good faith; and that it was not made clearly to appear that the morphine solely produced death, and that the wound did not at all contribute to the death at that time. Under the authorities, this was equivalent to a finding that the wound did not contribute to the death. This case differs from that in this: that here the intervening cause, which it is alleged hastened death, was not medical treatment, designed to be helpful, and which the deceased was compelled to procure because of the wound, but was an act intended to produce death, and did not result from the first wound in the natural course of events. But we have reached the conclusion by a course of argument unnecessarily prolix, except from a desire to fully consider the earnest and able argument of the defendant, that the test is—or, at least, one test—whether, when the death occurred, the wound inflicted by the defendant did contribute to the event. If it did, although other independent causes also contributed, the causal relation between the unlawful acts of the defendant and the death has been made out. Here, when the throat was cut, Farrell was not merely languishing from a mortal wound; he was actually dying; and after the throat was cut he continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event. If the throat-cutting had been by a third person, unconnected with the defendant, he might be guilty; for, although a man cannot be killed twice, two persons, acting independently, may contribute to his death, and each be guilty of a homicide. A person dying is still in life, and may be killed; but, if he is dying from a wound given by another, both may properly be said to have contributed to his death.

Other points are raised by the defense. One is that the prosecuting attorney told the jury in his opening that he would prove that the defendant himself did the throat-cutting. No evidence tending to establish this proposition was offered by the prosecution, and it is contended the defendant was prejudiced by this statement. We cannot say that the statement was not made in good faith, and with the intent to attempt its proof. If so, it was not an abuse of his position by the prosecuting officer. It was made, not by the district attorney, but by an assisting attorney, who probably was not as well advised of the case as he should have been. But the defense could not have been prejudiced. It doubtless weakened the case for the prosecution, which, by the statement, seemed to admit that such proof was essential to its case.

After the defense had closed, the prosecution was permitted to call a witness to prove the facts concerning the knife wound. This had only been shown before by the medical witness who testified as to the wounds, and one witness who came in just as Farrell breathed his last, and who spoke of the wounds. The witness called was the son of defendant, and he is strongly indorsed by the defense as a truthful witness. It appears that there was no other witness who could have testified to the occurrences at that time. The procedure was irregular, but the defense was certainly not injured thereby. In fact, I do not see that the evidence was at all important to the prosecution.

The court refused to instruct the jury as follows: "If you believe from the evidence that it is impossible to tell whether Will Farrell died from the wound in the throat or the wound in the abdomen, you are bound to acquit." The instruction was properly refused. It assumed that death must have resulted wholly from one wound or the other, and ignored the proposition that both might have contributed, as the jury could have found from the evidence.

The other points are relatively trivial. I have examined them, and cannot see how injury could have resulted, supposing the rulings to have been erroneous. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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124 Cal. 528

ARCHER v. FREEMAN et al. (L. A. 261.)

(Supreme Court of California. May 27, 1899.)

FRAUD—DISCOVERY—LACHES—LIMITATION—ASSIGNMENT.

1. Fraud alleged in the sale of land consisted of false statements that a college would be immediately built on the adjacent land, and that the grantor had donated $100,000 in cash towards it. The grantor lived in a distant state, but spent several months each winter on the land purchased, and had several daughters he wished to send to the college. The foundations were laid the first winter, and work continued for a few months, but was entirely abandoned, and it soon became apparent that no college was to be built. Three years later the grantee tried to avoid payment for another tract because the college was not being built, but paid a lesser amount in compromise. At this time the grantor expressed a belief that the college would be built; but the grantee did not ask him about the donation. *Held,* that the circumstances put him on inquiry as to the falsity of the statements, and in an action 6 years after the purchase he could not avoid the plea of limitation by alleging failure to discover the fraud.

2. A right to sue for fraud, unconnected with something having a legal existence and value, is not assignable.

In bank. Appeal from superior court, Los Angeles county.

Action by W. L. Archer against Daniel Freeman and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Murphey & Gottschalk, for appellant. Cochran & Williams, S. M. White, Sheldon Borden, and Lamme & Wilde, for respondents.

McFARLAND, J. This action was brought to recover damages alleged to have been sustained by plaintiff through certain alleged misrepresentations made by defendants with respect to certain lands at Inglewood, in Los Angeles county, purchased by plaintiff from defendants. There is also a second count in the complaint for damages alleged to have been sustained by one Thompson under conditions similar to those stated in the first cause of action, it being averred that Thompson assigned his cause of action to plaintiff. After plaintiff had introduced all his evidence and rested, the defendants moved for a nonsuit, which was granted. Judgment was rendered for defendants, and plaintiff appeals from the judgment upon the judgment roll and a bill of exceptions. In their answer the defendants denied the material averments of the complaint, and also set up the statute of limitations and laches on the part of the plaintiff. The motion for a nonsuit was based upon numerous grounds, among others the statute of limitations and laches; and from the opinion of the court below, which is attached to the brief of respondents, it appears that the court granted the nonsuit mainly upon the two grounds last above stated. If the nonsuit was properly granted upon those grounds, it is not necessary to critically examine the other points made in the case. And we think that the court correctly granted the nonsuit upon the grounds aforesaid.

The plaintiff commenced negotiations for the purchase of the land in question in November, 1887, and the transaction was completed in January, 1888, at which time he paid the purchase money and received a deed of conveyance of the land. This action was commenced June 25, 1894, which was between 6½ and 7 years after the alleged fraudulent misrepresentations and promises which are alleged to have been made and given at the time of the purchase. Therefore the statute of limitations had run more than twice from the time of the alleged frauds until the filing of the complaint, unless, under section 338 of the Code of Civil Procedure, there was no discovery by plaintiff of the facts constituting the alleged frauds until within three years next preceding the commencement of the action. However, it is the clearly established law that in such a case a party must be held to have had knowledge of the alleged fraud whenever the means of knowledge existed and the circumstances were such as to put him on inquiry. Moore v. Boyd, 74 Cal. 171, 15

Pac. 670, and cases there cited; Lataillade v. Orena, 91 Cal. 578, 27 Pac. 924; Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43. Therefore if plaintiff had the means of knowledge, and was put upon inquiry as to the alleged frauds more than three years before the commencement of the suit, the action is barred. The frauds relied on consist of certain alleged representations made by the defendants, principally through their alleged agents, with respect to certain improvements that were going to be made and certain things that were going to be done in connection with the townsite of Inglewood, recently laid out, in which the lots of land sold were situated. It is averred in the complaint that defendants falsely represented that extensive arrangements had been made for irrigating the land; that extensive parks, gardens, walks, etc., would be constructed, and particularly that a college would be built on the grounds; that the defendant Freeman "had donated" $100,000 in cash for the building of the college; and that the college "was to be commenced and prosecuted to the finish." But the main frauds relied on were the alleged promise that the college building would be immediately erected, and the alleged misrepresentation that Freeman had donated $100,000 for that purpose. The other alleged misrepresentations are not much dwelt on by counsel for appellant, and need not be further considered. The plaintiff averred and testified that he had daughters and other young ladies under his charge whom he wished to send to the college, and that the building of the college was the main inducement to his purchase of the land; and upon his own statement he expected the college to be speedily erected and put in running order, so that he might have the advantage of sending his daughters and wards there to be educated. The alleged misrepresentations were made by several different firms of real-estate dealers, some of them residing in Los Angeles, a few miles from Inglewood, others of them residing at Pasadena, also in that general neighborhood, and others residing at Inglewood itself. These real-estate agents had advertisements and maps upon which there were pictures of a large college building "with turrets." It is denied by the defendants that these agents had any authority to make such representations; but, for the purposes of this opinion, that question need not be considered. It sufficiently appears that as early as 1888, and certainly in April, 1891, the plaintiff, as a man of reasonable caution and observation, ought to have known that said alleged representations, if made, were false, and that the least inquiry would have demonstrated their falsity. In the latter part of 1887, or in the first part of 1888, there were foundations laid for a college building; but work thereon continued for only two or three months, and was then entirely abandoned. No more work was ever done towards the erection of the college, and it was quite apparent that no college was to be built. The plaintiff had his legal residence in the state of Pennsylvania; but during all the years from 1887 to 1894, when this suit was commenced, he spent several months each year at and near Inglewood, and was an observer of the condition of things at the latter place. He and his assignor, Thompson, had purchased from the defendants some other land at Inglewood, which they had not entirely paid for; and, being pressed for payment in the spring of 1891, they were evidently suspicious that no college was to be built, and made some efforts to avoid the last payments on said land. They finally, however, in April, 1891, settled their payment on said land by a compromise in which Freeman released a considerable amount of the money due. Before that settlement plaintiff and Thompson had some conversation with Freeman, and that was the only occasion in which it was claimed that Freeman himself ever made any promises or representations. The substance of the conversation was that they asked Freeman if the college would ever be built, and his reply was that it was his belief that it would be. But as to the most important alleged misrepresentation, namely, that Freeman had donated $100,000 in money for the building of the college, they never made of him any inquiry. Neither did they make any inquiry about said $100,000 of any person who could have given them correct information upon the subject. The statement which they claim that defendants' alleged agents made to them was simply that Freeman had donated this $100,000; but no donee was named, nor did the plaintiff ever endeavor to find out who the donee, if any, was. Upon the maps presented by the agents it appeared that the land where the college was to be built belonged to the "University of Southern California," who might well be the donee, if there were any, of the said money; but no inquiry was ever made of said university or of the president thereof, who was known to plaintiff, as to whether any money had ever been delivered to them for that purpose; nor was there any inquiry made by plaintiff of any one as to who the donee of this great donation was. Even if he was as childlike, innocent, unsuspicious and unable to cope with wide-awake Western people as his counsel represents Pennsylvanians to be, still it is difficult to believe that he was so unsophisticated as to have had no suspicion that the alleged $100,000 donation was a myth; and the fact that there was not to be any college there at which he could educate his daughters and wards must have forced itself on his observation. This case furnishes another illustration of the reasons upon which the statute of limitations and the doctrine of laches are founded, namely, "the probability that during the course of many years witnesses will die and recollections of events long past will become indistinct in the memories of the living"; for it appears that many persons, who, if living, would be important witnesses as to the alleged fraudulent misrepresentations and false promises upon which the action is founded, had died before it was commenced.

As to the second count of the complaint, the considerations above stated apply as well to the conduct of the assignor, Thompson, even if the assignment could be considered as valid; but the alleged assignment was of a pure, naked right to bring an action for fraud, unconnected with any property or thing which had "itself a legal existence and value, independent of the right to sue for fraud," and was therefore void. A mere right to complain of fraud is not assignable. Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Whitney v. Kelley, 94 Cal. 146, 29 Pac. 624; Sanborn v. Doe, 92 Cal. 152, 28 Pac. 105. Under the foregoing views, which are elaborated in the opinion of the learned judge of the trial court, it is unnecessary to discuss the other matters argued in the briefs of counsel. The judgment is affirmed.

We concur: HENSHAW, J.; GAROUTTE, J.; HARRISON, J.; VAN DYKE, J.

124 Cal. 542

HARRINGTON v. PATERSON et al.

(S. F. 833.)

(Supreme Court of California. May 31, 1899.)

CONTRACT—RESCISSION FOR FRAUD—LACHES.

The purchaser of a house seeking to avail himself of a fraudulent statement that it was "first-class in every respect" remained in possession of the house nearly four years before objecting to his contract, and claimed not to have discovered the fraud for two years, but gave no reason therefor, and continued to pay interest on a mortgage he assumed for sixteen months after the alleged discovery of fraud. *Held*, that his repudiation of the contract was not made "promptly" after the discovery, as required by Civ. Code, § 1691.

Department 1. Appeal from superior court, city and county of San Francisco.

Suit by Louise S. Harrington against Edward M. Paterson and another. There was a judgment for plaintiff against defendant Paterson, and he appeals. Affirmed.

T. M. Osmont, for appellant. Warren Olney, for respondent.

VAN DYKE, J. October 7, 1891, appellant purchased from the plaintiff certain premises in the city of Oakland, with a dwelling house thereon, for the sum of $9,000. A thousand dollars was paid in cash, and the purchaser assumed and agreed to pay and discharge the mortgage on said premises, previously executed by the plaintiff and her husband to the defendant bank, in the sum of $3,500, and also executed a note and mortgage to the plaintiff in the sum of $4,500, the balance of the purchase price.

The action is for the foreclosure of the mortgage executed to the plaintiff, and was commenced April 26, 1895. The defendant bank, by way of cross complaint based upon its own and prior mortgage, also asked for foreclosure. The defendant Paterson filed his amended answer and cross complaint as against the plaintiff. The plaintiff demurred "to the cross complaint and affirmative matter set forth in the amended answer and cross complaint of the defendant Edward M. Paterson," on the ground, among others, that it "did not state facts sufficient to constitute a cross complaint or cause of action, nor entitle the defendant Paterson to any affirmative or other relief." The court sustained "the demurrer of plaintiff to defendant Paterson's amended cross complaint," without leave to amend. The matters averred in the cross complaint necessary to be considered are that, while the negotiations for the purchase were pending, the husband of the plaintiff, as her agent, represented to the defendant that the dwelling house on the premises was in every respect a first-class building; that it was constructed throughout with first-class material; that it had been built for plaintiff and her family; that, in order to insure the most thorough construction and equipment of said building and the use of the best material therein, the plaintiff had caused the same to be built by day labor, and not by contract; that said building was constructed at a much greater cost, and in much more substantial manner, and of much better materials than it would have been if built by contract; that it cost $5,200, and was worth the sum of $5,250; that the land on which it was built, being the premises conveyed, was worth $3,250; that these representations were false; that the dwelling house was built by contract, not by day labor, was not constructed of first-class material, but second and third class, and it did not cost to exceed $3,200, was not built for the home of plaintiff, but upon speculation; that the defendant was a man ignorant of, and had no knowledge of, the construction or value of dwelling houses; and that the defendant, for the first time, discovered and ascertained the falsity of the representations stated on December 1, 1893. And he alleged that he thereupon notified plaintiff of such discovery, and that he refused to be bound by said contract of sale, and repudiated the same, and demanded the return of all moneys paid thereunder, and that he would redeed the property to the plaintiff, and restore the possession thereof, but does not aver either the execution or tender of a deed. It appears further from the cross complaint that the appellant entered into the possession of the house and premises at the time of the purchase thereof, and has since continued in such possession. There is no reason shown why the appellant did not discover or ascertain the facts showing the representations to be false, as alleged, prior to December, 1893, and, further, it appears from the cross complaint that the appellant continued paying interest on the bank mortgage up to April, 1895, and on the plaintiff's mortgage up to January, 1893.

Our Code prescribes the general rule in reference to the rescission of a contract. The party desiring to rescind must do so promptly on discovering the facts which entitle him to rescind. He must restore to the other party everything of value which he has received, or offer to do so. Civ. Code, § 1691. From the time the appellant entered into possession of the premises he had every facility for ascertaining whether the alleged representations were false or true, and the law presumes that within a reasonable time he had fully ascertained the truth or falsity of such representations, if made, and it was his duty immediately to take steps for a rescission, if he desired so to do. "Upon obtaining knowledge of the facts he should commence the proceeding for relief as soon as reasonably possible. Acquiescence, consisting of unnecessary delay after such knowledge, will defeat the equitable relief." 2 Pom. Eq. Jur. § 817. "He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by rescission or refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself in reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of, and relief from, the misrepresentations." Id. § 897.

From his own showing the appellant continued to pay rent on the bank's mortgage for many months after he admits he discovered the allegations to be false, and paid interest on the plaintiff's mortgage for over a year after he entered into possession of the premises, and still took no steps for a rescission until the suit brought to foreclose the second mortgage. Archer v. Freeman (L. A. No. 261, a bank case just decided) 57 Pac. 474, presented features of laches and acquiescence something similar to this case. There, upon an action for damages claimed to have arisen from false representations on the sale of real estate, the plaintiff was nonsuited, and this court, in affirming the judgment, uses this language: "It is the clearly established law that in such a case a party must be held to have had knowledge of the alleged frauds whenever the means of knowledge existed and the circumstances were such as to put him on inquiry. Moore v. Boyd, 74 Cal. 171, 15 Pac. 670; Lataillade v. Orena, 91 Cal. 578, 27 Pac. 924; Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43." We think the demurrer to the cross complaint was properly sustained. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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124 Cal. 498

COLUSA COUNTY v. GLENN COUNTY.

(Sac. 561.)

(Supreme Court of California. May 25, 1899.)

TAXATION—ACTION BETWEEN COUNTIES—STATE BOARD OF EQUALIZATION—JURISDICTION—MONEY HAD AND RECEIVED.

1. St. 1893, p. 290, § 1, provides that every assessment of property made after the year 1879 which is invalid, or may afterwards be declared invalid, shall be remade and reassessed by the state board of equalization for the year for which the assessment was invalid. *Held*, that the board cannot make a reassessment of the property of a railroad which has been regularly assessed under Pol. Code, §§ 3664–3669, regulating the manner of making such assessments, since such sections are constitutional and valid.

2. A railroad company, pursuant to an attempted reassessment of its property for taxes under St. 1893, p. 290, § 1, paid them to a new county, which had been, subsequent to the original assessment, created out of the county in which the prior assessment was made. The act creating such new county made no provision for an apportionment of the public property, or of the debts or credits of the old county, between it and the new one. *Held*, that such county, having received the taxes, knowing that they were under an assessment made by the old county, was liable on its implied promise to pay them to the old county, which was entitled thereto.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county.

Action by the county of Colusa against the county of Glenn. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

John T. Harrington, for appellant. H. W. Johnson and Ernest Weyand, for respondent.

COOPER, C. Action to recover $1,622.72 taxes assessed by plaintiff against the Northern Railway Company for the years 1886 and 1887, and which said sum was paid by said railway company to defendant in November, 1894. The case was submitted in the court below upon a stipulation as to the facts. Judgment was entered for plaintiff for the amount prayed. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

The following is a portion of the stipulation: "That in the years 1886 and 1887 the said Northern Railway Company was regularly assessed by the state board of equalization the amount of assessable property and the amount of taxes due from said Northern Railway Company, and the number of miles of track of said Northern Railway Company in said county of Colusa were determined, and the whole thereof in said years 1886 and 1887 apportioned to plaintiff, by said board of equalization; that the various steps required by law were regularly taken in the matter of the assessment of the railway company, the said Northern Railway Company, and said assessments and taxes were made and levied in accordance with the constitution of the state of California and the provisions of the Political

Code of said state, and said apportionment made by the said state board of equalization to the said county of Colusa regularly made in accordance with law; that the county clerk, auditor, and board of supervisors of the county of Colusa during said years 1886 and 1887, and after the action of the said state board of equalization, did all things required of them by law in the matter of the assessment of the property of the said Northern Railway Company, and levy of taxes due from it: that after the completion of all the necessary steps relating to the assessment and the levy of the property of and the taxes due from said Northern Railway Company, and the ascertainment of the amount due from said company, the same was not paid, but all steps necessary to be taken and all requirements of law were done, performed, and fulfilled." It was further stipulated that the state board of equalization reassessed the property of said railway company for the years 1886 and 1887, and apportioned the amount in controversy to defendant, under an act of the legislature of the state of California entitled "An act in relation to reassessments of property or equalization of the same and the collection of taxes thereon in cases where a former assessment made since 1879 is illegal or invalid, or where the proceedings for the collection of such taxes have been ineffectual by reason of error, irregularity or invalidity, and such taxes have not been paid," which act was approved March 23, 1893. St. 1893, p. 290. The case was here on a former appeal (Colusa Co. v. Glenn Co., 117 Cal. 434, 49 Pac. 457), and on that appeal it appeared that the court below sustained a demurrer to the complaint, plaintiff declined to amend, and judgment was entered for defendant. This court, after a full consideration of the case, held that the complaint stated a cause of action, and that the demurrer should have been overruled, and reversed the case. On that appeal it was claimed that there was a reassessment of the property by the state board of equalization under the said act of March 23, 1893. The court held that the question was not then presented in such manner that it could be passed upon, and used this language: "Whether there was such reassessment, and whether, if there was, it would affect the right of the plaintiff to recover in this action, are questions that are not so presented as to require decision. If there was a reassessment, and if that fact relieves the defendant from liability, it is open to the defendant to plead it." Upon the case being remanded the defendant accordingly filed an amended answer, and pleaded in defense of the action a reassessment made by the state board of equalization in August, 1894. The law of the case was practically settled on the former appeal, except as to the effect of such reassessment by the said state board.

The principal question to be now determined by this court is as to whether or not the state board had jurisdiction to make the reassessment. The point is thus stated in appellant's brief: "If the state board had jurisdiction to make the reassessment, the decision is erroneous." We will therefore first examine this question. The state board of equalization being a limited tribunal, its jurisdiction is limited, and it possesses only such powers as are expressly conferred by statute, and none others. Finch v. Tehama Co., 29 Cal. 457; Modoc Co. v. Spencer, 103 Cal. 498, 37 Pac. 483. Looking at the said act of March 23, 1893, for the power of the said state board, we find that the portion of section 1 of said act applicable to this case reads as follows: "Every assessment of property made after the year 1879 which is invalid or may hereafter be adjudged to be by reason of any illegality, invalidity or irregularity declared or existing in the assessment of such property, or in the mode provided for the assessment thereof, shall be remade and the property re-assessed and equalized for each year for which such assessment is invalid as aforesaid and for the year for which the assessment of such property was invalid as aforesaid." It is therefore evident that the said state board had no power to reassess the property of the said Northern Railway Company for the years 1886 and 1887, unless said assessment for said years was invalid when said act took effect, or was thereafter adjudged to be so. The stipulation hereinbefore quoted shows that the assessment for the years 1886 and 1887 was regularly made, and "that the various steps required by law were regularly taken in the matter of the assessment of the railway company." It is therefore admitted that the assessment of 1886 and 1887 was made strictly in compliance with the sections of the Political Code, 3664 to 3669, but it is claimed that the said sections of the Political Code are unconstitutional and invalid, and that this court so hold in People v. Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303. In the opinion in that case, written by Mr. Justice Fox, the court did apparently so hold; but the case is, as to this point, expressly overruled in People v. Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905, in an exhaustive opinion of the court in bank, delivered by Mr. Justice Harrison, in which the principal question was as to the validity of said sections of the Political Code; and they were held to be constitutional and valid. It was claimed that the case of People v. Central Pac. R. Co., in 83 Cal. 393, 23 Pac. 303, had held said sections of the Political Code to be unconstitutional, but the court said: "There are matters in the opinion of Mr. Justice Fox in People v. Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303, in support of the contention of the appellant; but, after the court had decided that the complaint was insufficient in any aspect in which it might be reviewed, its further opinion of the effect of a complaint that would have sufficiently presented a cause of action must be regarded as obiter dicta." It follows that the state board of equalization had no jurisdiction to make the reassessment, and that the assessments of 1886 and 1887 were valid, and made while all the territory now included in Glenn county was a part of the territory of plaintiff. The act creating the county of Glenn did not provide for any apportionment of the public property or of the debts or credits of Colusa county between it and the new county, and in such case the whole thereof belonged to Colusa county. Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316; Tulare Co. v. Kings Co., 117 Cal. 195, 49 Pac. 8; Colusa Co. v. Glenn Co., 117 Cal. 438, 49 Pac. 457. It is said by Mr. Justice Harrison, speaking for the court, in Los Angeles Co. v. Orange Co.: "In the absence of any provision in reference thereto [property and assets], the old county will be entitled to retain all public property and assets except such buildings and structures as lie within the limits of the new, and will also be liable for its prior obligations." It follows that the money due Colusa county as taxes for the assessment of the years 1886 and 1887 was at the time of the creation of Glenn county assets of the plaintiff, and plaintiff has the right to recover it. It does not now occur to us why the plaintiff would not be entitled to the money due for taxes for said years even if the assessments of 1886 and 1887 were void, and it was collected by reassessment through the machinery of the act of March, 1893. If the law should provide a method of collecting a debt in a case where before there was no machinery for its collections, this would not change the title from the true owner of the debt to some one else. The debt, when collected, would be the property of the owner thereof. It is said that, if the board of equalization had no jurisdiction to make the reassessment, then the payment by the railroad company to defendant was a voluntary payment and in no way concerned the plaintiff. To this view we cannot accede. The stipulation of facts shows that the payment by the Northern Railway Company of the amount was for taxes due for the years 1886 and 1887 under the attempted reassessment. Defendant was not created, had no name or existence, until March, 1891. We look in vain for any statute authorizing the defendant to collect a debt that had long been due to plaintiff at the time defendant came into existence. Defendant received the money knowing that it was paid for taxes under the assessment of Colusa county for the years 1886 and 1887. Where money is received by one, and belongs to another, the law implies a promise on the part of the receiver to pay it over, and the party entitled to it may maintain an action for its recovery. District Tp. of Norway v. District Tp. of Clear Lake, 11 Iowa, 506; Bridges v. Board, 92 N. Y. 570; San Gabriel Valley Land & Water Co. v. Witmer Bros. Co., 96 Cal. 635, 29 Pac. 500, and 31 Pac. 588. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(124 Cal. 512)

SWEENEY et al. v. MEYER et al. (S. F. 1415.)[1]

(Supreme Court of California. May 26, 1899.)

MECHANICS' LIENS — PREMATURE PAYMENT OF CONTRACTOR — OWNER'S LIABILITY — FORECLOSURE—EXTRA WORK—ATTORNEY'S FEES.

1. By Code Civ. Proc. § 1184, relating to mechanics' liens, no payment made before due, under the contract, will defeat, diminish, or discharge any lien except the contractor's. It is also provided that, on service of a written notice by one who has performed labor or furnished material, the owner shall withhold from the contractor all or sufficient money to answer such claim, and money paid while the notice is in force shall be deemed, for the purpose of all liens except the contractor's, a premature payment, within the meaning of, and subject to, this section. *Held*, that the continued liability on a premature payment imposed by the first provision does not depend on the giving or failure to give the notice referred to in the latter provision.

2. In an action to foreclose a mechanic's lien, where extra work is claimed for, the complaint and the evidence in support thereof, should specifically show what constituted such claim.

3. In a consolidated action to foreclose mechanics' liens, attorney's fees, of $100 each, were allowed to two claimants who had separate attorneys, and who filed separate complaints, and were adjudged $293.23 and $107.64, respectively. The other eight plaintiffs had other attorneys, and joined in a complaint on claims aggregating $663.02, and were allowed $100 attorney's fees, to be apportioned ratably according to their several judgments. The trial was of considerable length and some complexity. *Held*, that the allowance of attorney's fees was not excessive.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by G. C. Sweeney and others against Johanna K. Meyer and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants Johanna K. and A. Meyer appeal. Judgment modified, and order affirmed.

Frank M. Parcells, for appellants. A. G. Eells, H. K. Eells, J. N. Young, and H. W. Hutton, for respondents.

PER CURIAM. This is a consolidated action for the foreclosure of certain liens of mechanics and material men. Judgment passed for the plaintiffs, and the owners, Johanna and Antone Meyer, appeal from that judgment and from the order denying a new trial.

1. The contract specified the times during the progress of the work when the partial payments were to be made. The court found that the third and fourth of these payments

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[1] Rehearing denied June 24, 1899.

were made prematurely, and in advance of the terms of the contract, and prior to the time when due, and were therefore invalid as payments for the purpose of diminishing or discharging the liens, or any of the liens, involved in the action. By the mechanic's lien law, "no payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person except the contractor, but as to such liens such payment shall be deemed as if not made, and shall be applicable to such liens." Code Civ. Proc. § 1184. By the same section, it is also provided that a written notice may be served upon the owner by one who has performed labor or furnished material, and that upon service of such notice "it shall be the duty of the owner to and he shall withhold from his contractor, or from any other person acting under such owner * * * all money due or that may become due to such contractor * * * or sufficient of such money to answer such claim; * * * and all money paid thereafter by the owner to the contractor, while such notice is in force, shall, for the purposes of all liens of all persons except that of the contractor, be deemed a payment prior to the time the same was due within the meaning of and subject to the provisions of this section." Under this law, appellants contend that an owner becomes liable for payments prematurely made to his contractor only in the event that thereafter, and before the time when such payments are due, he is served with the requisite notice. To this it must be answered that, while such might well have been the law, the law is not so written. The provision as to notice is entirely separate and distinct from the provision invalidating payments prematurely made. The proceedings under the notice are in the nature of a garnishment, whereby there is impounded specific moneys due, or thereafter to become due, to the contractor. The provision of the law as to premature payments is not made dependent upon the giving or the failure to give notice. The provision is but a forthright declaration that, if a contractor shall make a payment prior to the time when it is due, that payment shall be deemed not to have been made, so far as affects all lien claimants other than the contractor himself. It is a provision like the provision requiring recordation. It is an arbitrary demand of the statute, for the failure to comply with which the owner must suffer. If it be said that it is a harsh requirement, this may be conceded, but at the same time it should be noticed that the owner need not suffer from it if he complies with the law.

2. It is claimed that the court erred in refusing to strike out all of plaintiffs' evidence relating to the extra work, the value of which the court found to be $700. It is also claimed that the evidence is insufficient to support the findings and judgment as to said extra work. Four of the plaintiffs did extra work of the aggregate value of $194.92, and the court finds upon sufficient evidence that this work was done at the instance of defendants, and that the several sums were justly due, and were of the reasonable value charged therefor. The evidence relating to these matters, we think, was clearly admissible. It is also found by the court that the plans and specifications were materially departed from, "and a large amount of extra work, * * * outside that mentioned in said contract, * * * was done upon said structure at the order of said owner of said property, the amount and value of which departures, extra, and different work was and is the sum of seven hundred dollars, no part of which has ever been paid, and all of which, together with the sum of six hundred and seventy-five dollars, the last and final payment due under said contract, is applicable to the payment of the liens of the several plaintiffs." This sum of $700 is added to the third and fourth payments, making applicable to the lien $2,375. In another finding it appears that this extra work was done by Alsup, and there is evidence tending to support the finding. The evidence and the findings show that certain four of the plaintiffs did extra work of the value of $194.92, and defendants concede that they are entitled to liens therefor; but it is claimed that there is no evidence and no finding and no sufficient pleadings to justify the decision of the court that the owners are chargeable with $700 due Alsup for extra work. None of the complaints charge that Alsup did any extra work, and no extra work is mentioned in the pleadings, except that above stated, amounting to $194.92. In the course of the trial, however, there was evidence tending to show that Alsup performed extra labor and furnished extra supplies worth $700 or $800. By leave of court, plaintiffs amended two of the complaints so as to show the whole amount due from defendants on account of said contract to be the sum of $2,375. This amendment, we suppose, was made to let in the $700 extra work done by Alsup, but the complaints were not amended so as to allege that he did any extra work.

After the court had stricken out all of defendants' evidence as to payments made by them to sundry persons for material, counsel for defendants said: "The plaintiffs, aside from the extras which they have separately specified and declared upon, have not set forth any itemized statement or bill of those extras which they claim are of the value of seven hundred dollars. * * * If the plaintiffs will submit an itemized statement of the extras, we may be able to show that they have been paid. Until this statement is forthcoming, I move that all the evidence introduced thus far touching the extra and additional work, not specifically declared upon, be stricken out." The court denied the motion, to which ruling defendants excepted. We think defendants were entitled to know

—first, by appropriate and sufficient allegations of the complaint, and, second, by evidence in support thereof—what constituted this extra work. These facts do not appear either in the pleadings or by sufficient evidence. Without a showing of some kind by which specifications of this extra work could be brought to defendants' knowledge, it was not possible for them to intelligently meet the claim. As the matter stands, the court increased the fund subjected to the liens by $700 for extra work, without any allegations in the complaints in any way referring to this extra work, and without evidence in detail as to what it was and the value thereof, except that witnesses stated generally that the extra work done by Alsup was of the value of $700. The state of the pleadings and evidence considered, we think it was error to make this sum applicable to the liens, as was done by the decree.

3. We are asked to modify the allowance made for attorney's fees as excessive. Heath filed a separate complaint. The court gave him judgment for $293.23, and $100 attorney's fees. De Lair also filed a separate complaint, and was given judgment for $107.64, and $100 attorney's fees. The other eight plaintiffs filed a consolidated or joint complaint, the claims aggregating $663.02. The court allowed $100 attorney's fees in these eight claims, to be apportioned among the eight claimants, ratably according to their several judgments. Heath and De Lair each had separate attorneys, and the eight others had still other attorneys. Section 1195, Code Civ. Proc., provides that the trial court "must allow, as a part of the costs, * * * reasonable attorney's fees in the superior and supreme courts, such costs and attorney's fees to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action, or separate actions are consolidated." The fixing of attorney's fees is a duty devolved upon the trial court by the statute (Lumber Co. v. Welton, 115 Cal. 1, 46 Pac. 735, 1057); and conceding, but not deciding, that this court may, from what appears in the record, modify the judgment of the trial court in such matter, we do not think there is ground for doing so in this case. The transcript discloses a trial of considerable length and some complexity. The pleadings are necessarily somewhat extended in this class of cases. The trial judge was in better position than we are to determine a just apportionment of the attorney's fees, and, while it may appear that De Lair received a greater proportionate allowance than did the eight who consolidated their claims, we cannot say that there was such abuse of discretion as to warrant interference here. Under all the circumstances of the trial, the total of attorney's fees allowed seems not to be excessive. The judgment should be modified so as to show that the liability of defendants applicable to plaintiffs' liens is limited to the sum of $1,675. The judgment is ordered thus modified, and the order appealed from is affirmed.

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124 Cal. 518

SAN JOSÉ WATER CO. v. LYNDON, Sheriff.

(S. F. 1,301.)

(Supreme Court of California. May 26, 1899.)

MORTGAGES—FORECLOSURE—REDEMPTION.

A junior mortgagee joining in foreclosure of the senior mortgage, and asking by cross complaint for foreclosure of his mortgage and sale of the premises, cannot redeem from the sale.

Department 2. Appeal from superior court, Santa Clara county.

Mandamus by the San José Water Company against James H. Lyndon, as sheriff. There was a judgment for plaintiff, and defendant appeals. Affirmed.

E. M. Rosenthal, for appellant. S. F. Leib, for respondent.

PER CURIAM. This is an appeal from the judgment of the superior court in a mandamus case commenced therein. The purpose of the proceeding was to compel the defendant, as sheriff, to execute a conveyance of certain property sold by him to plaintiff's assignor under a decree of foreclosure and sale. The court below ordered the mandate to issue as prayed for, and the appellant appeals from the judgment. The appellant contends that the sheriff properly refused to execute the deed, because redemption from the sale had been made by one Herman Levy. This contention cannot be maintained, and the judgment must be affirmed upon the authority of Black v. Gerichten, 58 Cal. 56. The only facts necessary to be stated are these: An action was brought to foreclose a mortgage upon the land in question, and the said Levy, who was a junior mortgagee, was made a party to the foreclosure suit. Levy, by a cross complaint, set up his junior mortgage, and prayed for a foreclosure of his mortgage and sale of the premises. The court decreed a foreclosure of both mortgages and a sale under them. The proceeds of the sale were merely sufficient to pay the senior mortgage, and Levy had a judgment docketed, but did not pray for nor was there any deficiency judgment, at least in form, entered. The facts in Black v. Gerichten, supra, were similar to those in the case at bar, except that in the former case the junior mortgagee had a deficiency judgment entered; but the latter fact does not alter the rule there declared. A mortgagee cannot redeem from the sale made upon the foreclosure of his mortgage; and it makes no difference whether the foreclosure is in a suit originally brought by him, or upon a cross complaint in which he prays for and obtains a foreclosure in a suit brought by another mortgagee. In the case above cited the court say: "Whether such mortgage was foreclosed in the action in which the mortgagee was plaintiff or defendant is immaterial, for in the latter case he filed a cross complaint, and prayed a foreclosure of his mortgage. It is quite clear that the plaintiff in this case had no mortgage lien on the property subsequent to that on which the property was sold; for it was sold upon his mortgage lien, and his mortgage was merged in the judgment under which it was sold." Appellant relies upon Frink v. Murphy, 21 Cal. 108, but that case is referred to in Black v. Gerichten, and shown not to be applicable, because in Frink v. Murphy there was no cross complaint, and no foreclosure, nor prayer for a foreclosure, of the junior mortgage. See, also, Camp v. Land, 122 Cal. 167, 54 Pac. 839, where Black v. Gerichten is approved. The judgment appealed from is affirmed.

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124 Cal. 561

COFFEE v. HAYNES (LEES, Garnishee). (S. F. 1,662.)

(Supreme Court of California. May 31, 1899.)

GARNISHMENT—AFFIDAVIT — JURISDICTION — MONEY IN HANDS OF OFFICER—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CONVICTS—CIVIL DEATH.

1. An affidavit, for the order of examination of a garnishee to show cause why he should not obey the writ, which states that such garnishee "has property of said judgment debtor," etc., is a substantial compliance with Code Civ. Proc. § 717, providing that, upon proof by affidavit that any person has property of the judgment debtor, such person may be required to appear and answer concerning the same.

2. Where a garnishee appears and answers, and proceeds to the hearing in the trial court, without making any objection to the sufficiency of the affidavit on which citation issued, he waives any objection to its sufficiency.

3. Code Civ. Proc. §§ 717, 719, are not unconstitutional, for the reason that no provision is made for notice to the judgment debtor in an action of garnishment, and no opportunity given him to be heard.

4. Pen. Code, § 673, declaring that the sentence of a person to less than a life imprisonment suspends all his civil rights, and section 674, declaring that one sentenced for life is civilly dead, construed in connection with sections 675 and 677, providing that such provisions do not render the person convicted incompetent as a witness in criminal actions nor incapable of conveying property nor work a forfeiture, do not deprive the court of jurisdiction to make an order subjecting the property of a person sentenced for life to the satisfaction of a judgment.

5. Garnishee, a chief of police, by search made under a prisoner's directions, came into possession of money belonging to such prisoner. The search was made on the theory that material evidence as to the insanity of the prisoner would be disclosed. *Held*, that since it is presumed, from the fact that the prisoner was convicted, that the plea of insanity, if offered, did not prevail, a ruling of the court refusing to admit evidence, on the part of the garnishee, that at the trial of such prisoner on the charge of murder his counsel interposed the plea of insanity, does not prejudice the garnishee.

6. Garnishee, a chief of police, by search made under a prisoner's directions, came into possession of money belonging to such prisoner, with his consent; such money not being taken at the time of arrest, nor from the person of the prisoner, and having no connection with the cause of arrest. *Held*, that the money was not in custodia legis, so as to be exempt from garnishment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Walter A. Coffee against Theodore Park Haynes. I. W. Lees was garnished. From an order requiring said Lees, as garnishee, to pay over to the sheriff a sum of money belonging to defendant, he appeals. Affirmed.

J. J. Dunne, for appellant. Geo. D. Collins, for appellee.

CHIPMAN, C. Action for the value of certain legal services as attorneys at law rendered defendant, Haynes, by plaintiff's assignors. Plaintiff recovered default judgment for $1,920 on June 21, 1898, and on the same day a writ of execution was duly issued in the action, and was served upon appellant, Lees, June 22d, as garnishee. Appellant answered as follows: "San Francisco, June 22, 1898. [Directed to the sheriff.] Dear Sir: Replying to your process of garnishment, * * * I have in my possession no moneys * * * belonging to Theodore P. Haynes, * * * except such as has come into my possession in my official capacity * * * by reason of said * * * [defendant] having been a prisoner in my custody, and any and all of which property is exempt from attachment or execution by reason of its having come into my custody in the manner aforesaid. Yours, respectfully, I. W. Lees, Chief of Police." Thereafter, and on the same day, plaintiff filed his affidavit in the court praying an order of the court directed to the said Lees to show cause why he should not obey the writ of execution. On June 27th, the judge issued an order requiring the said Lees to show cause, to which the latter made written return under oath, July 1, 1898. The matter was heard upon the papers and upon the proofs submitted at the hearing, and the court ordered the said Lees to pay over to the sheriff the sum of $947.45. The appeal is from this order, and is here upon bill of exceptions.

On March 23, 1898, Lieut. Burke, of the police department of San Francisco, was shot and killed by defendant, who was promptly arrested and brought to the police station, where he continually proclaimed that the men who had visited him on the occasion of the lieutenant's death were robbers and thieves, and that the lieutenant was not an officer, but was a robber, and had come there to rob him. It was suggested to defendant that these persons would not have robbed him of much if they had robbed him, whereupon he disclosed the fact that he had money hid away and buried. To determine whether this was a mere delusion, appellant went to defendant's cabin, taking the latter with him. A search was made under defendant's direction, and under the cabin floor a considerable sum of money was unearthed, and some jewelry contained in tin cans. Appellant believed, from the persistent claim of defendant that he was about to be robbed, and from his conduct in the matter, that some question was raised as to defendant's sanity, and that whether the existence of this money was or was not a mere delusion was a material fact bearing upon defendant's sanity. It seems that defendant stated with great accuracy just what he had buried away in each tin can, and it was thought by appellant that to that extent this knowledge showed that he was sane; and it was claimed by appellant that the money so seized was necessary evidence to be used at the trial, and hence could not be taken by attachment. It is not disputed that the money belonged to defendant. His examination took place on April 11, 1898, and his trial began on June 8th following. He was convicted on June 13th, and was sentenced to imprisonment for life.

1. It is claimed that the affidavit of plaintiff for the order of examination is fatally defective, because it fails to state facts showing that the garnishee has property of the judgment debtor; that the statement in the affidavit that such garnishee "has property of said judgment debtor," etc., is a mere conclusion of law; and hence the affidavit is a nullity and the order void. The point was not raised at the hearing in the superior court. Appellant appeared and answered, and proceeded to the hearing upon the citation issued upon this affidavit, and appellant must be held to have waived any objection to its sufficiency. Furthermore, we think the affidavit was a substantial compliance with section 717, Code Civ. Proc.

2. It is further claimed that sections 717, 719, Code Civ. Proc., are unconstitutional, for the reason that no provision is made for notice to the judgment debtor and no opportunity given him to be heard. The question has been otherwise decided by this court. High v. Bank, 95 Cal. 386, 30 Pac. 556.

3. It is claimed that defendant was civilly dead when the order was made, and the court was without jurisdiction to make the order; citing Pen. Code, §§ 673–675. By section 673, "a sentence of imprisonment in a state prison for any term less than for life suspends all the civil rights of the person so sentenced. * * *" By section 674, "a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead." By section 675 it is provided "that the provisions of the last two preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property." Section 677 provides: "No conviction of any person for crime works any forfeiture of any property, except in cases in which forfeiture is expressly imposed by law. * * *" Under a statute similar to section 674, it was held in Re Nerac's Estate, 35 Cal. 392, that the suspension of the civil rights of the person sentenced to imprisonment in a state prison for a term less than life did not suspend the civil rights of his creditors, and that they still had the right to subject the property of the person so sentenced to the satisfaction of their judgment; and that no consequences follow, except such as are declared by the statute. Appellant invokes the rule expressio unius, etc., and argues that the consequences of civil death are such that the only rights reserved are those enumerated in section 675. If this be conceded as to the person sentenced, still it does not follow that the creditors lose all rights. He may not be entitled to bring an action, but actions may be brought against him. 6 Am. & Eng. Enc. Law, p. 65, tit. "Civil Death," and cases cited. The proceeding before us is not against the defendant, but against his creditor. The action was begun before defendant's trial on the criminal charge, but judgment was not entered until after his conviction. But we think plaintiff had a right to enforce the judgment subsequently entered. We cannot agree with appellant that civil death is identical in law with physical death. We are referred to In re Nerac's Estate, supra, where it was said: "If the convict be sentenced for life he becomes civiliter mortuus, or dead in law, in respect to his estate, as if he was dead in fact." That case called for no expression of opinion as to the consequences following a life sentence, and the declaration was therefore obiter. Our statute now makes the life convict a competent witness in criminal actions, and capable "of making and acknowledging a sale or conveyance of property." Section 675, supra. If he may sell his property, we can see no reason why his property may not be taken to pay his debts.

4. Error is claimed because the court refused to admit evidence that at the trial of defendant on the charge of murder his counsel interposed the plea of insanity. There was no claim made by appellant at the hearing of this citation that defendant was in fact insane. On the contrary, appellant expressly refrained from taking that position, and it must be presumed, from the fact that defendant was convicted, that the plea of insanity, if offered, did not prevail. Appellant was therefore not prejudiced by excluding this evidence, even if it were material, which we do not think it was.

5. The principal question presented is whether the money was protected from process because in custodia legis. It was held in Hathaway v. Brady, 26 Cal. 581, where money is deposited with the sheriff by a defendant to procure the release of an attachment, it is in the custody of the law; but, as was said in Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111, this is true because the money thus deposited becomes "a symbol of, and stands in place of, the attached property." In the Kimball Case it was said: "It is only where property is law-

fully taken by virtue of legal process that it is in the custody of the law, and not otherwise,"—citing Gilman v. Williams, 7 Wis. 334. It is generally held to be the law that property taken from a prisoner on his arrest by an officer charged with that duty is not, while in the hands of such officer, subject to levy, and cannot be reached by the process of garnishment; the reason being that to hold otherwise would lead to a grave abuse of criminal process. 1 Freem. Ex'ns, § 130a; 2 Freem. Ex'ns, § 255. Mr. Freeman says, supra: "This exception is not strictly on the ground that the property is in the custody of the law, for the charge under which the arrest was made may not relate to the property taken from the prisoner, and under no circumstances could it affect the title thereto." In the case here the money was not taken at the time of the arrest, nor from the person of the defendant, and had no connection whatever with the cause of the arrest. Appellant came into possession of it by direction of defendant, and with his consent. Appellant is neither more nor less than the bailee of defendant. He does not hold the money in his official capacity, and owes no duty to disburse it in such capacity, and we think it may be reached by garnishment. Mechem, Pub. Off. § 876; Wap. Attachm. § 411, citing the instructive case of Ex parte Hurn, 92 Ala. 102, 9 South. 515. Appellant makes the shadowy claim that the money was necessary at the trial to aid in establishing defendant's sanity. But the evidence is that it was not introduced at the trial, and it appears to us it was in no sense necessary to have the money in court to show the fact upon which appellant relied to prove defendant's sanity. The important fact was that he told with accuracy how much money he had and where it could be found. That could be conclusively proved without profert of the money itself. Suppose the money had been lost by or stolen from appellant before the trial of defendant; would there have been any difficulty in proving the essential fact bearing upon defendant's sanity? Certainly not. It seems to us quite clear that this money was not in the custody of the law, although in the custody of an officer of the law. The custody of the officer is not necessarily nor always the custody of the law. We are not called upon to say under what circumstances property taken from or belonging to a prisoner will be protected from civil process in civil actions against the prisoner. The decisions are not altogether harmonious upon the question. But we are satisfied that the property in the present case does not come within the reason of the rule, and ought not to be placed within its operation. The order should be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(125 Cal. 24)

GRIMBLEY v. HARROLD et al. (Sac. 541.)[1]

(Supreme Court of California. June 9, 1899.)

INSURANCE—CHANGING BENEFICIARY—AGREEMENT NOT TO CHANGE BENEFICIARY ENFORCEABLE — JURISDICTION—BY-LAWS — ESTOPPEL—HARMLESS ERROR.

1. The beneficiary named in a certificate of a mutual benefit insurance association, where she became such pursuant to an agreement with the member that she would pay all future assessments, and take care of him, and that he would not change the beneficiary, cannot be changed without the consent of the beneficiary.

2. Plaintiff was the beneficiary of a certificate

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[1] Rehearing denied July 7, 1899.

in a mutual benefit insurance association, the by-laws of which provided for the appointment of a board of arbitration to hear and determine who were its beneficiaries under its certificates, when conflicting claims are set up, and that the decision of such board should be conclusive, subject to appeal to the grand lodge. After death of insured, another claimed the proceeds of the certificate, and plaintiff filed her claim with the grand lodge, and subsequently adduced evidence of her claim before the board of arbitration, which decided against her, whereupon she commenced this suit, and did not appeal to the grand lodge. *Held*, that plaintiff is not bound by the decision of the board of arbitration, nor can the association, by its by-laws, deprive the courts of jurisdiction of the property rights vested by virtue of membership.

3. A beneficiary in a certificate issued by a mutual benefit life insurance association is not estopped to question the validity of a certificate issued to another subsequent to the issuance to her of her certificate, on the ground that she failed to state to the former the ground on which she claimed it, when the member demanded its return for the purpose of having a new certificate issued to such other, where he did not inquire the reasons of such refusal.

4. Evidence that plaintiff performed services in addition to the obligation alleged in the complaint to have been assumed by her, and that such services were a part of the consideration of the contract, though not so alleged, is not prejudicial to defendant, where the proof of the performance of the agreement alleged is sufficient, and plaintiff would be entitled to recover on the cause alleged.

5. As the extent to which cross-examination of a witness may be carried is largely a matter of discretion with the trial judge, the supreme court will not say that it was error to sustain an objection to a question in itself proper, where a witness has been exhaustively examined concerning the ultimate fact sought to be proved by such question.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by Helen Jane Grimbley against C. H. Harrold and another. From a judgment in favor of plaintiff, defendant C. H. Harrold appealed. Affirmed.

Budd & Thompson, for appellant. O. B. Parkinson, for respondent.

BRITT, C. There was evidence at the trial of this action that in the summer of the year 1894 the plaintiff, a young woman, upon the request and at the expense of one Frederick Shelton, her uncle, left her home in England, and came to this state, where said Shelton resided, for the purpose of caring for him in sickness; he proposing in rather indefinite terms to make some provision for her, saying, among other things, that he had some papers he wanted her to have. Shelton was then, and had been for several years previously, a member of the society called the Ancient Order of United Workmen, which has for one of the purposes of its organization the payment of a sum of money ($2,000), upon the death of any member, "to such person as he may, while living, direct, according to the rules, laws, and regulations of the order." He held the usual "beneficiary certificate," declaring his right of membership in said order, and his right to designate the beneficiary of said fund. The rules, laws, and regulations aforesaid allow any member to change his direction for payment of such money, and on August 16, 1894, Shelton surrendered the said certificate previously issued and obtained from the defendant grand lodge of said order the issuance of another, wherein he designated the plaintiff as the beneficiary thereunder, which new certificate he at once delivered to the plaintiff. Regarding this transaction the plaintiff alleged in her complaint, and the court found in substance, on sufficient evidence, that at and prior to the time of the delivery of such certificate to plaintiff it was agreed between Shelton and herself that she should thereafter pay all his dues to said order and all assessments levied by it against him, and that she should be the beneficiary to receive said sum of $2,000 at his death, and that he would not change the certificate in that behalf; that plaintiff accordingly did pay such dues and assessments after said August 16, 1894, and until July, 1895, when the order declined to receive the same from her further, for the reason that Shelton, in April, 1895, had changed the designation of the beneficiary of his insurance to the defendant Harrold, and had procured a new certificate to be issued in his favor, although plaintiff did not consent to such change, and still held the certificate of August 16, 1894, and refused to surrender the same. The court also found, though this circumstance was not alleged in the complaint, that plaintiff further undertook, as part of her said agreement with Shelton, that she would personally care for him as long as she was able, and that she performed this promise, except as excused or prevented by Shelton from so doing. There were other findings that, besides procuring the new beneficiary certificate of April, 1895, in Harrold's favor, Shelton also conveyed to him other property, real and personal, all upon certain trusts which Harrold undertook to execute; that out of funds thus derived Harrold paid certain debts of Shelton and his dues and assessments as a member of said order in July and August, 1895; and that Harrold had no knowledge of any contract between Shelton and plaintiff respecting said insurance money until after Shelton's death, but did know of her refusal to surrender the certificate she had received from Shelton, or to consent to his proposed change of the beneficiary thereof. Shelton died August 18, 1895. Among the rules of said order it is provided that a board of five members, to be appointed by the grand master workman, shall constitute "a board of arbitration to hear and determine all controverted questions which may arise as to the disbursement of the beneficiary fund under the control of the grand lodge, * * * and as to the liability of the grand lodge for any claim made against it by those claiming to be the beneficiaries of deceased members, and also as to who are entitled as beneficiaries when conflicting claims are set up," and that the decision of said board shall be conclusive, subject to appeal to the grand lodge or supreme lodge, "it being the purpose of this provision that all these rights shall be thus determined without recourse to the courts of law." After Shelton's death, plaintiff presented to said grand lodge her claim for payment of the said certificate of August 16, 1894, and her protest against payment of the subsequent certificate in favor of Harrold; whereupon, under the regulation just mentioned, the grand master appointed a board of arbitration, which heard such claim and protest, and decided adversely to plaintiff. She took no appeal to any other tribunal of the order, but, instead, brought this action against said grand lodge and Harrold. The answer of the grand lodge herein is, in effect, that it holds the sum of $2,000, to be paid to the party which the court by its judgment may decide to be entitled to receive the same. Judgment went for plaintiff, requiring the grand lodge to pay the money to her, and declaring that defendant Harrold is not entitled to any part thereof. Harrold has appealed.

Decisions of the courts of other states differ regarding the effect to be given to the contract of a member in societies such as the Ancient Order of United Workmen, whereby he assumes to dispose of his interest in the beneficiary fund of the order, virtually the proceeds of a policy of life insurance; but the question is hardly an open one here, so strong have been the intimations of this court that such a contract, when valid and not in conflict with the lawful conditions upon which the order grants the insurance, is effectual as against the subsequent attempt of the member to violate or annul it; and this must be held to be the law. Jory v. Supreme Council, 105 Cal. 20, 29, 38 Pac. 524; Adams v. Grand Lodge, 105 Cal. 325, 38 Pac. 914; Hoeft v. Supreme Lodge, 113 Cal. 91, 45 Pac. 185; Leaf v. Leaf, 92 Ky. 166, 17 S. W. 354, 854; Smith v. Society, 123 N. Y. 85, 25 N. E. 197; Maynard v. Vanderwerker (Sup.) 24 N. Y. Supp. 932. The case last cited, which is precisely in point here, was decided at special term, and the judgment was reversed on appeal upon a question of fact; but the opinion then delivered proceeds on the assumption that the law held by the trial judge was correct. 27 N. Y. Supp. 714, 76 Hun, 25.

Appellant urges that, as plaintiff took no appeal from the decision of the board of arbitration, she is concluded thereby; that this is the effect of the laws of the order under which the beneficiary certificate was issued. But the certificate issued to Shelton, like a policy of life insurance, evidenced a valuable right of property, and we cannot concede that it was competent for the order, while clothing him with such right, to confer upon its internal judicatories the sole power of determining the fact and consequences of any disposition he might make or attempt to make of it. Suppose Shelton had been permitted to designate a beneficiary by last will and testament; it would seem to be an extraordinary proposition to say that the society could confer on its own tribunals exclusive power to determine, in relation to the proceeds of the certificate, whether any will had been executed, allow or refuse it probate, and decide how it should be construed. The case before us is, in principle, but little different. The order in this instance has with entire fairness declared its indifference between the contending claimants; but the appellant, Harrold, insists that, to entitle her to recover as against him, the plaintiff must make a case on which she would be entitled to recover against the order, and cites some authorities to that effect. However that may be, we think the questions whether Shelton contracted with plaintiff as she alleged, and, if he did, what right she acquired in the subject of the contract, pertained to the jurisdiction of the courts of the political sovereign, the state, and it was not compulsory upon her to resort elsewhere. Relief Dept. v. White, 41 Neb. 547, 59 N. W. 747; Daniher v. Grand Lodge, 10 Utah, 110, 37 Pac. 245. See, also, Whitney v. Association, 52 Minn. 378, 54 N. W. 184; Bac. Ben. Soc. §§ 71, 450; Moore v. Woolsey, 4 El. & Bl. 243. Nothing to the contrary was held in Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170. That was a dispute between a member and the organization concerning rights founded immediately on the contract of membership, and which the member had, by assenting to its rules, agreed to submit to its tribunals. The plaintiff here is not a member of the order, and her cause of action contains an element wholly foreign to its laws, viz. her contract with Shelton.

It is contended, however, that plaintiff voluntarily left her demands to arbitration, and must abide by the result, even though the rules of the order in that behalf were not binding on her. The assumption of fact for this argument fails. The plaintiff presented to the grand lodge her demand for payment to herself, and protest against payment to Harrold. This was a proper course, whatever other proceedings she designed to take. The grand lodge did not respond directly. Her demand and protest were assigned for hearing to the board appointed by the grand master. Although called a board of arbitration, it lacked, as concerned the plaintiff, a prime essential of a legal body of arbitrators, in that she had no voice in selecting its members. It was really but a committee upon which, under the rules of the order, was devolved the duty of answering plaintiff's demand. The fact that she produced evidence before it to support her claims could not convert the hearing into an arbitration any more that if she had presented her proofs before the grand lodge itself. Compare Kumle v. Grand Lodge, 110 Cal. 204, 42 Pac. 634.

Appellant claims that the court should have held his equitable right to receive the money to be superior to that of plaintiff. This is asserted mainly on the circumstance that plaintiff did not inform him of her contract with her uncle at the time the latter demanded the surrender of the certificate she held in order that a new one might be issued to Harrold. But it appears that Harrold knew that plaintiff held the certificate, and that she denied the right of her uncle to deprive her of its benefits. This was sufficient to put him on inquiry as to the ground of her claim, and we cannot hold that she is estopped by failure to disclose to him particulars of which, so far as appears, he did not inquire.

It is objected that the court erred in receiving evidence that the plaintiff bestowed care on her uncle during his illness, and that this was part of the consideration for his agreement to make her the beneficiary of his insurance, on the ground that the complaint contained no allegation that she agreed to render such attentions. It is said, also, that the finding on this subject was beyond the issues. But the evidence tended to exhibit the relative situation of the parties towards each other, and hence to make more probable the matter which was averred, viz. that Shelton, in consideration of her payment of his dues and assessments, agreed that she should receive the insurance. It was therefore relevant. And, if the finding was beyond the issue,—which we do not decide,—yet, as the facts found within the issue were sufficient evidence of a valid contract, the appellant is not injured.

Plaintiff testified that she paid her uncle's dues and assessments, as she agreed with him, from her earnings at domestic service. On cross-examination counsel sought to ascertain whether she had funds sufficient for this purpose, with a view, apparently, to showing that the money she paid was really furnished by Shelton. She testified that she took some instruction in music, but paid for it out of her own money. Counsel inquired how much she paid for the lessons, and the court sustained an objection to the question. Possibly the question was proper cross-examination in the abstract; but the ultimate matter to be developed by this line of inquiry was whether she paid the assessments from funds supplied for that purpose by her uncle, and upon this it appears that appellant's counsel did examine her fully, and educed quite explicit answers. The extent to which cross-examination shall be carried is in some degree a matter of discretion with the trial court, and we cannot say that in this instance its discretion was abused. Other points argued are not important. We discover no material error in the record. The judgment and order denying a new trial should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

(124 Cal. 568)

BEMMERLY et al. v. WOODWARD.

(Sac. 573.)[1]

(Supreme Court of California. May 31, 1899.)

EXECUTORS AND TRUSTEES—LIABILITY—COMPOUND INTEREST—CLAIM AGAINST ESTATE—PRESENTATION—CORRECTION OF JUDGMENT.

1. Where a will constitutes the executors trustees, and they fail to keep the funds invested as is their duty as trustees, but mingle them with their own, and occasionally draw them from the bank for their own private purposes, they will be charged with compound interest.

2. Though a trustee, who has failed to keep the trust funds invested, and has mingled them with his own, should be charged with compound interest up to his death, his estate is not thereafter liable therefor; the estate being simply indebted on a claim.

3. That a claim had not been presented against an estate before action thereon, as provided by Code Civ. Proc. § 1500, is mere matter of abatement, which is waived unless pleaded, provided the claim is thereafter presented within the time limited for presentation of claims.

4. Where a complaint is entitled B. and V., "heirs and administrators" of B., but it is plainly stated in the body of the complaint that they sue in their representative character, and that the estate of B. has not been distributed, and judgment is so entitled, the entry of judgment for plaintiffs in their individual capacity is a clerical mistake, which may be corrected at any time.

Department 2. Appeal from superior court, Yolo county.

Action by Albert M. Bemmerly and another, described in the caption of the complaint as "Heirs and Administrators of the Estate of Michael Bemmerly, Deceased," against Mary Woodward, executrix of G. W. Woodward, deceased. Judgment for defendant, and plaintiffs appeal. Modified.

E. B. Mering and A. L. Hart, for appellants. J. C. Ball, for respondent.

TEMPLE, J. This is an action against the executrix of a deceased executor to compel an accounting and to recover property of the estate. The plaintiffs are, respectively, administrator and administratrix, with the will annexed, of the estate of Michael Bemmerly, deceased. The complaint shows that Bemmerly died in 1877, testate, and leaving an estate of great value. G. W. Woodward and Henrietta Bemmerly were named in the will as executor and executrix, and both were appointed and duly qualified in June, 1877. Mrs. Bemmerly resigned as executrix in 1879, and G. W. Woodward took into his possession the entire estate, and continued in the exclusive possession thereof until the 21st day of December, 1894, when he died. While executor he received the rents, issues, and profits of the estate, and "thereby made and received large profits." The will is not set out in the complaint, but it imposed upon the executors a continuing trust, in addition to the ordinary duties of executors. The fourth subdivision reads as follows: "(4) I direct that all the balance of all my real estate of which I may die possessed shall not be sold or divided, except as hereinafter provided; that is to say: Whenever one of my children

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[1] Rehearing denied June 30, 1899.

becomes of age, it shall be entitled to his or her share of the estate then remaining in the hands of my executors, and they are hereby directed and authorized to deliver up such child's portion by fair division made of the lands then belonging to the estate." It is charged that on the 2d day of January, 1884, the executor filed his last annual account, which was settled and approved by the court, and from which it appears that he then had in his hands, in cash, $17,433.74. The estate consisted of a large amount of real estate and personal property, and it is charged that since the above annual account Woodward has made no return, but has rented the land and sold the product, from which he has realized large sums, which he has kept and mingled with his own property. The complaint contains allegations in regard to specific pieces of real estate, and as to each it is charged that Woodward received rents and profits, which he commingled with his own money; also statements of profits over and above expenses of each year, showing that at all times since the last annual account rendered, to his death, Woodward had a large amount of money in his hands belonging to said estate; also, that he yearly made sales of grain and other products without any order of court, and never made any report of such sales. There is also a general averment that all receipts from the estate were commingled by Woodward with his private funds, and were used in his private business, and for his own profit and gain, and have been so used since his death by the defendant, who is his executrix. The complaint contains no express averment that Woodward neglected to keep the money of the estate invested, as his duty was as trustee. The amended and supplemental complaint avers the due presentation of a proper claim against the estate of Woodward, but also shows that such presentation and rejection were after the commencement of this action. The answer admits nearly all the facts stated in the complaint, including the charge that Woodward received the moneys, and made large profits from the use and advantage thereof. By a very generous construction, it may be understood as denying that Woodward commingled the funds of the estate with his, or used them in his private business. It is worthy of note, however, that, while the answer admits that Woodward had in his hands for many years large sums belonging to the estate, no investments on behalf of the estate are set out. There is, however, in the complaint a general allegation that Woodward, while executor, acquired other property, from which he received rents and profits, and one piece of property so acquired is specified. The answer also includes a statement of the accounts of Woodward, which itself shows that Woodward at all times since 1884 had on hand large sums of money which he did not invest for the advantage of the estate.

The findings are generally in favor of plaintiffs, but upon the questions of fact principally litigated and discussed they are strangely indistinct and unsatisfactory. The main point of difference at the trial was whether Woodward had mingled the funds of the estate with his private funds, and had used the estate money in his own business and for his private advantage. I think it appears by necessary inference from the findings that Woodward did use the money of the estate in his private business, but it is not distinctly so found, nor is there a finding of any special investment made of estate moneys for his own advantage. The next most important issue was whether Woodward had neglected to invest money in his hands as trustee for the advantage of the trust. There is no express finding upon the subject, but, as in regard to the other matter, I think it appears by necessary inference that the trustee had and held in his hands for years sums of money which he ought to have invested for the advantage of the estate, and did not. Whether such inferences are necessary from the findings is matter of argument, and the most troublesome question presented by the appeal. It is found that Woodward took possession of the estate, and rented the land for one-fourth of the crop; that the yearly crops were placed in the warehouse by the tenants, and were sold by Woodward without any order of court, and no report of such sales, or showing receipt of the money, has ever been made; also, that Woodward dealt with the property as his own, and his management thereof was prudent; also, that he kept no account with a bank of the funds of the estate, but had a general account in his own name with the Bank of Woodland, where he deposited his own money and that of the estate, and checked out of this account money for his private use and for current expenses of the estate; at times he drew all the money from the bank, and occasionally the account was overdrawn, and frequently there was less money in the account than the money due from Woodward to the estate; also, that he mingled the funds of the estate with his own, and used them indiscriminately. It does not appear necessarily from this finding that Woodward used the estate money for his own advantage. The evidence shows that during this time Woodward purchased $50,000 worth of real estate for himself, and that immediately after each purchase the general bank account was much depleted, and sometimes overdrawn. The findings are, however, strangely silent upon these important matters. Still, there is a finding which contains a statement of an account from the last annual settlement made in January, 1884. This shows the receipts and expenditures of each year, and that since the year 1884 Woodward had, or should have had, constantly on hand a large sum of money belonging to the estate; and there is no finding that Woodward ever made any investments or loans for the estate. Indeed, it is not alleged that he did so in the answer. At the best, the answer only denies that he mingled the funds or used the money of the estate for his private purposes. True, the complaint does not charge distinctly that Woodward, as trustee, neglected to keep the funds invested so as to earn an income for the beneficiaries; but it is charged that he mingled the trust funds with his own, and used them for his private purposes. To show an honest execution of the trust, it was incumbent upon Woodward to show what he did with the money. In the absence of such a showing, I think we must conclude that he did not use them for the estate.

The will constitutes the executors trustees, and there was never any settlement of the administration, and distribution of the estate to the trustees. Annual accounts should have been rendered, and the estate managed as required of executors. As the administration was left open because of the trust, Woodward was, of course, responsible as trustee, and should have kept the money invested for his beneficiaries. As he did not do that, but mingled the funds with his own, and even, under the findings, must have occasionally drawn them out of the bank for his own private purposes, I think he was properly charged with compound interest. Civ. Code, § 2262; Estate of Cousins, 111 Cal. 445, 44 Pac. 182; 2 Pom. Eq. Jur. § 1076; In re Hilliard, 83 Cal. 427, 23 Pac. 393.

In the judgment, compound interest was charged up to the death of Woodward, and also against his estate up to the time of the entry of judgment. It is contended that it was error to allow compound interest since the death of Woodward. The complaint charges that all the property of the estate, including the money, upon the death of Woodward passed into the possession of the executrix of Woodward, "who continues to hold and use the same, and neglects and refuses to pay over said moneys, or account for the same," and, again, "has been and now is held by said Mary Woodward, as a constructive trust, to account for the same, the interest and profit thereof." Of course, Mrs. Woodward could not, as executrix of Woodward's estate, assume an active trust in favor of the estate of Bemmerly, nor could she make the estate of Woodward liable for her own personal tort. The recovery in this case is upon the theory that Woodward had mingled the money of the estate with his own, and that no funds came to the executrix bearing the earmarks of Bemmerly's estate. Under such circumstances, the estate of Bemmerly was required to present a claim to the executrix; and, under the law, the executrix could not pay the demand until it was allowed and payment authorized by the court. The executrix owed no duty to the beneficiaries of the trust to keep the money invested, and she could not pay until authorized. The estate was simply indebted in that amount. Under such circumstances, interest could not be charged. The judgment must therefore be modified so that interest will be charged only up to the death of Woodward.

The supplemental complaint avers that the claim for the amount due plaintiffs was duly presented to the defendant, as executrix of the estate of Woodward, within the time allowed by law for the presentation of claims, and that it was rejected. These allegations are admitted in the answer. Still the complaint itself shows that the suit was commenced before the claim had been presented and rejected. There was no plea in abatement, nor was any objection made on this account at the trial or before judgment. Although there is some controversy upon the subject, we will assume that the objection was made in the statement in the application for a new trial. Section 1493, Code Civ. Proc., provides that all claims arising upon contracts must be presented within the time limited; any claim not so presented is barred forever. Section 1498 enacts that, if rejected, suit must be brought within three months; and section 1500, that no holder of a claim shall maintain an action thereon, unless the claim is first presented, except upon mortgage liens.

It is contended that plaintiffs had no cause of action at the time that the suit was commenced, and such objection may be made at any time in the trial court, although it cannot be made for the first time in this court. It has been held, however, that this is a mere matter of abatement, which is waived unless pleaded. Formerly such pleas could only be interposed before a plea to the merit. Under our Code all defenses may be included in one answer, but, if a defense which is mere matter of abatement is not made by that time, it should be deemed waived. In the case of Hentsch v. Porter, 10 Cal. 555, it is said: "We think it clear that the failure to aver the presentment is not such a fatal objection to the complaint as to make judgment by default a nullity, or reviewable on appeal." And again: "In this case the objection comes too late. It must be presumed, in favor of sustaining the judgment of the district court, that proof was made of the disallowance of the claim of the administrator, which supplied the want of averment to that effect." See, also, Coleman v. Woodworth, 28 Cal. 568; Bank v. Howland, 42 Cal. 129; Drake v. Foster, 52 Cal. 225; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811. In these last cases it is merely said that the objection cannot be made for the first time in this court, and Hentsch v. Porter is cited as authority. That was sufficient to dispose of those cases, but the rule was not so limited, nor do those cases suggest the reason for the rule. It is fully shown in Hentsch v. Porter. It is simply matter of abatement,—a defense which is not favored, and must be made by plea, and in proper time, or it is waived. If so waived, the court will be rarely justified in permitting the defense to be made later. In this case, if the defense had been promptly made, plaintiffs could have dismissed their suit and brought another. But if, after three months had elapsed after the claim was rejected, the point could be successfully urged, plaintiffs would have lost their right of action. If, however, the time for the presentation of claims had wholly elapsed before or after suit brought, and the claim had not been presented, it would have been a different matter. Then the claims would be forever barred, and it would be both the privilege and the duty of the executrix to urge the point. And she would be entitled, as matter of right, to file a supplemental answer, if the defense had accrued after the issues had been made up. It is clear that the defense was waived in this case.

The next point of importance urged is that the judgment as first entered was void, and the amendment made while the motion for a new trial was under consideration was wholly unauthorized, and therefore also void. Perhaps the objection is felo de se, for, if the first attempt to enter judgment was a total failure, there was, as matter of law, no judgment until the amendment, for the first time, made it valid. The point is that in the judgment, as first entered, it was decreed that "Albert M. Bemmerly and Nettie E. Vickroy do have and recover," while they could only recover, if at all, in their representative capacities. In the caption to the judgment the plaintiffs are described as "Heirs of and Administrators of the Estate," etc. This entitling of the case, which, so far as it has any significance, shows an impossible case, and which also afflicts the complaint, has bred this unnecessary trouble. Of course, no one could think for a minute that the heirs of Bemmerly and the administrators of his estate could join in such a complaint, although by special statute they are permitted to join in certain cases. The pleader probably had some doubt as to the proper parties, because of the additional trust imposed upon the executor by the will; but surely plaintiffs could not, in the same complaint and by the same allegations, allege rights which to a certain extent are inconsistent with each other. One theory implies that a distribution of the estate has been had; the other, that the estate has not been distributed. In the body of the complaint, however, it is plainly stated that plaintiffs sue in their representative character, and their appointment and qualification as administrators are set out, and these allegations are expressly admitted in the answer. The claim presented is alleged to have been presented by them in their representative capacity, and it is further averred that the estate has not been distributed. Under these circumstances, I think it plainly appears upon the face of the record that the entry of the judgment for the individual plaintiffs was a clerical mistake, and that the correction was proper at any time, and defendants are not aggrieved thereby. It does not follow that it was not a clerical error because the judgment is signed by the judge.

It seems to be admitted that it was error to compound the interest with the principal on July 10, 1897. This is relatively an unimportant matter, but can be corrected without a new trial.

If there was error in fixing the compensation of Woodward as trustee, in my judgment such error was to the advantage of defendant. It may well be doubted whether anything should have been allowed, considering the manifest abuse of his trust on the part of Woodward.

I think the partial grant of a new trial sufficiently defines the issues to be retried. Of course, if upon such retrial a new judgment is necessitated, it must be entered. It cannot be supposed that the court has directed a retrial of the issue without the power to determine the issue upon the evidence to be taken. The trial court is directed to modify the judgment in regard to the allowance of interest in accordance with this opinion, and further, should it be rendered necessary by the new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

(124 Cal. 533)

In re STEELE'S ESTATE. (L. A. 608.)

(Supreme Court of California. May 29, 1899.)

PERPETUITIES.

1. A will leaving property in trust to pay one-third of the income to testator's widow for life, to pay to each of his three minor children during the minority of each two-ninths of the annual income, to pay to each of them as they respectively attain majority one-ninth of the value of the property as appraised when the eldest of them attains majority, to pay a like amount to each of them as they respectively attain the age of 25 years, and to pay to each of them while between the age of majority and the age of 25 years one-ninth of the annual income, does not violate the law against perpetuities, as the express trusts may not, by any possibility, suspend the power of alienation for a period longer than the continuance of lives in being; there being several and distinct trusts as to each of the children, though they may fail by reason of the death of the children before distribution.

2. There can be no "accumulations" beyond minority, where the trust provides for payment of the income annually.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

In the matter of the estate of Charles A. Steele, deceased. Petition of W. M. Steele and others for a partial distribution was denied, and they appeal. Affirmed.

Wm. P. James and F. R. Willis, for appellants. W. J. Hunsaker and N. P. Conrey, for respondent.

HAYNES, C. This appeal is from an order denying appellants' petition for a partial distribution of said estate. The petitioners, W. M. Steele, Charles A. Steele, and Idella D. Steele (appellants here), are children and heirs at law of said testator, and who, by the terms of the will, were excluded from any participation in said estate. Their chief contention is that said will purports to vest said estate in a trustee for the benefit of the widow and certain other children of the testator, and that said trust is void under the provisions of the Civil Code against perpetuities. Said will was executed January 27, 1897. After directing the payment of debts, funeral expenses, etc., and making a special bequest to his wife of furniture and other articles held for home and personal use, it bequeathed and devised to George B. Shaffer, as trustee, all the residue of his estate, in trust, for the following purposes: "(a) To pay and keep paid out of said trust estate all taxes, assessments, and other necessary expenses and indebtedness incident to the management of the trust estate. (b) To sell, transfer, and convey, upon such terms as he may deem to be for the benefit of the estate, any of the property thereof, and to keep the estate in the form of improved income-bringing real property or well secured interest-bearing loans, giving preference to mortgages on improved realty. (c) To pay one-third of the net annual income in quarterly installments to my wife, Rose B. Wallace Steele, during the entire term of her natural life. (d) To pay to the guardian of the estate of my daughter, Viola A. Steele, during her minority, two-ninths of the net annual income of the trust estate. (e) To pay to the guardian of the estate of my daughter, Hazel A. Steele, during her minority, two-ninths of the net annual income of the trust estate. (f) To pay to the guardian of the estate of my son, Fred A. Steele, during his minority, two-ninths of the net annual income of the trust estate. (g) To pay to each of my said children, Viola, Hazel, and Fred, as they respectively attain their legal majority, a sum of money equal to one-ninth of the value of the trust estate, as appraised under authority of the proper court at the time when the eldest of said three children shall attain her majority. Instead of money, the said trustee shall have power to deliver to either of said children well-secured notes or bonds and mortgages, if the donee shall elect to accept the same. (h) To pay or deliver in like manner to each of said three children above named, as they shall respectively attain the age of twenty-five years, one-ninth of the value of the trust estate, as in like manner appraised at the time when the eldest of said three children shall attain the age of twenty-five years. (i) To pay to each of said three children above named, while they shall be respectively between the age of majority and the age of twenty-five years, one-ninth of the net annual income of the trust estate. (k) Upon the death of my said wife, Rose B. Wallace Steele, the portion of my estate not included in the foregoing provisions made for my three children above named shall be deemed to be included in, and together with and as being a part of, the said trust estate, for the exclusive use and benefit of said three children, Viola A., Hazel A., and Fred A. Steele, and shall, as to both income and principal, pass to the said three children above named equally, share and share alike, at the same times and in like manner and proportions as have been hereinabove directly provided respecting the two-thirds of the estate first given for the benefit of said three children." The will was admitted to probate in July, 1897, and Walter Lindley was duly appointed and qualified as executor on September 3, 1897. Said petition for partial distribution was filed January 13, 1898, and objections thereto were duly filed by the executor, Walter Lindley, the trustee, George B. Shaffer, and Viola A. Steele, Hazel A. Steele, and Frank A. Steele, named in the will as beneficiaries under said trust. Said beneficiaries, being minors, appeared by said G. B. Shaffer, their guardian. The objections filed to the petition were that it did not state facts sufficient to authorize a decree of partial distribution, and that petitioners were not interested in said estate. Upon the hearing, the court entered an order sustaining the objections, and denying said petition, and from that order the petitioners appeal.

The principal question is whether this will is void under the following provisions of the Civil Code relating to perpetuities:

"Sec. 715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 772.

"Sec. 716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

"Sec. 771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715."

Where the trust is created by will, the death of the testator is deemed the time of the creation of the limitation. Civ. Code, § 749. "A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee." In re Walkerly's Estate, 108 Cal. 647, 41 Pac. 772. This is but a paraphrase of section 716, supra, which declares "void in its creation" every future interest which, "by any possibility, may suspend," etc. The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results; but if, under the terms of the deed or will creating the trust, when properly construed, the instrument, "by any possibility, may suspend" the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created, nor any estate vested in the trustee. If the trust is valid, being an express trust, the beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. Civ. Code, § 863. The petition in this case alleged that Viola, Hazel, and Fred, beneficiaries named in said will, were, at the date of filing said petition, all minors under the age of 16 years, and in this proceeding they all appeared by their guardian. Said petition was filed January 13, 1898. By the terms of the will, the trustee is directed to pay to the widow one-third of the net annual income during her natural life, and to the guardian of each of said three children, during the minority of each, two-ninths of the net annual income. Under item 3, subdivision (g), the trustee is directed to pay to each of said three children, as they respectively attain majority, one-ninth of the value of the trust property, the value to be ascertained by an appraisement "under authority of the proper court at the time when the eldest of said three children shall attain her majority." Under this provision, it is contended by appellants that no payment or distribution of the one-ninth of the corpus of the trust property could be made to any of the three children until the eldest child arrived at the age of majority, and that, if she should die before majority, there could be no distribution of the corpus of the trust, since there could be no distribution without appraisement, and no appraisement could then be made. To meet this contention, respondent insists that the will should be construed as if it provided that the appraisement should be made when the eldest surviving child attained majority. If appellants' contention is sound, the express trust created by the will would fail of its purpose, not because it was void in its creation, but because it became impossible of execution by the happening of a subsequent event, which, not having occurred, cannot be urged as a ground upon which the present invalidity of the trust can be predicated. Non constat that she may attain the age of 25 years, and both appraisements be made as contemplated by the will. These considerations make it apparent that we need not consider whether respondent's construction of the will is correct or not. It must be apparent that appellants' present rights depend upon the present invalidity of the will, and not upon future contingencies which are not within the prohibition of the statute. The will makes no disposition of the property for a period longer than the continuance of lives in being. If the three children should all live until the whole of the property is distributed to them, they would take an absolute title in fee, and could at once, or at any time thereafter, convey such absolute title at their pleasure, without any limitation or restriction whatever. If they should all die before any distribution is made, the express trust created by the will for their benefit would fail for the want of beneficiaries, and so as to all property not distributed if they should all die after partial distribution; and the same would be true as to the interest of any one of the beneficiaries in case of his death.

Appellants further contend, however, that the trust must continue until the eldest daughter arrives at majority; that, whether she lives or dies, the trust must continue for a definite time; that as she may die before her majority, and as the trust must continue until the date at which she would attain her majority, if living, there is a time when the trust may exist which is not bounded by a life in being, there being no provision in the will by which the share or interest of any one of the three shall inure to the benefit of the survivor or survivors. But the trust does not survive the death of the beneficiary, these trusts being several and distinct. If the language had been that an appraisement and distribution could not be made until the eldest child attained her majority, "or would attain her majority, if living," a definite time would be fixed, not dependent on a life or lives in being, before which there could be no distribution, and in such case the trust would be void. In Re Hendy's Estate, 118 Cal. 656, 50 Pac. 753, it was said: "But it matters not whether it be by express terms or by necessary construction that lives in being measure the duration of the trust. If it appear with certainty that the trust cannot longer continue, the law against perpetuities is not violated. Thus a trust to A. until he arrives at the age of forty years would not violate the law, for every trust necessarily ceases when there is no beneficiary, and in the case instanced it is obvious that A.'s life is the ultimate and determinative measure of duration. In no event can the trust continue longer than his life. Upon his death before reaching the age of forty years the trust determines for the lack of a beneficiary." See, also, Becker v. Becker, 13 App. Div. 342, 43 N. Y. Supp. 17. When distribution is made, and only to the extent it is made, the trust property vests in the beneficiaries; and hence as to all property not distributed to the beneficiaries, or to either of them, during their respective lives, the express trust ceases and determines. Upon the death of one of the children before distribution, as to all property not distributed, his or her share does not pass to or vest in the co-beneficiaries under the trust, for the reason that until distribution such share is not vested in the beneficiary, but in the trustee. Under the terms of the will, however, the trustee is made the residuary legatee, and all property which, under the express trust declared in the will, fails to become vested in the beneficiary by reason of his death before distribution, vests in the trustee as a resulting trust for the benefit of the heirs at law of the testator, the ultimate disposition thereof under the express trust having failed. In Packard v. Marshall, 138 Mass. 301, it is said: "When the purposes of a trust have failed, or have been completely performed, the trustees then hold the estate for the benefit of the heirs at law as a resulting trust, and are answerable to them for it upon proper proceedings,"—citing Easterbrooks v. Tillinghast, 5 Gray, 17; Ackroyd v. Smithson, 1 Brown, Ch. 503; Cox v. Parker, 22 Beav. 168. See, also, 1 Perry, Trusts (4th Ed.) § 160. A distinction should be taken between trusts which fail for want of beneficiaries and trusts attempted to be created by will, but which are void under the statute against perpetuities or other statutes, and therefore vest no estate in the alleged trustee, while, if the trust is valid when created, and afterwards fails for the want of a beneficiary, a trust results in favor of the heirs of the testator; but, as the heirs and trustee may at any time convey an absolute estate, the resulting trust is not within the statute against perpetuities. Whether this resulting trust would be for the benefit of the heirs generally, or for the benefit of the survivor or survivors of the three beneficiaries named in the will, is not considered or decided, our only purpose being to show that in no event is a perpetuity created. It is contended, however, that the will provides for an appraisement when the eldest child attains her majority, and that, if she should die before reaching majority, no appraisement could be made, nor any distribution, since the distribution depends upon the appraisement. The obvious intention of the testator was that an equal and just distribution of the trust property should be made. The provision directing an appraisement is an administrative provision, designed to secure that end, and to which the trustee might properly have resorted had it not been mentioned in the will, or which the court, upon the proper application of any party interested, would compel. If we are right in these conclusions, it is apparent that this provision of the will can, by no possibility, create a perpetuity, and it is for that purpose alone that it is here considered.

Appellants also contend that "accumulations beyond minority are void." But here there are no accumulations. Where the rents, dividends, or other income is treated by the trustee as capital, and he invests it, makes a new capital of the income derived therefrom, and invests that, and so on, such capital and accrued income constitute "accumulations." Here the entire net income is distributed annually. The uncertainties in the will referred to by appellants relate to the matters hereinbefore considered. We think it clear that the will is not void under the statute against perpetuities; that, if all of the three children should live until after all the several distributions are made, viz. at majority, at the age of 25, and upon the death of the widow, there would appear to be no uncertainty as to the disposition intended; that the only uncertainties arise out of contingencies that may never happen, and which can be considered here only for the purpose of determining whether the will is void; for, if void, the deceased died intestate as to the trust property, and petitioners are entitled to share in the estate; but, if not void, while the trust may possibly fail as to the whole or parts of the trust property for want of beneficiaries, that fact does not show any present right in the petitioners. I advise that the judgment be affirmed.

We concur: BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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124 Cal. 520

GATELY v. CAMPBELL et al. (S. F. 1,038.)

(Supreme Court of California. May 26, 1899.)

LANDLORD AND TENANT—LIABILITY FOR DEFECTS—INSTRUCTIONS.

1. In the absence of a covenant, a landlord is not liable for injury to the tenant from a faulty construction or defective condition of the building existing at the time of the lease, but unknown to the landlord.

2. Under Civ. Code, § 1941, declaring that the lessor of a building intended for occupation of human beings must put it in a condition fit for occupation, and section 1942, declaring that, if the landlord does not do so, the tenant may vacate or expend a month's rent for repairs, the landlord is not liable for injury to the tenant from such lack of condition.

3. An instruction which, after reciting evidence, states that, if the jury "are satisfied this testimony is true," they can find for defendant; if not, they will find such damages as they think proper,—satisfies Code Civ. Proc. § 608, providing that, if the court state the testimony, it must inform the jury that they are the exclusive judges of all questions of fact.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Delia Gately against H. F. Campbell and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Oliver Ellsworth, for appellant. E. J. Pringle, Jr., for respondents.

COOPER, C. Action for damages for personal injuries. Verdict and judgment for defendants. Motion for new trial, and order denying same. Appeal from judgment and order.

The plaintiff rented rooms in a tenement house at 8 Parks Place, in the city and county of San Francisco, in January, 1893. It does not clearly appear who was the owner of the premises so leased to plaintiff, but the arrangements were made with one Mrs. Falls, to whom plaintiff paid the rent. On the 8th of September, 1893, plaintiff claims to have been severely injured by a fall caused by the floor or platform giving way under her feet. In the first count of the third amended complaint it is alleged that the injury was caused by reason of the breaking away of the floor, which was not originally safely constructed, and was never constructed so as to be safe for human occupation, which facts were well known to defendants, and were never known or discovered by the plaintiff until she was so injured. In the second count of said amended complaint it is alleged that some two or three weeks prior to September 8th, one day while passing over the floor, plaintiff thought she felt the floor "shake a little," and, for fear the same might give way, she notified the defendants thereof, and requested them to examine the same, and strengthen it if they found it necessary. Both counts of the said amended complaint are sworn to by plaintiff. There is no testimony in the record tending to support the second count, but, on the contrary, the plaintiff testified that there was nothing during her tenancy that would indicate that there was danger in living there or in passing out and walking over the floor from day to day; that the floor looked all right. Counsel for plaintiff, in his brief, says that the contention of the plaintiff is "that the platform and its supports were faultily and unsafely constructed, and that the latter were rotten and decayed at the inception of the tenancy, a fact known to defendants, but unknown to, and concealed from, plaintiff." He again says in his brief: "No evidence was introduced to prove the dilapidations to have occurred subsequent to the beginning of the tenancy." Therefore it is apparent that there was no evidence to prove the second count of the amended complaint, and it was abandoned by plaintiff. We will now examine the first count. There is no allegation in the complaint of any covenant in the lease as to repairs, nor of any fraudulent representation or concealment of the condition of the leased premises. The controlling question left in this case is whether or not the landlord, in the absence of fraud, concealment, or covenant in the lease, is liable to the tenant for an injury suffered by him during his occupancy by reason of the defective condition or faulty construction of the leased premises. At the common law, the lessor is not liable for such injury. Keates v. Earl of Cadogan, 10 C. B. 591; Howard v. Doolittle, 3 Duer, 464; Tayl. Landl. & Ten. §§ 175a, 382. And this court has often laid down the same rule. Brewster v. De Fremery, 33 Cal. 341; Van Every v. Ogg, 59 Cal. 565; Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260; Willson v. Treadwell, 81 Cal. 58, 22 Pac. 304; Daley v. Quick, 99 Cal. 181, 33 Pac. 859. Counsel for plaintiff, in his brief, seems to concede the rule, but claims that the premises were defective and unsafe at the time they were leased to the plaintiff, which facts were known to defendants, but unknown to plaintiff. There is no testimony in this record to support such claim; but, if there were such testimony, the question was fairly left to the jury, under the instructions of the court. It is claimed that it is the duty of a landlord leasing a building for the occupation of human beings to put it in a condition for such occupation,—citing Civ. Code, § 1941, which reads as follows: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine." This contention is answered by the fact that there is no testimony in the record that the building, at the time it was leased to plaintiff, was not in a condition fit for the occupation of human beings. The plaintiff said in her testimony: "Did not notice any decay or dilapidation about the premises when first rented, nor anything that needed repairing." And again: "Mrs. Falls stated that she was looking after the house generally, and wanted to know if there was anything needed to be done." A further and conclusive answer to this contention is that the obligation imposed upon the landlord by section 1941 should be and is limited by the extent of the privilege conferred upon the tenant by section 1942, and the only consequence of a breach of the landlord's obligation is that the tenant may either vacate the premises or expend one month's rent for repairs. Civ. Code, § 1942; Van Every v. Ogg, 59 Cal. 565; Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260. It follows that the instructions given to the jury by the learned judge of the court below were correct. Most of the criticism of plaintiff's counsel is directed at the following instruction given by the court: "As I understand it, the plaintiff does not claim that Mrs. Falls ever said, before the injury, that she knew of the danger, or that the porch was liable to fall down. It is also in evidence by the testimony that the plaintiff herself did not apprehend any danger from the condition of the place. Then, these two parties, Mr. and Mrs. Falls, have been called, and they have testified that they never knew anything about it until it occurred. If you are satisfied that that testimony is true, you can find a verdict in favor of the defendants; if not, you will find for such damages as you shall think proper to allow, bearing in mind that in a case of this kind the duty of proving notice and knowledge upon the part of the agents rests upon the plaintiff." It is admitted that the constitution gives judges the right to state the testimony and declare the law; but it is claimed that, under the provisions of section 608, Code Civ. Proc., "if the court state the testimony of the case it must inform the jury that they are the exclusive judges of all questions of fact." We think the court left it plain to the jury that they were the exclusive judges of the facts. It said: "If you are satisfied this testimony is true, you can find a verdict in favor of the defendants; if not, you will find for such damages as you shall think proper to allow."

In the case of Jones v. Chalfant (Cal.) 31 Pac. 257, the instruction, "If these facts all appear in your minds as I have stated them, then your verdict will be for defendant," was held not error. In a case where there is no conflict of testimony, and the plaintiff could not recover under the facts as shown by the testimony, the judge could even instruct the jury what their verdict should be. It is claimed that the court committed error in not giving the instructions requested by plaintiff numbered 1 and 2. We have carefully examined these instructions, and think the court committed no error in refusing them. The first one was correctly refused, among other reasons, because it is based upon a presumption of facts not in the record. There is no evidence that the defendants in this case had knowledge of any such defects in the building as would render it unsafe or dangerous. The second one relates to the rule as to giving notice to the landlord in case of defect or dilapidations, and, if the landlord fail to repair, the tenant may do so and deduct one month's rent, etc. The requested instruction was not based upon any testimony in the case, as we have before attempted to show, and it therefore was not error to refuse it; and, further, it was given substantially in the charge of the court. It seems to us that counsel is now precluded from claiming the refusal as error in the face of the following statement in his brief: "The charge of the trial court is an able exposition of the law governing the rights of a tenant as against a landlord for injuries resulting from dilapidations arising subsequent to the inception of the tenancy; but it is submitted, with all respect to the learned trial judge, that it is not relevant to the claims of plaintiff in this case, who asserts a cause of action for damages suffered by reason of the negligence and practical fraud of defendants in leasing premises known to them to be unsafe and unfit for human occupancy without putting the same in repair, and concealing the true state of affairs from the tenant." If the instruction of the court in regard to the law giving the rights of a tenant as against a landlord for injuries arising from dilapidations subsequent to the inception of the lease "is not relevant to the claims of plaintiff," we cannot see how the instruction offered by counsel would be relevant. The testimony supports the verdict, and we find no prejudicial error in the record. We advise that the judgment and order be affirmed.

We concur: HAYNE, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

In re ADAMS' ESTATE. (Sac. 569.)

(Supreme Court of California. June 1, 1899.)

EXECUTORS AND ADMINISTRATORS—SETTING APART HOMESTEAD—VALUE—DISCRETION OF COURT—INSOLVENCY OF ESTATE.

1. It is no objection to an order creating a probate homestead that the homestead exceeded $5,000 in value.

2. The evidence showed that a homestead for life only, set apart to a widow with four minor children to support, and no means of her own, consisted of 215 acres of arable land, on which were situated the dwelling house, barn, outhouses, etc., together with about 85 acres adjoining, of little, if any, value. *Held*, that the court did not abuse its discretion in making the order setting apart such homestead.

3. Under Code Civ. Proc. § 1465, providing that, where no statutory homestead has been selected, the court must set apart a homestead for the use of the surviving husband or wife and the minor children, the insolvency of an estate does not prevent a court from setting apart a probate homestead.

4. It is not necessary for the court to find on all the issues raised by an answer where they are as to matters entirely immaterial to the determination of the petition.

Department 2. Appeal from superior court, Yolo county.

Petition by Elizabeth Adams, widow of D. Q. Adams, to have a homestead set apart from the estate of decedent. From orders and judgments setting apart a probate homestead, the Bank of Woodland, a creditor, appeals. Affirmed.

N. A. Hawkins and Craig & Hawkins, for appellant. R. L. Simpson and R. E. Hopkins, for respondent.

128 Cal. 380

McFARLAND, J. This is an appeal by the Bank of Woodland, a creditor of the above-named estate, from an order setting apart a probate homestead to the widow and minor children. No person other than said appellant objects to the order. A great deal of immaterial matter is contained in the transcript and discussed in the briefs. There are really only two questions involved: First, had the court authority to set apart a homestead of greater value than $5,000? and, second, did the court abuse its discretion in making the order appealed from?

1. The value of the homestead, as found by the court, was $11,139.70, and appellant contends that the order was invalid, because the premises set apart were of greater value than $5,000; but this contention cannot be maintained. It has been definitely settled that a court may create a probate homestead exceeding $5,000 in value. In re Walkerly, 81 Cal. 579, 22 Pac. 888; Estate of Schmidt, 94 Cal. 334, 29 Pac. 714; In re Smith's Estate, 99 Cal. 449, 34 Pac. 77.

2. Considering all the facts in the case, which need not here be given in detail, there is no ground for holding that the court abused its discretion in making the order appealed from. The decedent, D. Q. Adams, died in 1890, leaving an estate of the appraised value of about $200,000, and an indebtedness of

about $90,000. For some years after his death there was no doubt about the solvency of his estate. The property of the estate consisted mainly of land in Yolo and Fresno counties. There was one tract of land in Yolo county of 3,900 acres, on which was the family residence, and the homestead set apart by the court is on this tract, and consists of 215 acres of arable land, on which were situated the dwelling house, barn, outhouses, etc., together with about 85 acres adjoining, which consisted of gravelly creek bottom of very little, if any, value. The widow had four minor children to support. She had no means of her own. The homestead was set apart to her only for her life; and we think that the property thus set apart was no more than was reasonably sufficient for her own support and the maintenance and education of the four minor children. If the homestead had been applied for soon after the death of the decedent, no plausible objection could have been offered; but between that time and the date of the application, which was six years afterwards, the business of farming became unprofitable, and the value of the lands greatly depreciated, so that, when the order was made, it was, at least, doubtful if the assets of the estate would be sufficient to pay all of appellant's demands which remained unsatisfied. Appellant was a large creditor of the estate, and a great part of the indebtedness of the estate to it was secured by mortgages which were foreclosed, the appellant being the purchaser at the foreclosure sales. The appellant complains that the court did not make a sufficiently definite finding as to the insolvency of the estate at the time of the homestead order; the finding being that the remaining property, which is described, "if sold at public auction under the order of this court, would not pay in full the outstanding indebtedness of said estate and the charges and expenses of administration." If findings were necessary, and the question had arisen in a case where insolvency was a material and vital issue, the finding might well be assailed for want of directness. The insolvency of an estate does not prevent a court from setting apart a probate homestead. Section 1465 of the Code of Civil Procedure, which deals with the subject, is part of a chapter devoted exclusively to "the provision for the support of the family, and of the homestead," and provides that, where no statutory homestead has been selected, the court "must" set apart a homestead "for the use of the surviving husband or wife, and the minor children," and contains no limitation founded upon the insolvency of the estate. In Phelan v. Smith, 100 Cal. 165, 34 Pac. 669, this court said that among the objects of administration are: "(1) To support the family for a period; (2) to set apart a homestead to the family;" and that "setting apart a homestead is a part of the probate proceeding as much as is a family allowance." And in Keyes v. Cyrus, 100 Cal. 326, 34 Pac. 723, the court, speaking of section 1465, said: "The manifest object of this section is the support of the family, and to make provision for their support and maintenance. These demands of the family are deemed superior to those of heirs or creditors. Setting apart a homestead is a part of the probate proceedings as much as is a family allowance; 'it is a right bestowed by the beneficence of the law of this state for the benefit of the family.' In re Moore's Estate, 57 Cal. 442. A homestead may be set apart to the widow even though the estate be insolvent, and the property so set apart constitute the entire estate of the decedent." The question of solvency or insolvency is therefore immaterial, except only as it may go to the information of the court touching the condition of the estate; and the finding in question shows that the court was sufficiently informed on that subject.

The answer of the appellant to the petition for the homestead is quite lengthy, and contains some 14 different paragraphs; and one of the main contentions of appellant is that the court did not find on all the issues claimed to have been raised by the answer. It has never been definitely determined by this court that findings are necessary on the decision of a motion for a probate order like the one here in question, and the intimations have rather been that they are not necessary (Estate of Arguello, 85 Cal. 152, 24 Pac. 641; Miller v. Lux, 100 Cal. 613, 35 Pac. 345, 639; Estate of Sanderson, 74 Cal. 199, 15 Pac. 753); but, waiving that question, it is sufficient to say that the issues claimed to have been made by the answer to which it is contended there are no findings are of matters entirely immaterial to the determination of the petition for the homestead.

The finding of the value of the premises set apart for the homestead is fully supported by the evidence, for the opinion of certain witnesses as to value was to be considered in connection with certain facts which appeared in the testimony; and, at best, the value claimed by appellant to have been shown was only a few hundred dollars greater than that found by the court. We see no other material matters necessary to be specially noticed. The case was first tried, and judgment entered setting apart the homestead, and afterwards a new trial was granted on the one issue of the value of the premises, and a similar judgment was then again entered; and appellant appeals from both judgments, and from the order granting a new trial, on the ground that it should have embraced all the issues. What we have said applies to all these appeals. The judgments and orders appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

124 Cal. 368

CITY OF LOS ANGELES v. LOS ANGELES CITY WATER CO. et al. (L. A. 655–658.)

(Supreme Court of California. June 3, 1899.)

On rehearing. Modified.
For former opinion, see 57 Pac. 210.

PER CURIAM. In the above-entitled cases the petition for rehearing is denied. In response to one suggestion in the petition, it is proper to say that, if the city of Los Angeles has any rights to the waters of the Los Angeles river as a riparian proprietor, such rights were not involved in these cases, and were not considered or determined by the decision. We also think, after further consideration, that what was said in the opinion about the general character of the ownership of the waters of the river by the city of Los Angeles to the point that it was only entitled to the use of the water when in a position to use it, and could not assert any rights of ownership in the water except when in such position, was unnecessary to the decision, and the same is hereby eliminated from the opinion. The water company is, substantially, in the position of a mortgagee in possession, having a lien on the property involved as security for the performance of the covenants of the city contained in the contract; and we see no reason, for the present, at least, why their lien and possession should be disturbed, or a receiver appointed.

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124 Cal. 594

PEOPLE v. FARLEY. (Cr. 494.)

(Supreme Court of California. June 2, 1899.)

HOMICIDE—EXPERT EVIDENCE—THREATS OF DECEASED—ADMISSIBILITY—SELF-DEFENSE.

1. Where the defense to a prosecution for homicide was that it was committed in self-defense while deceased was attacking accused with a knife, and it appears that the shot causing the death passed through deceased's upper arm and body near the shoulder, it is error to admit expert medical testimony on the part of the people that the arm through which the bullet passed must have been hanging down at the time; the matter not being a subject for expert evidence.

2. Expert medical evidence that when deceased was shot he could not have been standing erect is inadmissible on the part of the people, that fact not being the subject of expert testimony.

3. The fact that accused was at fault in bringing on the difficulty does not deprive him of the right of self-defense, where deceased persisted in attacking him after he had desisted.

4. In a prosecution for homicide, threats made by deceased at a prior unfixed time, not relating to any one in particular, are inadmissible.

5. Where the homicide was committed in the course of an altercation, and accused pleads self-defense, threats made by deceased against accused, not communicated to the latter, are admissible on the question as to which of the parties commenced the deadly affray.

In bank. Appeal from superior court, San Bernardino county.

William Farley was convicted of manslaughter, and he appeals. Reversed.

Bledsoe & Bledsoe, for appellant. Atty. Gen. Ford, for the People.

BEATTY, C. J. The defendant was accused, by information, of the crime of murder, and found guilty of manslaughter. He appeals from the judgment and from an order denying his motion for a new trial.

It appears from the evidence in the record that a quarrel had occurred between the defendant and the deceased early in the morning, in which the deceased was very insulting and abusive and wholly in the wrong. This quarrel was renewed after some interval of time, apparently by the fault of the deceased, and a fight ensued, in which the defendant was worsted. The parties being separated by the bystanders, the deceased continued to threaten and abuse the defendant, who thereupon borrowed a pistol from an acquaintance. Within half an hour after borrowing the pistol he again encountered the deceased. The evidence is conflicting as to what then occurred. According to the evidence of the defendant himself, the deceased assailed him with a foul epithet, and immediately attacked him with a pocketknife, which he had open in his hand. He says that he warned deceased that he had a pistol; that the deceased grasped his pistol with his left hand, and cut him with his knife; that he jerked the pistol away from deceased, and fired once, when the deceased turned away and passed into a store near which they were standing. In respect to these matters the defendant is partly corroborated and in part contradicted by his own witness, and they each contradicted themselves upon minor points. From all the testimony it seems pretty clear that but one shot was fired, and that the fatal bullet passed through the left arm of the deceased about five inches from the point of the shoulder, and thence directly through his body from left to right, making its exit at the right armpit. Death ensued in a few minutes, the deceased making no dying statement.

The first error assigned is the admission, over the objection of defendant, of the evidence of the surgeon performing the autopsy that the left arm of the deceased must have been hanging down by his side when the fatal shot was fired. The ruling of the court upon this point was erroneous (People v. Milner, 122 Cal. 181, 54 Pac. 833; People v. Smith, 93 Cal. 445, 29 Pac. 64; People v. Westlake, 62 Cal. 303), but can scarcely have been harmful. It was not introduced for the purpose of contradicting defendant's account of the struggle, for he had not then testified; and in point of fact it did not contradict him, for the fact that the arm of the deceased was hanging by his side when the shot was fired is not at all inconsistent with the statement of the defendant that a moment before deceased had been grasping his pistol with his left hand. Besides, it is perfectly evident that, although the witness stated in terms that the arm was hanging down, he only meant that the wounded upper arm must have been by the side of the body, in order that one bullet should pass directly through arm and chest, and this, it is conceded, must necessarily have been the case. If defendant or his counsel had desired to show that, although the upper arm was by the side of the body the forearm might have been extended, this could have been done by a single question on cross-examination. And, if there were no other error in the case, I should be reluctant to say that this particular ruling justified a reversal of the judgment. But this witness was further interrogated by a juror, and, replying to him, volunteered the opinion that when the deceased was shot he could not have been standing erect. There was no call for this opinion, and apparently no ground for it, and the court, on motion of defendant's counsel, struck it out; but the witness repeated it in a modified form, and it was not again stricken out. Although it seems to have been pretty thoroughly demolished on the cross-examination, it is not clear that it could not have prejudiced the case of the defendant, who testified that deceased at the moment he was shot was standing up and striking at him with his knife.

The court also erred in giving the following instruction: "The apprehension of danger to life or limb which justifies a man in taking the life of another must be an honest one, one that is well grounded, and must arise out of a reasonable cause; but a cause which originates in the fault of the person himself, in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself, by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person. Error of apprehension the law overlooks, when a man is called upon to act on appearances, but it does not overlook dishonesty of apprehension; hence a real or apparent necessity, brought about by the design, contrivance, or fault of the defendant, cannot be availed of as a defense for the commission of a crime." This instruction is copied from a portion of Justice McKee's opinion in People v. Westlake, supra, which was never concurred in by a majority of the court, and which was expressly disapproved in People v. Conkling, 111 Cal. 625, 44 Pac. 314, for reasons there stated, and upon grounds discussed in People v. Button, 106 Cal. 628, 39 Pac. 1073, and People v. Hecker, 109 Cal. 451, 42 Pac. 307.

The court did not err in striking out a portion of the testimony of the witness Case. The threats to which this testimony related were not only never communicated to the defendant, but they do not appear to have related to him. If they had been directed against the defendant, the fact that they were not communicated would not have rendered them irrelevant in a case like this, where the question was who commenced the deadly affray, but vague expressions of the character of those testified to, made at a time not specified and respecting persons not named, were clearly irrelevant.

As to the objection to the sufficiency of the evidence to sustain the verdict, that is answered by what is said in People v. Milner, 122 Cal. 171, 54 Pac. 833. For the errors above noticed, the judgment and order appealed from are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.; HENSHAW, J.; HARRISON, J.; VAN DYKE, J.; GAROUTTE, J.

(124 Cal. 663)

CUSHING v. PIRES. (S. F. 1,089.)[1]

(Supreme Court of California. June 5, 1899.)

APPEAL AND ERROR—WAIVER OF OBJECTIONS—WATER AND WATER COURSES—SURFACE WATERS—DIVERSION.

1. An objection that the complaint fails to state a cause of action, or, if it does, it is not the one to which the proofs were directed upon the trial, will not be heard for the first time on appeal, where the findings and judgment of the trial court are clearly supported by the evidence, and the case is correctly decided on the merits.

2. A landowner cannot protect his own land by turning the storm or surface water which would naturally flow thereon away from his own and onto the land of another, to the injury of the latter.

3. Testimony as to conversations with defendant regarding the matters in issue is admissible when offered in rebuttal and in explanation of defendant's own testimony on the same subject.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Action by Thomas Cushing against Manuel S. Pires to enjoin defendant from interfering with the repairing of a certain culvert, and to restrain him from destroying the same, and for damages. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Thomas C. Huxley, for appellant. Fitzgerald & Abbott, for respondent.

GRAY, C. This action was brought to enjoin defendant from interfering with the repairing of a certain culvert, and to restrain him from destroying or filling the same in with earth, and for damages. Defendant appeals from the judgment and from an order denying his motion for a new trial.

Plaintiff owned land adjoining defendant on the west. There was a county road some distance to the east of plaintiff's land. Plaintiff and defendant were accustomed to reach this road by means of a private road commencing at the northeast corner of defendant's land, and running thence east along the northern boundary of and on plaintiff's land out to said county road. One Reynolds owned a tract of land adjoining the lands of both plaintiff and defendant on the north. All these several tracts were composed of bottom lands near the Bay of San Francisco, nearly flat, but with a slight slope to the south of several feet to the mile. In the rainy season great quantities of water fall upon this land,

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[1] Rehearing denied July 5, 1899.

and this water, as observed by witnesses, for upwards of 20 years has been accustomed to flow from the Reynolds land, through slight natural depressions, in a southerly direction across the private road referred to, and so on across defendant's land. Some three or four years before the trial, this private road was graded up slightly above the surface of the adjoining territory, and this grading left a gutter or ditch along the sides of the road, and had the effect to dam up the surface water, preventing it in some measure from flowing upon the land of defendant, and causing it to follow the road in a westerly direction, and flow upon the lands of plaintiff. To obviate this, and to permit the water to take its natural course across the lands of defendant, and to prevent its flowing upon his own lands in unnatural abundance, the plaintiff constructed a culvert on defendant's land across said private road at a point thereon very near to the northeast corner of his own land, where there was a natural depression through which the storm and surface waters had been accustomed to flow from the Reynolds tract upon and across defendant's land. In January, 1894, the defendant tore out this culvert, destroyed it, and filled in the depression where it had been, and thus prevented the water from flowing through it to his land, and caused a much greater amount of water to flow upon plaintiff's land than otherwise would have flowed there, and, as a result, plaintiff's growing crops were damaged, and his land was injured by the consequent erosion of the same. The strongest contention of appellant for reversal of the judgment and order appealed from is based on the ground of a defective complaint. The argument is that the complaint fails to state a cause of action, or, if it does state any cause of action, it is not the one to which the proofs were directed upon the trial. On an inspection of the record we cannot say that this argument is altogether without foundation. But we find that no such argument as this, and no objection of this nature, was at any time presented to the court in which the case was tried. There was no demurrer to the complaint, and no motion based upon a variance between the pleadings and proof, and to such evidence as might have been objected to on the ground that it was not pertinent to the case made by the pleadings no such objection was made. Had counsel made the objection he here urges, and presented his argument in support thereof at the trial with the same force and clearness as in his brief in this court, it would have resulted, probably, in an amendment of the complaint. He did not do this, but proceeded with the trial as if all the matters to which the evidence was directed were properly in issue. The findings and judgment were clearly supported by the evidence, and the case was decided correctly on the merits. It is the settled law of this state that a land owner cannot protect his own land to the injury of another's land by turning the storm or surface water which would naturally flow thereon away from his own and onto the lands of another. Ogburn v. Connor, 46 Cal. 346; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795; Hicks v. Drew, 117 Cal. 305, 49 Pac. 189. While the complaint is not to be recommended as a precedent to be hereafter followed, yet in view of the fact that no objection, either as to its form or substance, was made in the court below, we think it sufficient to support the judgment based upon it. It is true that the objection that the complaint does not state a cause of action may be successfully made for the first time on appeal, but the appellate court will not be overzealous to find a defect in a complaint that the appellant himself failed to discover until the case had been decided against him on its merits. We think the defects in the complaint, as well as the variance complained of, are of a nature to be waived by failure to call them to the attention of the trial court by proper objections, and that defendant should not be heard to urge those objections for the first time after judgment. Hill v. Haskin, 51 Cal. 175; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, and 24 Pac. 382; Knox v. Higby, 76 Cal. 264, 18 Pac. 381; Dikeman v. Norrie, 36 Cal. 94; Bell v. Knowles, 45 Cal. 195.

There was no error in permitting plaintiff to testify as to the conversations with defendant about raising the road and putting in culverts. This was proper in rebuttal and explanation of defendant's testimony on the same subject. For the foregoing reasons, we advise that the judgment and order should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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124 Cal. 651

SMITH v. SMITH. (Sac. 453.)[1]

(Supreme Court of California. June 5, 1899.)

DIVORCE—PLEADING—EXTREME CRUELTY—SUFFICIENCY OF ALLEGATION—DIVISION OF HOMESTEAD.

1. Under Civ. Code, § 94, declaring that extreme cruelty, as a ground for divorce, may consist either of the infliction of grievous bodily injury, or grievous mental suffering, an allegation that "during the last two years defendant has treated plaintiff in a cruel and inhuman manner," that defendant has applied the coarsest epithets to her (naming them), and has accused her of a want of chastity, states no cause of action.

2. Under Civ. Code, § 146, subd. 3, relating to divorce, declaring that, if a homestead has been selected from the community property, it may, in the discretion of the court, be divided, or be sold and the proceeds divided, the trial court may award an undivided two-thirds to the wife.

Department 1. Appeal from superior court, San Joaquin county.

Action by Mary E. Smith against Thomas R. Smith for divorce. There was a judgment for plaintiff, and defendant appeals. Affirmed.

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[1] Rehearing denied June 24, 1899.

J. G. Swinnerton and Budd & Thompson, for appellant. Elliott & Elliott, for respondent.

GAROUTTE, J. This is an action for divorce. Plaintiff having died pending the appeal, her heirs at law have been substituted as parties plaintiff, and the litigation continued, certain property rights being involved. The complaint attempts to allege two grounds of divorce, namely, willful neglect and extreme cruelty. A general demurrer to both causes of action was overruled, and, upon issue made, judgment went for plaintiff, the court finding in her favor upon both counts. The property involved consists of a homestead upon community, an undivided two-thirds of which was awarded to plaintiff, and the remaining one-third to defendant. The complaint states no cause of action for extreme cruelty. The pleading in this regard alleges that "during the last two years defendant has treated plaintiff in a cruel and inhuman manner," that defendant has applied the coarsest epithets to her (naming them), and has accused her of a want of chastity. By section 94 of the Civil Code, extreme cruelty may consist either of the infliction of grievous bodily injury, or grievous mental suffering, upon the other party to the marriage. Here there is no allegation of either. Grievous bodily injury, or grievous mental suffering, is the ultimate fact, and should be alleged. There is no attempt whatever to allege bodily injury, and the probative facts alleged in no degree establish grievous mental suffering. The law is so recognized and declared in all the recent cases. Andrews v. Andrews, 120 Cal. 187, 52 Pac. 298; Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298. Calling a woman vile names and accusing her of unchastity may inflict upon her grievous mental suffering, and it may not. It depends entirely upon the particular woman. Such treatment of one woman might inflict upon her vital wounds, while the same treatment of another woman would not leave a mark. It is said in Barnes v. Barnes, supra: "Whether in any given case there has been inflicted this grievous mental suffering is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party." Hence an allegation of these evidentiary facts falls far short of hitting the target, when the object aimed at is a good cause of action. We attach no importance whatever to the declaration that the defendant treated plaintiff in a cruel and inhuman manner. Indeed, the trial court closed its eyes to this allegation, and made no finding upon it.

The cause of action for willful neglect is sufficiently stated, and the evidence in the record is sufficient to support the finding of fact in that behalf. Upon this cause of action, and upon the findings and judgment made and entered therein, the court had the power to deal with the property as was done. The property here involved is a homestead created upon the community property. By virtue of section 146 of the Civil Code (subdivision 3), the trial court may divide the community homestead between the parties. Its discretion in such matter is of the widest, and there is no ground in this case upon which to disturb that discretion. We do not understand that the community homestead necessarily should be divided in severalty.

There are various technical objections made to the rulings of the court. Even conceding that they may be raised upon an appeal from a judgment decreeing a divorce, where the original plaintiff has died since the appeal was taken (see Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064; Downer v. Howard, 44 Wis. 82), still these assignments of error do not contain sufficient merit to demand a reversal of the judgment. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

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124 Cal. 682

DINGLEY v. McDONALD et al. (S. F. 1,412.)

(Supreme Court of California. June 6, 1899.)

PRINCIPAL AND AGENT — DELEGATION OF POWERS—ACTION BY SUBAGENT—POWER TO SUE — RATIFICATION AFTER SUIT—EFFECT—EVIDENCE.

1. The cashier of a bank, authorized by the directors to collect a claim, consulted an attorney. Subsequently he wrote him that, acting under the opinion of the directors, he had ordered the papers turned over to him, and requested that he act without consulting the bank further. *Held*, that such attorney became the special agent of the bank, with general power for the collection of the claim, and not merely the agent of the cashier.

2. A special agent, with general power for the collection of a claim, cannot delegate his authority by assignment so as to invest his assignee with power to sue thereon, as Civ. Code, § 2349, provides that an agent can delegate his authority, when not specially authorized, when the act to be done is purely mechanical, and the power to bring a suit implies the power to control it, and is more than a mechanical act.

3. Where an agent for the collection of a claim, without any authority to delegate his power, assigns it to another to sue thereon, a ratification by his principal of such act after the commencement of the suit is not equivalent to a precedent authorization as to defendant, since the principal could not by his act take away from defendant a defense he had at the commencement of the action.

4. Under Civ. Code, § 2349, providing that an agent may delegate his authority to another when it is the usage of the place to do so, in an action by the assignee of an agent the court will not assume that it was the usage of agents in the locality where the suit is brought to assign claims for collection, but it must be proved.

5. Where the assignee of an agent, who had no power to delegate his authority for the collection of a claim, sues thereon, a contention by

plaintiff that defendant cannot suffer injury from a judgment, as it will protect him from a second action by the principal, is unavailable to enable him to continue the suit, since, until the principal ratifies the agent's act, defendant continues liable.

6. An agent with plenary power to collect a claim cannot transfer it to a third person, without consent of his principal, and invest him with such title as will enable him to sue thereon.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles L. Dingley, Jr., against R. H. McDonald and others. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant J. M. McDonald appeals. Reversed.

Sawyer & Burnett, for appellant. H. A. Powell and W. A. Dow, for respondent.

CHIPMAN, C. Action to recover judgment against defendants, as stockholders of the Pacific Bank, upon its indebtedness to the Exchange National Bank of Spokane (referred to hereafter as the "Spokane Bank"), plaintiff's assignor. Several causes of action were set forth in the complaint, but one of which is here on appeal. Plaintiff had judgment, from which, and from the order denying motion for a new trial, defendant J. M. McDonald appeals.

Appellant contends that the assignment of the claim to plaintiff was without authority, and that, as he had no interest in the claim at the commencement of the action, he cannot recover. The complaint was filed May 18, 1896. The court found that on that day the Spokane Bank "assigned and set over to plaintiff, for the purpose of collection, all its claim and demand against said Pacific Bank, * * * and all right of action for said sum, and plaintiff is now the owner and holder thereof." This finding is challenged as not supported by the evidence. It seems that several of the creditors of the Pacific Bank made assignments of their claims in one instrument to plaintiff. This instrument on behalf of the Spokane Bank was executed in the following terms: "Exchange National Bank, by W. H. Chickering, Its Atty." A document was admitted in evidence showing that on February 20, 1897, the Spokane Bank passed a resolution confirming and ratifying said assignment by said Chickering "and all proceedings thereunder." Defendant objected on the ground that it was executed after the commencement of the action. The evidence showed that the claim was in the form of an open account between the two banks, leaving the balance (after some payments since the failure of the Pacific Bank) as found by the court; that plaintiff had no interest in it, beyond expenses and commissions of collection, and that he gave no consideration for the assignment, but "it was merely for the purpose of collection." On June 24, 1893, the board of directors of the Spokane Bank held a meeting, at which the minutes of the board show the following proceedings: "Question of our claim against the Pacific Bank of San Francisco was taken up. E. J. Dyer, cashier, was instructed to go to San Francisco and see what the condition of our claim is, and to take all necessary steps that he may deem best for this bank, both now and in the future." Objection was made to admitting this action of the board on the ground that it conferred no authority upon the cashier to delegate his authority to a third person to assign the claim. On April 7, 1896, Cashier Dyer wrote W. H. Chickering, Esq., of San Francisco, as follows: "Your kind favor of 3d at hand. Acting under the opinion of the board of directors I wired you to-day as per inclosed copy. I have also wired the Anglo to turn the matter over to you. * * * Any action by you will be quite satisfactory to us." The telegram was as follows: "Have instructed bank to turn Pacific papers over to you. Will you investigate them, and act as you deem best, without consulting us further?" This was introduced over defendant's objection that it "did not authorize Mr. Chickering to make said assignments." Mr. Chickering testified that he was Mr. Dyer's attorney in an estate matter here, but received no compensation for his services in this matter. He testified: "I cannot exactly say I had any authority to act for the Bank of Spokane. If I did, it was in writing." Later in the trial he produced the above letter and telegram, which, together with the ratification of his acts, constitute his only authority. He testified: "The assignment was made for the purpose of bringing an action against the stockholders of the Pacific Bank on the claim for the benefit of the Exchange National Bank. I wrote to the bank that I did not think they were warranted in bringing an independent suit for this amount, and that it were better to sue with others, and save expense." When he so wrote, does not appear.

If we were to assume that Dyer was acting upon the authority given him in 1893, the question to be decided would not be different, and, as we view the matter, would be less favorable to plaintiff. In the latter case we would have an attempted substitution of Mr. Chickering by Mr. Dyer, without the latter being "specially authorized" to make such substitution. Civ. Code, § 2349, subd. 4. We think it fairly appears that the cashier spoke for the bank, and had authority to do so. It is as though the bank had placed in Mr. Chickering's hands the matter of its claim against defendant, with authority to act as he (Mr. Chickering) deemed best without further consulting the bank. He became a special agent of the bank (Id. § 2297), with general powers with respect to collecting the claim, the subject of his agency. As the agent of the bank, acting with authority from it, and not by delegation, we think he undoubtedly could have brought the suit in the name of the bank, and perhaps, under the broad terms of the power, could have made a compromise settlement. He did neither of these things, but undertook to delegate his authority to plaintiff by assigning the claim to him. Id. § 2349, provides as follows: "An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others: (1) When the act to be done is purely mechanical; * * * (3) when it is the usage of the place to delegate such powers; or (4) when such delegation is specially authorized by the principal." It is not, and cannot be, contended that Mr. Chickering was specially authorized to delegate his authority; nor can we regard the act to be done by the plaintiff as "purely mechanical." The acts contemplated by the statute as purely mechanical are such as occur where the delegation carries with it no discretionary authority, which cannot be said to be true of the acts to be performed by a plaintiff in an action. The power to bring the suit implies the power to control it when brought, and this involves discretion. Furthermore, we cannot agree with respondent that the subsequent ratification was equivalent to a precedent authorization under section 2307, Civ. Code. That is true as between the principal, the bank, and the agent, Chickering, and the plaintiff, the subagent, but it is not necessarily so as to the defendant. In Wittenbrock v. Bellmer, 57 Cal. 12, the president of a bank was authorized to accept payment of a note and mortgage, but, instead, he sold and assigned the note to Wittenbrock, who brought the suit. Some time thereafter the bank ratified the sale and assignment. It was held that the bank could not thus take away from the defendant the defense he had at the commencement of the action, to wit, that plaintiff, Wittenbrock, was not legally invested with title, and was not then the owner of the claim. Respondent contends that the case here is clearly distinguishable from that case, because there the president undertook to sell the claim, while here the authorized agent of the bank undertook only to assign for collection. We are unable to make this distinction available to plaintiff. Section 2349, as we have seen, gives to the agent authority to delegate the "power when it is the usage of the place to delegate such power." The facts do not bring the case within the rule in Greig v. Riordan, 99 Cal. 316, 33 Pac. 913. No usage was shown for agents to assign claims for collection, and we cannot assume that any such usage exists in San Francisco, where the suit was brought.

It is urged that, because defendant was ultimately protected from a second action by the Spokane Bank, he cannot suffer injury by this judgment, as he clearly is at least once liable. But that was the situation in Wittenbrock v. Bellmer, supra. So, here, until the Spokane Bank ratified the acts of Chickering, defendant was liable to the bank, if Chickering had no authority to assign the claim to plaintiff.

Both parties rely upon Malloye v. Coubrough, 96 Cal. 649, 31 Pac. 622. In that case a foreign judgment held by Abel, Rey & Co., in London, was confided to an agent by letter of attorney, with authority to bring any suits or proceedings and prosecute the same as he might think fit; to institute any proceedings in insolvency, or for the liquidation of the affairs and estate of the said Henry Coubrough; "and for all and any of the purposes aforesaid to use our names, and generally to act in and about the premises as fully and effectually as we ourselves could do if personally present and acting therein." The power contained no general clause authorizing the attorney to do anything necessary or convenient in the collection of the judgment. The agent assigned the judgment to plaintiff for the purpose of suing thereon. The court said that the power "confines the authority to the institution and maintenance of suits, actions, and proceedings to that end. The general language at the conclusion is limited to the premises, which defines what may be done. All these could have been done in the name of Abel, Rey & Co. Therefore an assignee was not necessary in order to take any of the steps * * * contemplated as possibly necessary or convenient. * * * Had the letter of attorney authorized the agent to adopt any measure he might deem expedient, or had it been necessary to substitute an assignee for the purpose of maintaining any action or proceeding which might be thought advisable, perhaps the construction contended for should prevail. But, under the circumstances, I think the language cannot be so extended." Respondent claims that the facts here present just such authority as was in the mind of the court as described in the latter part of the opinion above quoted. The difficulty we find in applying what is there said is that the assignment conferred discretionary powers upon plaintiff, and was therefore in violation of section 2349, Civ. Code, for the reasons already stated. So far as the record discloses, Mr. Chickering had no control of the case. Plaintiff brought the action, and the attorneys appearing are his attorneys. The general power given Mr. Chickering was based upon the special trust and confidence reposed in his personal ability and integrity, and the rule is that such power, in the absence of authority, express or implied, cannot be redelegated by the agent so as to bind the principal. 1 Am. & Eng. Enc. Law, p. 972; Story, Ag. § 14 et seq.; Mechem, Ag. §§ 405, 406. The books give exceptions to the rule, but these exceptions are now brought into and enumerated in section 2349, supra, and are the only exceptions. But aside from any question of delegated authority by an agent, and assuming that Mr. Chickering had plenary power to collect the demand, we do not think he could transfer it to a third person, and thus invest a stranger to the bank with the title and control. There are cases where some present imperative necessity or where usage has justified the courts, in the particular cases, in implying a power to assign as incident to the power to collect. Story, Ag. § 14, and notes. But the evidence presents no such case here. The principle of the decision in Malloye v. Coubrough, we think, should govern this case. The judgment and order should be reversed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

124 Cal. 666

WILLIAMS v. COOPER. (Sac. 535.)

(Supreme Court of California. June 6, 1899.)

JUDGMENT — RES JUDICATA — MORTGAGES — SUIT TO FORECLOSE—PARTIES—EJECTMENT—EVIDENCE.

1. A mortgagee, who, as agent for the mortgagor, participates in the defense of an action of ejectment by a tax-title claimant against the mortgagor, involving the validity of the tax title, by employing and paying counsel to conduct the defense, does not thereby make himself such a party to the action that he is bound by the judgment.

2. The holder of a tax deed is not a necessary party to a suit to foreclose a mortgage, since the tax lien, if valid, whether it antedates the mortgage or not, is superior to the mortgage lien.

3. A mortgagee who has not been made a party to a suit involving the validity of a tax deed upon the mortgaged premises is not bound by a judgment in favor of the tax-title claimant.

4. In ejectment by a mortgagee, claiming under sheriff's deed on foreclosure, against a tax-title claimant, whose tax deed had been held good in a prior action by him against the mortgagor, the defendant cannot prove his title, as against the plaintiff, by putting in evidence the judgment in the prior action, to which the mortgagee was not a party, although he participated in the defense, as the mortgagor's agent, by employing and paying counsel to conduct it.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county.

Ejectment by W. H. Williams against H. M. Cooper. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. & Geo. H. Mastick and E. A. Bridgford, for appellant. Edwin Sigfried and Thos. Rutledge, for respondent.

HAYNES, C. Ejectment to recover possession of certain lots in the town of Williams, in the county of Colusa. Said action was tried by the court without a jury. The plaintiff had judgment upon the findings, and the defendant appeals therefrom, and from an order denying a new trial.

The complaint is in the usual form, and not verified. The answer denied each and every allegation of the complaint, and for a second defense alleged, in substance, that in 1890 William Miller, being then the owner of the demanded premises, mortgaged them to the plaintiff; that said premises were afterwards sold by the tax collector of Central irrigation district for an assessment which became delinquent December 31, 1889; that defendant, Cooper, became the purchaser at said sale, and received the tax collector's deed therefor on March 26, 1891; that on May 25, 1891, Cooper, claiming title under said tax deed, and relying solely thereon, brought an action of ejectment against said Miller and against his tenants, Long, Kidd, and Peters; that Williams, the plaintiff here, for the protection of his interest as mortgagee, openly took substantial control of the defense of said action, with the consent of the defendants therein, employed counsel, and conducted the defense in that court and in the supreme court, and paid the costs and expenses of said defense; that on August 6, 1892, this defendant (Cooper) obtained judgment in the superior court in said action that he had a good and valid title under said tax deed, and was entitled to the possession of said premises; that said judgment was affirmed by the supreme court on June 6, 1896, and this defendant was put in possession under a writ issued upon said judgment; that thereafter said Williams commenced an action against said Miller to foreclose his said mortgage, obtained a decree that said lots were sold by the sheriff thereunder, and, after obtaining the sheriff's deed, commenced this action; that said deed constitutes plaintiff's only claim of title, and defendant pleads his said judgment in bar of this action. The findings of the court were in accordance with the allegations of said second defense, except as to the participation and control of Williams in the defense of the said action of Cooper v. Miller (Cal.) 45 Pac. 325; and in relation thereto it found, in substance, that Williams' only participation or control of the defense was as agent for said Miller. Upon the trial, Cooper did not offer or introduce his said tax deed in evidence, but put in evidence the judgment roll in his said action of ejectment against Miller, and certain evidence tending to sustain his allegation that Williams conducted the defense of that action, and had such interest in and relation thereto as that he became bound and concluded by said judgment.

Appellant's first proposition is "that Williams, in effect, made himself a party defendant to the action of Cooper v. Miller, and is bound by the judgment therein."

1. As we have seen, the court found that Williams' participation in the trial of Cooper v. Miller was as the agent of Miller, and not in the protection of his interest as mortgagee; but appellant contends that this finding is not justified by the evidence. Williams at that time had no title to the property, and was not in possession, and was therefore not a necessary or proper party defendant to the action of ejectment. That he had such an interest as would have authorized him to intervene in that action may be conceded, but he was not bound to do so. Williams had been the agent of Miller in the collection of

rents, payment of taxes and insurance, etc., and a portion of the rents was from time to time applied upon the mortgage he held upon the property. There was also evidence tending to show that he employed counsel to defend the action on the part of the tenants, and, to induce them to continue paying the rents to him, promised to protect them from a repayment to Cooper. He testified, however, that all that he did was as the agent of Miller, who was absent. It would serve no useful purpose to rehearse the evidence upon this point at greater length; for, conceding that the evidence was sufficient to justify a finding the other way, it was clearly sufficient to support the finding made by the trial court, and therefore we cannot disturb it.

2. Appellant's second contention is that the judgment, sale, and deed in the foreclosure case of Williams v. Miller do not make out a title as against appellant, he not having been made a party to that action. Cooper, however, was not a necessary party in Williams' suit to foreclose his mortgage. The record shows that the tax for which the property was sold by the tax collector was delinquent before the mortgage was executed by Miller to Williams; but whether Cooper's tax title related back to the date when the tax lien first attached, or to the date of its delinquency, or the date of the sale, is immaterial, since the tax lien, whether it antedated the mortgage or not, was, if valid, superior to the mortgage, and it is not necessary to make a prior or superior lienholder a party to the action to foreclose an inferior mortgage lien. Here, however, Cooper's claim was adverse and paramount to that of the mortgagor, and he denied the efficacy of the mortgage as a lien on his title, and therefore it was not necessary to join him as a co-defendant with the mortgagor. "Such an adverse claim to the land in opposition to the mortgage cannot be tried in the equitable action to foreclose." McComb v. Spangler, 71 Cal. 418, 423, 12 Pac. 347; City and County of San Francisco v. Lawton, 18 Cal. 474; Ord v. Bartlett, 83 Cal. 430, 23 Pac. 705; Emeric v. Alvarado, 90 Cal. 470, 27 Pac. 356; Cody v. Bean, 93 Cal. 578, 29 Pac. 223; Sichler v. Look, 93 Cal. 608, 29 Pac. 220. Nor did the foreclosure sale or sheriff's deed to Williams in any way affect Cooper's title under his tax deed; but as Williams was not a party to the ejectment suit of Cooper v. Miller, in which Cooper's tax title was adjudged to be valid, he was not bound by that judgment, and Cooper's title, as against Williams, could not be proved by the production of the judgment against Miller. Upon the question of the validity of the tax title, Williams was entitled to his day in court. It is quite true, as held in the New York cases cited by appellant, that the foreclosure did not devest Cooper of his title. Had he produced his tax deed upon the trial of this case, and shown that it was valid, if its validity was attacked he must have prevailed in this action; but as he did not produce his deed, but relied upon a judgment by which Williams was not bound, he necessarily failed to show title in himself.

Appellant cites Cohen v. Solomon, 66 Fed. 411, and Mendenhall v. Hall, 134 U. S. 559, 10 Sup. Ct. 616, and remarks concerning them, "So it is clearly held by these cases that the holder of the tax title is a necessary and proper party, if his rights are to be rendered subject to the mortgage." But appellant had already shown—what we fully concede—that the foreclosure does not affect the tax title; meaning, of course, unless the tax title was in fact litigated therein. But I do not think that the above cases cited by appellant are authority for the proposition that, in cases such as the one at bar, the holder of the tax title is a necessary party; but, if it were otherwise, it would be dangerous, in the absence of legislative direction, to reverse a doctrine so long and distinctly adhered to by this court. But I do not think those cases decide that the holder of the tax title is a necessary party to the foreclosure case (unless under exceptional circumstances), but that he may be made a party, and the tax title litigated therein. In the first of these cases, after the foreclosure proceedings were commenced in the federal court, the holder of the tax title brought suit in the state court to quiet his title under the tax deed. By supplemental bill he was brought into the federal court,—which had first obtained jurisdiction of the res,—and compelled to litigate his title in the foreclosure case. This, under the circumstances, was necessary to avoid a conflict of jurisdiction, and the court based its action upon that ground. In Mendenhall v. Hall the holder of the tax title was made a party to the foreclosure case upon an allegation in the bill that the mortgagor and the holder of the tax title colluded to defeat the mortgage by suffering the taxes to become delinquent, and thus creating a title free from the mortgage; thus presenting a question of equitable cognizance, which could be properly litigated in the foreclosure suit, since, if the collusion were shown, it would be immaterial whether the tax deed was otherwise valid or not.

No other questions are made or discussed. I advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(124 Cal. 653)

In re JAMES' ESTATE. (S. F. 1,467.)[1]

(Supreme Court of California. June 5, 1899.)[2]

REVIEW—IMPROPER EVIDENCE—WITNESSES—IMPEACHMENT—MARRIAGE—EVIDENCE—DECLARATIONS—RES GESTÆ.

1. It will not be presumed that the admission of improper evidence, duly objected to, tending on its face in any degree to influence the find-

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[1] For modification of opinion, see 57 Pac. 1008.

[2] Rehearing denied July 5, 1899.

ings of fact of the court below, did not have that effect.

2. Under Code Civ. Proc. § 2051, expressly forbidding the impeachment of a witness "by evidence of particular wrongful acts," the fact that one witness had written an immoral book, and another had read it, cannot be shown to impeach their credibility.

3. Testimony of a father and stepmother as to the pure surroundings and education of their daughter is not contradicted by evidence that she had once read an immoral book, written by her stepmother, and is incompetent on an issue as to her marriage to a decedent, there being nothing to show that the decedent knew that there was such a book in existence.

4. Declarations of a father and stepmother that their daughter, who was a member of their family, was engaged to be married to a decedent at the time of his death, is incompetent on an issue as to whether or not they were in fact married at that time, there being no evidence of a conspiracy.

5. Voluntary declarations of a decedent, made a few weeks prior to his death, that he was a widower, that he had dropsy, catarrh, and symptoms of Bright's disease, and was impotent, are incompetent on an issue as to whether he was married when they were made, as they are no part of the res gestæ, under Code Civ. Proc. § 1850, making a declaration which forms part of a transaction which is itself the fact in dispute, or evidence of that fact, admissible as part of the transaction.

6. Declarations of a decedent, made a few weeks before his death, that he was a widower, are inadmissible in opposition to a claim that he was married at that time, under Code Civ. Proc. § 1852, providing that the declaration of a member of a family, who is a decedent, is admissible as evidence of common reputation, where, in cases of pedigree, such reputation is admissible.

7. On an issue as to whether a decedent was married to a person claiming to be his widow, evidence of her specific acts of immorality prior to the alleged marriage are inadmissible.

8. Where the declarations of a decedent as to his physical condition are inadmissible, expert testimony, based upon such declarations, must be rejected.

Department 1. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Charles A. James, deceased. From a decree of distribution, and from an order denying a new trial, Laura Milen James and Milen James, also called Theodore Milen James, appeal. Reversed.

W. H. H. Hart and Geo. W. Fox (Aylett R. Cotton, of counsel), for appellants. Geo. D. Shadburne, for respondents.

GAROUTTE, J. The appellants, claiming to be the widow and son of Dr. Charles James, deceased, appeal from a decree of distribution made and entered in the matter of his estate, and from an order denying their motion for a new trial. Dr. James died leaving quite a large property, and Laura Milen James now claims to be his widow, and Theodore Milen James, the infant son of Laura, claims, by guardian, to be his son. The marriage relation relied upon is commonly called a "contract marriage," and is evidenced by an agreement in writing purporting to be signed by both parties named therein. The lower court, after an extended trial, found as a fact that there never was a marriage between Dr. James and Laura Milen, and that her infant son was not his son.

It is first contended upon the part of the respondents that there is sufficient evidence in the record, which came before the court without objection, to support the findings of fact, and that, therefore, even conceding the admission of evidence under objection which should have been denied admission, still a new trial for the aforesaid reasons should not be ordered. This position cannot be sustained. If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale, and lost the case to the appellants. This must, of necessity, be the rule wherever improper evidence has been admitted, which, upon its face, tends in any degree to affect the final conclusion of the court. Counsel for appellants present an elaborate brief, wherein they discuss the claimed errors of law committed by the trial court in the admission of evidence. Counsel for respondents present an elaborate reply brief, wherein they discuss at great length the sufficiency of the evidence to support the findings, and devote but little time and space to the discussion of the alleged errors of law relied upon by the other side. It would have been more satisfactory to this court if they had devoted more labor to the questions of law raised by appellants in their brief.

Before passing to an examination of the merits of the motion for a new trial, let us look at the parties directly and indirectly connected with this litigation, their situation and relations. Dr. Charles James, 60 years of age, was the owner of a large apartment house, situated upon Howard street, in the city of San Franscisco. Dr. Milen, a traveling vendor of drugs; his second wife, Jessie Milen; his daughter by his first wife, and her husband (Mr. and Mrs. Dickman); and Laura Milen, his unmarried daughter, sister to Mrs. Dickman, and 19 years of age,—rented rooms of Dr. James in his apartment house on December 13, 1894. Prior to this event the family of Dr. Milen were strangers to Dr. James. Little time was devoted to the courtship, for the contract of marriage between Laura Milen and Dr. James is dated January 6, 1895, and according to the testimony of Laura it was executed at that date, and the marriage relations thereupon immediately assumed. Dr. James died at his rooms in this house January 28, 1895, after a very short illness. An infant,—Theodore Milen,—joint defendant and appellant with his mother, Laura, was born to her September 16, 1895.

During the examination of Dr. Milen he identified a book entitled "Was He to Blame?" as written by his wife, Mrs. Jessie Milen.

This book was highly immoral, and was introduced in evidence under objection. This evidence was thereafter followed by respondents with evidence that Laura Milen had read the book, and also the additional evidence that it had been subsequently suppressed by the Society for the Suppression of Vice. As evidence tending to besmirch the character of the author, and also that of the daughter, these facts were well calculated to serve that end. And in serving that end it necessarily had the effect of weakening the credibility of these two witnesses,—the two most important witnesses to the fact of marriage. It therefore goes without saying that it was prejudicial to the appellants' side of the case. To support the admissibility of this evidence upon the ground that it tends to weaken or impeach the credibility of these two aforesaid witnesses, no authority can be cited. The book was a separate, distinct, independent piece of evidence, and all authorities agree that independent, specific acts of immorality may not be affirmatively shown to impeach a witness. It has been declared by this court that such acts may not even be shown upon the cross-examination of the witness himself; and even those cases which go to the length of holding that such an examination of the witness may be gone into upon cross-examination still declare that the answer of the witness is final and conclusive, and its truthfulness beyond all attack by independent evidence. We cite numerous cases to support the foregoing propositions: Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Hinkle v. Railroad Co., 55 Cal. 629; People v. Hamblin, 68 Cal. 101, 8 Pac. 687; People v. Elster (Cal.) 3 Pac. 884; Evans v. De Lay, 81 Cal. 105, 22 Pac. 408; People v. O'Brien, 96 Cal. 180, 31 Pac. 45; People v. Un Dong, 106 Cal. 88, 39 Pac. 12; People v. Wells, 100 Cal. 462, 34 Pac. 1078; Jones v. Duchow, 87 Cal. 109, 23 Pac. 371, and 25 Pac. 256; Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141; People v. Silva, 121 Cal. 668, 54 Pac. 146; Code Civ. Proc. § 2051. This section of the Code expressly forbids the impeachment of a witness "by evidence of particular wrongful acts." Respondents' counsel claim that this evidence was offered to contradict the testimony of Dr. and Mrs. Milen as to the pure surroundings and education of their daughter Laura. All the testimony of Dr. Milen in chief upon this point is as follows: "I have bestowed all I could in the way of care over her books and education. I have not been able to provide all the books I have wished for them at home. I do not know that I ever gave my wife any instructions about the moral culture of my children. I considered that she was competent to care for them in that respect, so I did not consider it necessary to leave any instructions." Mrs. Milen gave no testimony whatever on the subject. Respondents claim that there was neither a marriage between this man and woman, nor meretricious relations, and that the whole thing was without any semblance of truth, and was a corrupt scheme, pure, and simple, concocted after the old man's death, by which to secure the possession of his property. Aside from the question of impeachment, which we have already considered, this evidence is wholly inadmissible from any standpoint. The fact that the stepmother wrote an immoral book, and that appellant, the daughter, read it, shed no light upon the all-important issue in the case, namely, marriage or no marriage. There is nothing in the record to indicate that Dr. James, prior to his death, had any knowledge as to the authorship of the book, or that Laura had read it, or that there was such a book. Therefore, as in any way bearing upon the question of marriage, this evidence failed to reach the mark. It does not even contradict the testimony of her father which we have quoted above.

The trial court admitted in evidence the declarations of Mrs. Milen and Mr. and Mrs. Dickman, made after the death of Dr. James, to the butcher, the baker, and the coal dealer, to the effect that Laura was engaged to be married to the doctor at the time of his death. This evidence was not offered for impeachment purposes, for no foundation had been laid for it when the respective witnesses were testifying upon the stand; but, upon the contrary, it was offered and received as independent and affirmative evidence tending to show the nonexistence of a marriage between the parties. Under well-settled rules of law, the evidence was objectionable. It was hearsay of the purest character, and does not come within any of the exceptions recognizing the admissibility of that character of evidence. These appellants could not be bound to the extent of a hair by the declarations of third parties. It is claimed by respondents that these witnesses were members of the Milen family, and that declarations of any member of the family are admissible as part of the res gestæ. This claim, as presenting a rule of evidence, is untenable. What third parties may say as to the character of a past occurrence, or as to the actual happening or nonhappening of an occurrence, will not be stamped by the law as res gestæ. The fact that these parties may all be said to have been members of the Milen family gives no additional support to respondents' position. Declarations of members of a family, who are not parties to the litigation, as to matters similar to those before us, are no more admissible than the declarations of strangers. The rule of law as to the admissibility of declarations of certain described persons, when those declarations bear upon matters of pedigree and kindred subjects, cannot be invoked here, for the reason that the parties making the declarations are neither deceased nor beyond the jurisdiction of the court. People v. Mayne, 118 Cal. 516, 50 Pac. 654. It is also claimed that these witnesses were coconspirators with the appellant Laura, and that as such conspirators their declarations were admissible. There is not the slightest evidence in the record of a conspiracy between these parties, and the admission of the evidence upon that ground cannot be justified. As to the declarations of Laura, the appellant, they were admissible against her, at least.

Declarations made by the deceased, Dr. James, within a few weeks prior to his death, and within the time within which the appellant Laura claims she was his wife, were admitted in evidence under objection. These declarations were testified to by various neighbors and friends of the doctor, and covered a wide field. The most important ones were to the effect that he was a widower, that he had dropsy, catarrh, and symptoms of Bright's disease, and that he was impotent. We are satisfied that the rules of evidence forbid the introduction of this kind of evidence. It is not res gestæ; neither does it belong to that class of hearsay which the law recognizes as competent and admissible evidence. This evidence is not res gestæ. Section 1850 of the Code of Civil Procedure fairly covers those cases where declarations form part of the res gestæ, and here we have no such case. That section provides: "Where, also, the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." These declarations are no part of a transaction. They are substantive, independent statements of the existence of certain facts. The unsworn statement of Dr. James that he had Bright's disease, or dropsy, or catarrh, cannot be held to prove that fact. If such were the law, a man being dead, the flood gates for perjured testimony would be raised to their fullest extent. These declarations of James as to his various bodily afflictions were in no sense those of a patient to his physician. Neither were they those involuntary and spasmodic exclamations of an injured man as to his physical pains, made at the time of the injury. These declarations of the deceased were not involuntary exclamations. They were made deliberately and calmly, and necessarily covered the health of the deceased for a past period of time. The true rule upon this question is stated in Roosa v. Loan Co., 132 Mass. 439: "When the bodily or mental feelings of the party are to be proved, his exclamations or expressions indicating present pain or malady are competent evidence; and in Bacon v. Inhabitants of Charlton, 7 Cush. 581, 586, where this rule is stated, it was said by the court: 'Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady.'" We find analogous principles discussed in many cases upon contest of the probate of wills, where contestants have claimed the testator never signed the instrument, or that he signed it under duress or menace. In such cases it has always been held that the declarations of the testator as to menace or duress, or as to the fact of his signature, are hearsay, and cannot be received in evidence. If the issue is will or no will, and the testator's declarations may not be received to indicate the truth, how may the declarations of Dr. James be received upon the issue of marriage or no marriage, or potency or impotency? The cases appear entirely similar in principle. Such declarations are held to be "mere hearsay evidence, which, by reason of the death of the party whose statement is offered, can never be explained or contradicted by him." Griffith v. Diffenderffer, 50 Md. 480. One of the important questions in Boylan v. Meeker, 28 N. J. Law, 276, bore upon the matter of the forgery of a will, and the declarations of the alleged testator to the effect that he had never made a will were rejected as hearsay evidence. In the case of In re Calkins' Estate, 112 Cal. 300, 44 Pac. 577, in speaking as to the declarations of a testatrix, a contest of the probate of her will being the matter in litigation, this court said: "But to the extent that they purported to be declarations of the acts of others or of her own acts, they were but matters of hearsay merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity of cross-examination, or of explanation by the party who had uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining their verdict."

Section 1852 of the Code of Civil Procedure provides: "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." It is now contended that the declarations of Dr. James that he was not married are admissible under the provisions of the foregoing section. But this cannot be so, for the reason that such declarations must come from a member of a family; and the whole case of respondents rests upon the claim that James was not a member of the Milen family. He was not a member of Laura Milen's family unless he was her husband, and that is the sole point involved in this litigation. Pearson v. Pearson, 46 Cal. 622, is much relied upon to support the admissibility of these declarations. But that was a case coming directly within the provisions of the section quoted, and the declarations were admitted by virtue of the law there declared. The declarations were there made by the testator in his will, to the effect that certain parties therein named were his wife and his children. These declarations comprised all the evidence upon the question, and were held by this court sufficient to prove the facts embodied therein. The entire opinion of the court concedes that the testator was a member of the family comprised in part of the parties named in the will. The admissibility of pedigree evidence by declarations has for its only basis the close and intimate relations existing between the declarant and the party to whom the declarations pertain. The declarations, to be admissible, must not only be made by a deceased member of the family, but they must be made of and concerning a member of the same family. Here we have nothing of the kind. If a family relation be assumed to have existed between this man and this woman sufficient to justify the admission of his declarations, after death, as to the marriage relation existing between them, then the respondents' whole case falls to the ground; for there was no family relation between these two people unless it was that of husband and wife. There is no pretense of any other.

Evidence came from one Lewis, under objection, to the effect that some years prior to the date of the alleged marriage the appellant Laura had allowed herself to be fondled by him. Evidence of Mrs. Zollinger was also introduced, tending to show that appellant Laura had slept with a man at her house upon a certain night, some weeks prior to the alleged marriage. Nearly all that has been said as to the admissibility in evidence of the book entitled "Was He to Blame?" is entirely applicable here. These matters could not have been inquired into upon the cross-examination of the appellant Laura. Much less may they be proven as affirmative, independent evidence tending to blacken her character, and thus impeach her credibility as a witness. Upon matters of impeachment she has the same rights as any other witness. In the Sharon Case, supra, it was held that questions calling for such evidence could not be addressed to the witness upon cross-examination. Specific acts of immorality cannot be proven to impeach a witness. We have already cited an army of cases to that effect. Even conceding the evidence of these two witnesses to be true, yet it in no way tends to prove that these parties did not enter into a marriage contract, and thereafter live together as husband and wife.

Aside from the declarations of the deceased, James, there is no evidence that he was afflicted with any sort or kind of disease prior to his death. Those declarations have been held inadmissible. It therefore follows that all the expert evidence of medical gentlemen based upon his physical condition as declared by himself must be rejected. This necessarily follows, for there is no proper evidence in the record upon which to base expert medical testimony. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN DYKE, J.

(124 Cal. 583)

HUELLMANTEL v. HUELLMANTEL et al.

(S. F. 1,609.)[1]

(Supreme Court of California. June 1, 1899.)

DIVORCE—HOMESTEAD—CLAIM OF THIRD PERSON—ALIMONY—APPOINTMENT OF RECEIVER—COSTS.

1. In an action for divorce, and to set aside a conveyance of land owned by her husband, made to deprive plaintiff of her homestead rights, a decree which cancels the deed, and decrees that plaintiff have judgment for a certain sum in lieu of her homestead rights, and makes such judgment a lien on the land, is erroneous, in so far as it annuls the deed from the husband to his co-defendants, other than for the purpose of subjecting it to the lien of the judgment, as, between the parties thereto, such conveyance is valid.

2. In an action to subject land to a wife's claim of homestead, evidence that S., one of the husband's co-defendants, prior to her marriage, at considerable cost, erected a building on a part of a lot, subsequently occupied by her and her husband as a homestead, pursuant to an agreement with the husband whereby he was to have an interest in the property to the extent of the amounts so expended; that he was to receive one-half of the net income of the property until he was paid; that he recorded the agreement, and she, before her marriage, knew of the arrangement; that he took no mortgage on or deed of the property, nor did he reserve any right to remove the building; that he collected rents, and took out insurance policies in his own name; that he has a claim for an unpaid balance; and that plaintiff filed a homestead claim on the whole lot,—will warrant a decree that he has no interest in the property paramount to the wife's homestead rights, but such decree will not affect his right to enforce his claim against the husband.

3. In an action for divorce by a wife, the court has a right to award her an amount in lieu of an interest in the homestead and a monthly allowance which was theretofore granted to her, and make such amount a lien on the premises claimed as a homestead, under Civ. Code, § 139, providing that, where a divorce is granted for an offense on the part of the husband, the court may compel him to make provision for the support of the wife, and further providing that it may from time to time modify its orders, and section 146, subd. 4, providing that, if a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it to the innocent party for a limited time.

4. Evidence that the husband has failed to pay alimony pursuant to orders of the court, and that he has attempted to dispose of his property for the purpose of preventing the wife from getting any part of it, authorizes the appointment of a receiver on her application, and after notice to him, under Civ. Code, § 140, which provides that the court may enforce the payment of alimony by the appointment of a receiver.

5. On appeal, in a suit for divorce, where there is nothing in the transcript to show that the trial court acted on its own motion, or without notice, in the appointment of a receiver, it will be presumed that it acted upon due application and notice; and, if such is not the case, it is appellant's duty to show it by his statement or bill of exceptions.

6. It is error to allow the wife, in a suit for divorce, costs of a prior appeal on a second trial of the action resulting in her favor, where the appeal resulted in favor of the husband.

7. A wife in a suit for divorce is, after the determination of an appeal in her favor, entitled to interest on amounts awarded her for suit money and alimony on the trial below from the date of the decree awarding the suit money, and the date when the alimony became due.

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[1] Rehearing denied June 30, 1899.

8. A wife is not entitled to interest on sums awarded in her favor as costs upon the first trial of an action for divorce, when the action was reversed after the first trial on appeal by the husband.

9. A husband is entitled to have deducted from the costs allowed to a wife on the first trial of an action for divorce the amount awarded to him as costs on a successful appeal from the decree in the first action, after a second trial resulting in her favor.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action for divorce by Caroline Huellmantel against Bernard Huellmantel and others. From a decree in favor of plaintiff, defendants appeal. Modified.

A. Morganthal, for appellants. M. Cooney, for respondent.

CHIPMAN, C. Divorce. The case was here on appeal once before, and was remanded with directions that "all that part of the judgment which undertakes to determine and dispose of the real property described in the complaint is reversed, and as to all that part of the judgment the order denying a new trial is reversed and a new trial is ordered." The decree granting plaintiff a divorce and alimony and counsel fees, and the order refusing new trial as to this part of the decree, were affirmed. 117 Cal. 407, 49 Pac. 574. At the time of his marriage with plaintiff, defendant Huellmantel was the owner of a certain lot of land in the city of San Francisco. Upon the front part of this lot there is a three-story building, which had generally been rented to tenants, and on the rear part of the lot there is a smaller house, in which the husband and wife resided. After the marriage, to wit, on April 6, 1889, plaintiff filed a homestead claim upon the whole lot. Defendants Francis and Rosalia Steffen claim ownership of the lot under deed from defendant Huellmantel dated February 14, 1891. Plaintiff alleges in the amended complaint, and the court found, that this deed was fraudulent, and was given to defeat plaintiff's homestead right. Defendant Scholten alleges in his answer that in 1876, at defendant Huellmantel's request, he erected, at a cost to him of $4,800, the building situated on the front portion of said lot, and also made other improvements aggregating in value $1,200, and also loaned defendant Huellmantel in that same year $600 in money; that on August 23, 1877, to secure the payment of these several amounts, defendant Huellmantel entered into a written agreement with said Scholten whereby the latter had an interest in said property to the extent of said sums due from said Huellmantel, and that by this agreement Scholten was entitled to receive one-half of the net income of said property until said indebtedness of said Huellmantel was paid. This agreement was recorded on January 22, 1878. Scholten claims that there is due him for rents and unpaid portions of said indebtedness, and for interest, the sum of $8,600. By stipulation of the parties the cause was tried upon the evidence contained in the former transcript relating to the property described in the complaint, and upon such further evidence as either party might introduce. The decree annuls and cancels the Steffens deed, and adjudges that neither one of the Steffens has any interest in the property. It also adjudges that plaintiff recover the sums following: $730 from defendant Huellmantel, the amount due under the former orders and decree of the court as alimony, "with interest thereon in the sum of fifty-three dollars," —in all, $783. "That plaintiff recover from the defendant Huellmantel * * * $1,000 permanent alimony, in full of all future claims upon defendant Huellmantel for support, in lieu of her claim and right of homestead;" from defendant Huellmantel to recover the further sum of $650, counsel fees awarded under former orders, "with eighty dollars interest thereon to date of this decree," amounting in all to $730; from defendant Huellmantel, the Steffens, and Scholten, $118 costs allowed on the former trial, with $20 interest to date of this decree,—in all, $138; from these last-named defendants $478 referee's fees and costs in said action, including interest (not stated separately) to date of this decree; from these same defendants all the costs in the action since the entry of the former decree in April, 1895; from defendant Huellmantel, $234, "costs incurred by her, and charged against her upon the appeal of the defendants to the supreme court." The decree adjudges that plaintiff has a lien upon the premises for all the foregoing amounts, and that none of the defendants except Huellmantel has any interest in said premises, and they are entitled to no relief in the action, orders the sale of the property at public auction, and appoints a receiver to take possession of the property and collect rents and profits thereof, to conduct the sale of the property, receive the proceeds, and pay the several amounts above awarded to plaintiff. Defendants Huellmantel, the Steffens and Scholten appeal from the judgment, and from an order denying motion for a new trial.

1. Appellants claim that the rights of the defendants the Steffens under their deed of February 14, 1891, were determined by the first appeal, and must be deemed to be the law of the case. The court did determine upon the evidence as it then stood what these rights appeared to be, but the court directed that "all that par. of the judgment which undertakes to determine or dispose of the real property described in the complaint is reversed, and as to all that part of the judgment the order denying a new trial is reversed, and a new trial ordered." The effect of this decision was to remand the whole question of property rights to be retried. In the first appeal it was found that the deed to the Steffens was fraudulent and void, and it is again so found upon substantially the same—certain-

ly as strong—evidence favorable to the validity of the deed. It was held here then that "the deed was not void, as between appellant Huellmantel and the Steffens, as to the land not a homestead." The former decree ordered the Steffens to reconvey to appellant Huellmantel, and this was held error. The last decree does not order reconveyance, but the court found as conclusion of law that the Steffens "have no right, title, or interest in or to said property, or any part thereof," and the decree adjudges that the deed "be and is hereby canceled, * * * and the said grantees therein named have not now, and shall not have or claim or take, any right * * * by virtue of said deed," and "that neither of the defendants, except the defendant Huellmantel, has any interest in said property, and they are not entitled to any relief in this action." There is no ground for this portion of the decree, so far as it affects the Steffens. Neither appellant Huellmantel nor the Steffens object to the validity of the conveyance from the former to the latter, and we do not think the court could do more than make the interest of the Steffens subject to the lien of plaintiff's judgment, and this much the evidence fully justifies. It was so held before, and the rights of the Steffens remain the same as between them and appellant Huellmantel.

2. The court decreed that Scholten has no interest in the property, and "that his claim is without merit, and that he has no lien on the said real estate or any part thereof." The evidence shows that Scholten built, at the cost to him of $4,800, the front building on the premises in 1876-77, pursuant to the contract pleaded by him, and that for many years he collected one-half the rents of the building to be applied under the contract, and took out insurance policies, loss payable to himself; that plaintiff knew of his claim before she married defendant; and that he still has a claim for an unpaid balance, which defendant Huellmantel does not dispute. Scholten took no mortgage upon or deed to the property as security, and his agreement is, in effect, merely an evidence of Huellmantel's indebtedness to him. It appeared by the evidence that the building erected by Scholten became part of the realty, and no right to remove it was reserved to Scholten. We think that the findings and decree as to Scholten's interest in the property were warranted by the evidence, so far as the agreement affected the rights of the plaintiff, but they must not be regarded as in any way concluding Scholten in the future, should he undertake to enforce his claim of Huellmantel's indebtedness to him. As between them, their mutual rights were not litigated in this action.

3. The court in the former appeal held that the homestead could not be set apart absolutely to plaintiff, but only for a limited period, the property being the separate estate of the husband. Civ. Code, § 146, subd. 4. The lower court in the last trial found that a homestead had been duly declared by plaintiff. The twenty-third finding of fact is as follows: "That, besides the amounts referred to, the court finds that the sum of one thousand dollars is a reasonable amount to be allowed and awarded to the plaintiff as and for permanent alimony, in lieu of homestead and all other claims upon defendant." The court at the first trial awarded $15 per month, payable monthly, as permanent alimony, which judgment of award was affirmed on the first appeal. At the last trial the court found that no part of this had been paid, and that it amounted at the date of the last decree to $730, for which judgment is given, with interest of $53. The fifth paragraph of the last decree is as follows: "That the plaintiff have and recover from the defendant Huellmantel, and she is hereby awarded, the additional sum of one thousand dollars ($1,000) permanent alimony, in full of all future claims upon the defendant Huellmantel for support, and in lieu of her claim and right of homestead." The effect of the decree is to leave the title to the property in defendant Huellmantel, freed from the homestead, although the court did not directly and explicitly assign it to the former owner, as section 146 directs the court to do if not assigned for a limited period to the innocent party. Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715. It is quite clear that the court awarded this additional permanent alimony to plaintiff in the place of the continuing allowance of $15 per month allowed in the first decree, and instead of any interest in the homestead. This we think the court could do, under section 139, Civ. Code. The court was not compelled to assign the homestead to plaintiff for a limited period.

4. It is objected that the court, by the decree, and upon its own motion, appointed a receiver, and directed him to take possession of the property, collect the rents and profits, and proceed to sell the property and pay the several sums adjudged to be due the plaintiff. The authority on which the decree rests is section 140, Civ. Code. The evidence showed that defendant Huellmantel has never paid any part of any of the sums awarded plaintiff by the first decree, and that defendant has enjoyed the use and rentals of the property since this action was begun in June, 1894. The evidence also tends to show that defendant Huellmantel conveyed the property to his daughter by a former wife and to his son-in-law, the Steffens, without consideration, to "prevent his wife from getting any part or any interest in it." At the time the deed was made to the Steffens there was trouble in the family, and plaintiff had left her husband. We think that the purpose for which the receiver was appointed was such as is contemplated by the Code. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177. The question, however, remains,—whether the receiver was properly appointed. A receiver ought not to be appointed except

upon the clearest proofs of its propriety, nor without the application of some one of the parties, and generally not without notice. Such appointment is allowable under certain circumstances ex parte, upon proper showing. High, Rec. § 111 et seq. But the cases are exceptional. There is nothing in the transcript to show that the court acted on its own motion, and without the application of plaintiff or notice to defendants. In support of the judgment, we must presume that the court acted upon due application, and after notice to defendants. If such was not the fact, it was the duty of defendants to so show by their statement, or by bill of exceptions.

5. Error is assigned as to certain sums awarded as costs, and as to interest allowed thereon, and as to interest allowed on alimony and counsel fees awarded at the first trial. We find it impossible to reconcile the findings and decree upon all these matters, and to make them conform to the situation at the going down of the remittitur on the first appeal. Costs were awarded to appellants on that appeal, but these costs thus allowed included only the costs on the appeal, and did not include the costs at the first trial. The decree, however, includes these costs on appeal which were awarded defendants, and judgment is given against Huellmantel for them. This was error. Plaintiff is entitled to recover interest at 7 per cent. per annum, without compounding, upon the sums awarded by the first decree as follows: (1) Upon the allowance for attorney's fees as originally made, from the date of the decree; (2) upon the installments allowed as alimony from the date of each, as they accrued,—interest to be computed to date of last decree, but in no case interest upon interest. No interest should be allowed on the costs of the former trial, and there should be deducted therefrom the costs in this court on the first appeal. All other items of cost attend the trial, and should form a part of the final decree, including referee's fees, which are part of the costs, and should not carry interest. The first, second, and eleventh paragraphs of the decree should be modified by striking out those parts purporting to cancel and annul the deeds therein referred to, and by providing that the said parties have not any right to or claim upon the premises superior to the lien of plaintiff thereon as in the decree declared, and that their, and each of their, rights and interests, are subordinate to the lien of plaintiff, and her right to have the property sold to pay the several sums found to be due her by the decree. The cause should be remanded, with directions to modify the decree in accordance with this opinion, and when so modified to stand affirmed as of the date when entered. The defendants the Steffens should recover their costs of appeal, and plaintiff should recover all other costs of appeal.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to modify the decree in accordance with this opinion, and when so modified to stand affirmed as of the date when entered; the defendants the Steffens to recover their costs of appeals, and plaintiff to recover all other costs of appeal.

(124 Cal. 597)

CITY OF LOS ANGELES v. POMEROY et al. (L. A. 419.)[1]

(Supreme Court of California. June 3, 1899.)

EMINENT DOMAIN—MEASURE OF DAMAGES—PLEADING—INSTRUCTIONS—APPEAL—HARMLESS ERROR—COSTS—WATERS—RESERVOIR—PERCOLATING WATERS — SUBTERRANEAN WATERS.

1. Under Code Civ. Proc. § 1247, authorizing the court in condemnation proceedings to determine all adverse and conflicting claims to the property, a city may in the same action assert its claim to an interest in the property, and condemn the outstanding interest of others.

2. A complaint by a city showed that the object of the proceeding was to condemn all the estate and interest of defendants in certain land described; alleging the interest to be the fee, subject only to the city's ownership of the exclusive right to the use of all the waters of a river flowing through it. *Held*, on demurrer, that the complaint sufficiently described the property sought to be condemned.

3. Where, by stipulation, all issues were tried to the court, but the question of damages, the court's action in not filing his findings as to the extent of the interest to be condemned until after the verdict was not error; correct instructions based thereon having been given to the jury.

4. A city sought to condemn lands to construct head works for a water system, and its plan was to build a subsurface dam across the outlet to a valley whose subsoil was saturated with water, and draw the water off by means of tunnels and lateral galleries. *Held*, that this would comprise a reservoir, for which the fee might be taken as authorized by Code Civ. Proc. § 1239.

5. The evidence being conflicting as to the necessity of taking the whole tract sought to be condemned, the finding of the trial court could not be disturbed.

6. All the waters of San Fernando Valley flow out through a narrow pass either on or beneath the surface, and at ordinary stages the water on the surface and that beneath are in intimate contact, and flowing in the same direction,—on the surface at the rate of 2 or 3 feet per second, and underground at 14 to 17 miles per annum. On a tract near the pass sought to be condemned, the surface flow gradually increased, indicating that the underground water is forced to the surface as it approaches the narrow outlet. *Held* to support a finding that the subsurface flow was a part of the surface stream, and was not percolating waters, and hence the right of the owner of the tract thereto was governed by the law of riparian ownership, and not of percolating waters.

7. A charge that the mere fact that some of the subterranean water forming part of the stream on lands sought to be condemned might be lost before reaching the surface would not entitle the owner to an amount of such water on his lands, equal to or less than that lost, if it would diminish the supply of a lower owner, was harmless, since, if the water was part of the stream, it could not be diverted, whether it would ever come to the surface or not.

8. Where water passes through the voids of

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[1] Rehearing denied July 3, 1899.

any loose, permeable material, filling or partially obstructing the channel of a stream, it is still a part of the stream. If it all sinks below the surface, the whole stream is subterranean. If a part sinks, and the remainder is on the surface, that which is invisible is as much a part of the stream as the surface flow.

9. A charge that if there is a river bottom filled to considerable depth with sand, gravel, or other porous material, over which a stream runs on the surface, and through and in which the water moves underground, enough of it rising to supply the surface stream, and through a larger space in the porous material, but in the same general direction as the surface stream, and in connection with it, and in a course and within a space reasonably well defined, then such underground portion would be a part of the water course, is not a charge on questions of fact; it being a question of law as to what a subterranean stream must be in order to make it a part of the surface stream.

10. Where the boundaries of a channel and the existence and course of an underground stream were unknown and undefined, except so far as they could be inferred, but there was a great amount of evidence to support an inference that the channel was bounded and defined by the sloping sides of parallel ranges of hills meeting underground, and there was a subsurface flow corresponding with the surface flow, the court properly submitted the question whether the subsurface flow was a part of the stream; and the question was not affected by the fact that the subsurface stream forced its way through sand and gravel and bowlders.

11. It is not error to refuse requested instructions given in the court's charge.

12. The pueblo right to water of a stream includes the right to take all the water that is reasonably necessary to give an ample supply for the use of its inhabitants, and for all municipal purposes for which the city may require water, including sewers, artificial lakes, irrigation of public parks, etc. This right is measured by the necessity, and, if the needs increase in the future, the right will expand to include them; and this, though the population of the city is not confined to the original pueblo limits.

13. The fact that under the Spanish régime a pueblo was for a time, owing to a decrease in population, deprived of its ayuntamiento, did not extinguish the pueblo, or impair its rights to the waters of an adjacent river.

14. A party cannot allege error in instructions given in form and substance as requested by him.

15. Code Civ. Proc. § 1249, making the "actual value" at date of summons the measure of compensation in condemnation proceedings, means the actual market value, and would not include additional elements of intrinsic value not known at that time.

16. Where a charge lays down a correct rule, applicable to the case, but there is no evidence on which to base it, it is harmless.

17. In determining the value in condemnation proceedings of percolating waters as distinguished from a water course, it is competent to consider whether the owner might not at any time be deprived of them by the exercise by others of the same right in their lands as claimed by him with respect to his own.

18. Where a city adopted its engineer's report, recommending in general outline a plan of a water system, and also a resolution directing its attorney to commence condemnation proceedings as soon as the ordinance providing for the system should be signed, and, after suit brought, the ordinance was published, and orders and resolutions were adopted providing for carrying out the proposed plan, it could not be said that the suit was commenced without authority, pursuant to a plan not formally adopted.

19. Under Code Civ. Proc. § 274, as amended by St. 1880, p. 54, requiring a party ordering the reporter to transcribe any portion of the testimony to pay the fees therefor, the costs of a transcription should not be taxed as costs where the parties arranged with the reporter, out of court, to furnish each a copy thereof at an agreed price.

In bank. Appeal from superior court, Los Angeles county.

Action by the city of Los Angeles against A. E. Pomeroy and J. D. Hooker. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

John S. Chapman, R. H. F. Variel, and John G. North, for appellants. W. E. Dunn and Lee & Scott, for respondent.

BEATTY, C. J. This is a proceeding to condemn "all the estate, right, title, and interest" of the defendants in and to a tract of land embracing about 315 acres, for the purpose of enabling the plaintiff—a municipal corporation—to construct and maintain thereon the "head works" of its projected system for supplying water to its inhabitants for private and municipal purposes. The defendants, appealing from a decree of condemnation and from an order overruling their motion for a new trial, not only allege numerous errors in the rulings of the superior court, but challenge the correctness of its findings of fact in many important particulars. With respect to these disputed facts, it will be necessary to state the various contentions of the parties in discussing the particular legal questions to which they give rise; and, passing them over for the present, we will, in this connection, only attempt to set forth the more general aspect of the case, as to which there is no substantial disagreement.

The city of Los Angeles, at the date of the commencement of this action, June 8, 1893, contained a population of about 70,000 souls, and covered an area of about 20,000 acres. At the date of the trial, in March, 1896, the population was upward of 75,000, having increased to that number from less than 12,000 in 1880. This rapid growth of the city promises to continue, and the only source of water supply for its inhabitants and for municipal purposes is the Los Angeles river, which flows through the city from north to south. The principal source of the river above the city is the San Fernando valley. This valley, embracing a watershed of from 450 to 490 square miles, is almost completely inclosed by considerable ranges of mountains, rising in places to an elevation of over 6,000 feet. The most important of these ranges is the San Fernando, which bounds the interior valley on the north. On the south and west it is bounded by the Cahuenga range, which at its northwestern extremity unites with the San Fernando. On the east the Verdugo hills are connected with the San Fernando range on the north, and, extending towards the south, leave a comparatively narrow outlet to the valley between their southern extremity and the eastern prolongation of the Cahuenga range. Through this outlet at the southeastern corner of the interior basin the Los Angeles river issues, flowing in an eastern direction parallel and close to the northern base of the Cahuenga range, until, having passed that obstruction, it turns to the south, and flows through the city to the Pacific Ocean. The interior of the San Fernando valley is a plain composed of detritus washed from the mountain sides, and having a moderate slope from the San Fernando range on the north towards the Cahuenga range on the south, and from the west towards the east. This portion of the valley—that is to say, the portion composed of material not in place, detritus washed from the mountain sides—which, for convenience, may be called the valley proper, extends about 24 miles from east to west, and is about 12 miles wide at its widest part, embracing an area of about 180 square miles. Its material is composed of bowlders, gravel, sand, and occasional masses of clay. The rainfall within the watershed of the valley is variable. When it is abundant, and the loose, porous material composing the valley proper is thoroughly saturated, the streams issuing from the rocky cañons of the mountains flow over the surface to the outlet of the valley, and pass off as flood water down the channel of the Los Angeles river. But this surface flow does not continue for any great length of time, and under ordinary conditions the mountain streams sink in the sand within a short distance of the mouths of the cañons, and no water appears upon the surface until it shows itself again in the Los Angeles river, where it takes its rise a short distance north of the Cahuenga range, on the southern side of the valley proper. The land which the city seeks to condemn lies at the base of the Cahuenga range, in the narrow outlet of the valley. It is almost 2 miles in length from east to west, and averages a quarter of a mile in width. At its eastern end it is about a mile west of the point where the Verdugo hills make their closest approach to the Cahuenga range, the width of the valley proper at this point being about 2 miles. Where the land lies the width is from 2½ to 3 miles. The surface of the river where it flows out of the land in question at its eastern end has an elevation above the sea level of about 460 feet, and is 200 feet higher than the main portion of the city of Los Angeles. In ordinary seasons, after the flood waters have run off and the river has assumed its normal condition, the water rises to the surface at some distance west of the land sought to be condemned, and increases rapidly in volume as it flows towards the east. There is considerable difference between the estimates of different witnesses, but it may be said, in general terms, in this connection, where strict accuracy is not important, that the surface flow of the river where it enters the tract in question is about 1,200 inches, miners' measure, and that its volume is about doubled by the accessions it receives in passing through the tract. These accessions are of the character that would naturally be expected from the topography of the valley, and the nature of the soil under and adjacent to the surface stream. The whole country on either side of the stream is found to be completely saturated with water; the plane of saturation near the open channel being slightly higher than the surface of the river, and gradually rising in proportion to the distance from the stream. From the sides and bottom of the visible stream the water percolates or trickles or gushes, according to the nature of the soil,—whether fine and comparatively compact, or coarse and gravelly and more loose and porous. The plan of the city for utilizing the land which it seeks to condemn is to drive a tunnel through it from east to west, a few feet below the bed of the river, and to extend filtration galleries north and south from the tunnel in such number and at such places as may be found best adapted to securing an ample supply of water. The plan also embraces a submerged dam and collecting chambers or reservoirs, but the main feature is the tunnel, with its lateral galleries, from which the water, draining and filtering out of the saturated soil, is to be delivered to the main supply pipe of the city, and thence to its distributing system.

The principal points of controversy between the parties are: First, as to the existence of a well-defined subterranean stream, by which the waters, or a large portion of the waters, resulting from the rainfall within the watershed of the San Fernando valley, are carried off through the pass between the Cahuenga range and the Verdugo hills; and, second, as to the rights of the city of Los Angeles, as successor to the Mexican pueblo, in the waters of the Los Angeles river. The claim of the plaintiff is that the city has certain extensive rights in the stream, over and above those of ordinary riparian owners, and that the stream itself consists, not only of the visible surface flow of the river, but of the large subterranean flow slowly passing through the bowlders, gravel, and sand under and adjacent to the river. Both of these claims are disputed by the defendants, and out of this controversy arise most of the points to be considered in disposing of the appeal. As to the rights of the city as successor to the pueblo, the allegation of the amended complaint is that ever since its organization the city has been the owner in fee simple of the exclusive right to the use of all the waters of said river, from its source to the southern boundary of the city, in trust for the public purposes of supplying the inhabitants of said city with water for domestic uses, and of supplying water for the irrigation of the irrigable lands embraced in the four square leagues of the pueblo, and for other municipal uses. And it is alleged that the defendants own the land sought to be condemned, subject to this right of the city to the waters of the stream. These allegations are denied by the defendants, and, in view of the issue thus made, the defendants, before the commencement of the trial, moved the court to stay the proceedings in the action until the determination of certain other suits then pending between the city and the defendants, in which the question as to their respective rights in the waters of the river was involved. The defendants also moved to strike out the allegations of the complaint setting up the claim of the city to the waters of the stream, contending that the city could not maintain a proceeding to condemn lands while asserting title in itself to that which constituted their chief value. These motions were denied by the superior court, and the exceptions to the rulings thereon give rise to the first point discussed in the briefs. Before taking up this point, however, it may be well to state the manner in which, by consent of the parties, the case was tried. It was stipulated that the court, sitting without a jury, should hear the evidence of the parties for the purpose of determining: First, whether the use to which the property was to be applied was one authorized by law, and the taking necessary; second, whether the proposed plan was compatible with the greatest public good and least private injury; and, third, what was the nature and extent of the plaintiff's interest in the waters of the river, —and these things being determined, that a jury should be impaneled to assess the amount of compensation to be awarded to the defendants for the interest condemned. In accordance with this stipulation, the court heard evidence bearing upon the three points mentioned, and at its close called a jury, before whom the trial proceeded upon the question of damages. During the progress of the jury trial the court made an oral announcement of its conclusions upon the issues submitted to its decision, but no formal findings were filed until after the jury rendered their verdict. The court, however, in charging the jury, instructed them as to those matters so far as it deemed such instructions necessary.

The consent of defendants to this mode of trying the various issues in the case was, however, given with an express reservation of their objection that the court had no jurisdiction in this proceeding to try any question of title in the plaintiff to the waters of the river, and they now contend that the superior court erred in refusing to stay the trial of the cause until the respective rights of the parties had been determined in other pending suits; and this upon the ground that a proceeding for condemnation is not one in which adverse claims of title can be adjudicated. This contention is rested upon the proposition that the proceeding, being statutory and special, must be strictly pursued, and, since the statute makes no express provision for litigating a claim by the plaintiff to an interest in the property sought to be condemned, the court has no power to determine such claim, at least when contested by the defendant. But we think the statute does not require so strict a construction. The superior court is invested with a general jurisdiction of all special proceedings not otherwise provided for, and, in conducting such special proceedings, exercises its usual and ordinary powers in disposing of the issues which are necessarily involved. Among the matters which may be involved in any proceeding to condemn private property for a public use are adverse claims to the compensation to be awarded. In such proceedings the complaint must contain the names of all owners and claimants of the property, if known (Code Civ. Proc. § 1244); and all persons claiming any interest in the property, or damages, though not named, may appear and defend (Id. § 1246). And the court has power "to hear and determine all adverse and conflicting claims to the property sought to be condemned, and to the damages therefor." Id. § 1247. These propositions are, of course, conceded by the appellants, but they contend that the right to set up and litigate adverse claims is confined by the very words of the statute to those who are defendants. It is true, the express provision above quoted from section 1247 applies only to the conflicting claims of those who are made, or who make themselves, defendants in the proceeding, but this is only because the interests of the defendants alone are to be condemned. The statute does not contemplate the condemnation of an interest which the plaintiff already has, or the payment of any damages, except to compensate those whose property is to be taken away; and therefore the plaintiff can have no concern in the determination of "adverse or conflicting claims to the property sought to be condemned and the damages therefor." But, although this provision of the statute has no direct bearing on the question here presented, it contains an express legislative recognition of the entire competency of the court to try and determine adverse claims to the property in a proceeding to condemn.

The question, however, which we have to decide, is this: Can a plaintiff, who is already the owner of an interest in land, secure the condemnation of outstanding interests in a case which in other respects is a proper one for condemnation? This is an important question, for it is apparent that such cases may frequently arise. Private property suitable and necessary for some lawful public use is often owned in shares by different persons, or subject to liens or servitudes; and the owner of a share or an easement, or holder of a lien, may be the proper agent of the state for the exercise of its power of eminent domain. In such case it is certainly desirable that the law should supply a convenient procedure by which he could secure exclusive control and ownership of the property upon payment of the value of the outstanding shares, or of the whole, less the amount secured by lien, or as diminished by the existing servitudes, The defendants do not seem to contest the proposition that our statute is adequate to the exigencies of such a case, but they contend that, when the interest asserted by the plaintiff is disputed, the proceeding to condemn must be held in suspense until, in a separate action, the respective interests of the parties are judicially determined. But why the necessity of such circuity of action? Both branches of the controversy would in any event be tried and determined in the same forum, and there seems to be no good reason why they may not be litigated in one action. Even if the adverse claim of the plaintiff were first determined in an action to quiet title, its subsequent assertion in a proceeding to condemn—whether admitted or contested—would be just as foreign to any express provision of the statute as if his right had never been determined. It follows, therefore, that the argument that the court can do nothing in these proceedings, except that which is in terms authorized by the statute, proves too much. It would not only debar the plaintiff from proceeding before his title had been adjudicated, but would debar him always. We see no reason for holding that a plaintiff is debarred from proceeding in such a case, nor can we see that the trial of all the issues in one action is attended with any special inconvenience. In whatever mode the plaintiff's interest in the property might be determined,—whether in a separate action, or preliminarily in the proceeding to condemn, as was done in this case,—the same consequences would follow; that is to say, the jury called to try the question of damages would require instructions as to the nature and quantity of outstanding interest remaining in the defendants, upon which to base an estimate of the damages, and the defendant would have the same remedy in case of erroneous instructions in either case. Considerations of convenience, therefore, do not seem to sustain the contention of appellants on this point. On the contrary, it would seem that very great public inconvenience might ensue if a plaintiff, asserting an interest in property which he seeks to subject to a public use, were obliged in every instance to prosecute to final judgment an action to quiet his title before he could proceed to condemn. And, if he can commence the proceeding to condemn before his interest has been adjudicated, it does not seem that a denial of his interest should stop the proceeding; for it is in the same court in which that issue must be tried in any event, and to try it when it is first made is only to do that which is necessarily incident to a proceeding clearly authorized, and express authority to do anything always implies the power to do that which is necessarily incidental.

If the views above expressed are in themselves reasonable, and if they embody a proper construction of the statute, they ought to prevail, even if opposed to previous decisions of this court; for no vested right can be violated or impaired by freeing a statutory remedy from inconvenient and burdensome restrictions imposed by a mistaken construction of the law. We are satisfied, however, that there is nothing decided in any of the cases referred to by counsel for appellants which is at all inconsistent with our conclusions. In Railroad Co. v. Moffatt, 7 Cal. 577, it was held, construing an act of 1853, that the commissioners appointed to assess the value of the property had nothing to do with the settlement of adverse claims, and that the persons in possession of the land condemned for a railroad were entitled to the whole assessed value of the land, as against third parties out of possession but claiming a superior title. This may have been a correct construction of the act of 1853, but the question here is different, and the law is materially different. In Spring Valley Water Works v. City of San Francisco, 22 Cal. 434, the act of 1853 was again construed, and it was again held that the commissioners appointed under that act to assess the value of the property condemned had nothing to do with adverse claims of ownership. That is a matter, it was said, to be determined by the court or judge before whom the proceeding was conducted, thus implying at least that the court could do what in the former case it was held it could not do. Wilcox v. City of Oakland, 49 Cal. 29, contains a dictum in line with the decisions in the two cases last cited to the effect that the commissioners appointed to assess damages have no authority to try questions of title as between adverse claimants—a proposition having no relation to the point in dispute here. In City of San Jose v. Freyschlag, 56 Cal. 8, which was a proceeding to condemn land for a street, the complaint alleged that the defendants were in possession and were the only owners and claimants of the land, and the answer set up the same fact. The jury, however, while assessing the damages at three hundred dollars, added a finding that defendants had dedicated the land for a street, and the court, adopting this finding, condemned the land, and awarded the defendants one dime by way of compensation. This judgment was reversed upon the sole and obvious ground that it was in conflict with the pleadings and based upon a finding without the issues, the court remarking obiter that if the plaintiff had alleged the fact of dedication it would have alleged itself out of court, because it would thus have shown the existence, by virtue of the dedication, of the only right it could have acquired by the proceeding to condemn.

City of San Jose v. Reed, 65 Cal. 242, 3 Pac. 806, was in all material respects the same as San Jose v. Freyschlag, and was decided the same way. The correctness of these decisions, and of the dictum, added to the first must be conceded, but they are not in point. The pleadings in this case distinctly allege that the defendants have a certain interest in the lands to be condemned, but not the whole interest; they show, in other words, that there is something to be condemned, and what that something is, and clearly make the issue which the court is to try. San Francisco & A. Water Co. v. Alameda Water Co., 36 Cal. 639, was a suit by one water company to enjoin a rival corporation from carrying on a proceeding to condemn water rights as to which the plaintiff asserted a preferential right of condemnation. It was held that the action was well brought in the district court, because the existing statute had not empowered the county court to try the question of preferential right between two corporations seeking to condemn the same property. This was no doubt a correct construction of the act of 1858, but our present statute is different (Code Civ. Proc. § 1247), and, if the question were the same, it would require to be differently decided, but it is in fact a very different question. In Water Co. v. Baker, 95 Cal. 269, 30 Pac. 537, it was held upon special demurrer that the complaint was bad for uncertainty in the description of the interest sought to be condemned. The plaintiffs in that case endeavored to excuse the admitted uncertainty in the description of the water rights which they sought to condemn upon the ground that they could not know the extent of such rights, and that it was therefore the duty of defendants to set out a certain description of what they claimed. Replying to this contention, the writer of the opinion said that it necessarily implied the further contention that the defendants would be subsequently estopped from asserting any rights which they neglected to set out,—a contention which he held could not be allowed, because this proceeding (to condemn) cannot thus be converted into an action to quiet title. This single expression in the opinion is all that appears to have any bearing upon the question here, and its bearing is only apparent, for, considered with reference to the point to be decided and in connection with what precedes and follows, it evidently means nothing more than this: That the plaintiff cannot in the proceeding to condemn, as he can in an action to quiet title, throw upon the defendant the burden of pleading the particular rights to be litigated, under penalty of forfeiting all that he does not expressly claim, or, in other words, that the rule of pleading in these cases requires the plaintiff to set out an accurate and intelligible description of the property, or the particular interest in the property, which, even in case of default, must be valued before it is condemned. We are in entire accord with this doctrine, and we think the plaintiff here has fully satisfied its demands. It has given an accurate description of what it seeks to condemn, and ought to pay for, before it takes possession. It claims an interest in the property, or an easement which it says diminishes the estate and interest of defendants, and all this is set out in order that the court and jury may know precisely what is to be considered in estimating the damages. We cannot, in the time at our disposal, undertake to review the numerous citations from the text writers and the decisions of other courts to which we have been referred by counsel. They undoubtedly contain expressions which in some instances are in conflict with the views above expressed, but we find nothing fairly and fully decided which cannot be reconciled with the conclusion we have reached, that the superior court did not err in overruling the motions to stay the proceedings and strike out.

2. The appellants contend in the next place that the superior court erred in overruling their several demurrers to the complaint as amended. The ground of the demurrers upon which they insist in their argument here is that the last amended complaint contains no certain description of the property which the plaintiff seeks to condemn, and they cite the case of Water Co. v. Baker, supra, in support of this contention. We do not think the cases are at all parallel. In the Aliso Case the description was in the last degree vague and uncertain, but here the complaint shows that the object of the proceeding is to condemn all the estate and interest of the defendants in 315 acres of land, which interest is alleged to be a fee-simple estate, subject only to the asserted ownership by the city of the exclusive right to the use of all the waters of the river from its source to the southern boundary of the city in trust, etc. If the interest claimed by the city is set forth with reasonable certainty, it necessarily follows that the interest to be condemned is equally certain, and we see no difficulty in determining from the complaint what the city claims. It asserts a right to the use of all the waters of the Los Angeles river flowing through these lands, paramount to and exclusive of any and all riparian rights in the owners of the lands. A great part of the argument of counsel for appellants is devoted to the question whether in fact and in law the city has any such right as she asserts, but this part of the argument seems to be out of place in considering the sufficiency of the complaint. The fact that the claim of the city has not been or cannot be established does not prove that it has not been clearly stated, and that is the only matter to be considered in ruling upon the demurrer.

3. The next proposition of appellants is stated in these terms: "If the court had any power to determine these questions at all in this action, it was error not to determine those issues before submitting the cause to the jury." To speak of submitting this cause to the jury is an inaccuracy which tends to confusion. By agreement of the parties only one issue in the cause was submitted to the

jury, viz. the question of damages. All other issues were tried by the court, and it was of no importance in what order they were decided, except in so far as a determination of one point was necessary as a basis for the determination of another. Undoubtedly it was necessary that the jury should be correctly instructed as to the quantity and extent of the estate and interest of the defendants in the land, in order that they might correctly estimate its value; and since, from the nature of the rights in controversy, and the agreement of the parties, that point was to be decided by the court, it was necessary that the jury should be informed, before retiring to consider of their verdict, what the conclusion of the court was, but that conclusion could be stated as well before as after the filing of formal findings of fact and conclusions of law. These were an essential preliminary to the judgment, but not to the instructions to the jury, and, if the instructions actually given were correct and full, the fact that findings had not been previously filed is of no consequence. Whether the conclusions of the court upon this point were sound, and whether the jury were correctly instructed, are points to be considered in another connection.

4. The next contention of appellants is that there is no authority in law for the condemnation of these 315 acres in fee simple for the purposes for which the property is sought to be condemned. An ordinance of the city of Los Angeles approved on the 8th day of June, 1893, is attached to, and made a part of, the complaint. By its first section it ordained that it was necessary that the land in controversy "be acquired by condemnation for the purposes of constructing head works for a water system." It will be seen that the purpose to which the land was to be devoted was not very definitely stated in the ordinance, but the amended complaint filed herein is somewhat more explicit, and shows with reasonable clearness what the plan of the city is. The land is found to be saturated with water to within a few feet of the surface. It is proposed to construct a subsurface dam at the lower end of the tract. A subsurface dam, of course, would not have the effect of flooding the surface permanently, but it would permanently raise the plane of saturation. This being done, it is next proposed to tap this heavily saturated bed of sand and gravel by means of a tunnel connected with lateral galleries, through which the water will be drained off and conducted to the supply pipes. In other words, the land is to be used as a reservoir, such as essentially it is, and none the less so because the water does not rise and stand above the surface. The evidence in the case shows that from one-fifth to one-third of the entire bulk of the material filling the valley below the plane of saturation is water. The land in its natural state, therefore, is a reservoir, and a subsurface dam is to be constructed in order to make it better serve the purposes of a reservoir. Such being the use to which it is to be devoted, the fee simple may be taken. Code Civ. Proc. § 1239; St. 1891, p. 102. As to the necessity of taking the whole 315 acres the evidence is conflicting, and the finding of the superior court cannot be disturbed. The evidence introduced by the plaintiff showed that, in view of the rapid increase of the population of the city, the probable necessity of extending additional lateral galleries to obtain a larger flow of water, and to conform to changes in the channel of the surface stream, and the necessity of excluding live stock from the land to prevent contamination of the water, it was necessary that the city should have the exclusive ownership and control of the whole tract.

5. Appellants next contend that the amount awarded by the jury as compensation for the tract condemned was not justified by the evidence. The jury found that the value of the defendants' interest in the 315-acre tract was $23,000, and that their remaining land would be damaged $2,000, by the severance of the smaller parcel. Appellants concede that the evidence sustains this verdict, if the value of the land for agricultural purposes is alone to be considered; but they claim that it is of enormously greater value, by reason of the great quantity of water percolating in the soil, which they contend they have a right to collect and convey away to other lands for sale. This claim of ownership of percolating waters is met by a claim on the part of the plaintiff that what the defendants call "percolating waters" are as truly a part of the Los Angeles river as the visible surface stream, and out of this contention arise the most important questions in the case. There seems to be no substantial conflict in the evidence and no radical difference between the parties as to the character of the subsurface flow in the tract condemned. It is agreed that all the waters of the San Fernando valley, except what is lost by evaporation or consumed in plant life, flow out through the narrow pass between the eastern extremity of the Cahuenga range and the Verdugo hills, either on or beneath the surface; and there is abundant testimony to warrant the conclusion that at ordinary stages of the river the water flowing on the surface and that which is beneath the surface are in intimate contact, and moving in the same direction. The land condemned is situated a short distance west of the narrow outlet of the valley, but the conditions, though differing slightly in degree, are substantially the same. The valley is somewhat wider, but there also the water on the surface and that beneath the surface are in contact, and all flowing in the direction of the outlet,—on the surface at the rate of 2 or 3 feet per second, underground at an estimated rate of from 14 to 17 miles per annum. It appears, also, as stated above, that the Los Angeles river first appears as a surface stream a few miles west of the tract

condemned, and gradually increases in volume as it flows to the east. The fact of this gradual increase in the surface flow of the river, taken in connection with the other facts above detailed, would seem to warrant the inference that the waters of the San Fernando valley, in seeking an outlet to the ocean, flow under the surface as far as they can find room to pass through the bowlders, sand, and gravel which fill the space between the hills on either side, and gradually rise above the surface as the valley narrows and leaves less and less room for passage underneath. Much the larger portion of an extremely bulky record is filled with the evidence of expert witnesses in regard to the topography of the San Fernando valley the material composing the valley proper, the amount of rainfall, measurements of surface flow, and a great variety of matters bearing upon this question of a subterranean stream. A careful study of this testimony, which, though conflicting upon many important points, is in reference to the larger and more general aspects of the case quite harmonious, convinces us that it is sufficient to sustain a finding in favor of the existence of a subterranean stream, if the law with respect to subterranean streams was correctly laid down in the charge of the court to the jury. There can be little doubt, we think, that the jury, under the instructions of the court, found that the subsurface flow in those lands was a part of the Los Angeles river, and governed by the law of riparian ownership, or by a pueblo right still more favorable to the plaintiff. If this was the finding, and if it was made under correct instructions, it cannot be said that the award of compensation is unsustained by the evidence; for, aside from the water flowing in the subterranean portion of the stream, as defined by the instructions, there is no evidence to prove the existence of any considerable quantity of percolating water in the tract condemned, and the same evidence which shows an inconsiderable quantity of such water tends strongly to prove that it could all be intercepted or drained by the owners of the adjoining lands before reaching the land taken. That is to say, if the defendants have the right to tunnel or trench their lands below the plane of saturation for the purpose of draining off water which has not yet reached to surface or subsurface stream, their neighbors on the north have the same right; and, since only a very small portion of the 315-acre tract is higher than the bed of the stream, the percolating waters which they could drain without interference with the stream would be too inconsiderable in amount, and their right too precarious, to add materially to the value of the land. Our conclusion on this point is that the verdict must stand, if the jury were correctly instructed, and this brings us to the consideration of the most important questions involved in the case.

6. A great many exceptions were taken to different instructions given by the court, and it is now insisted by appellants that the entire charge was in substance erroneous, and that the court erred in refusing to give the instructions requested by them, because they presented the law correctly, while the instructions actually given did not present it correctly. In view of the great number of exceptions to the charge,—on account not only of what it contains, but of what it does not contain,—there seems to be no more convenient method of presenting the points to be considered in this connection than by quoting very extensively from the record. The court charged the jury as follows:

"(1) Gentlemen of the Jury: This is an action whereby the plaintiff seeks to condemn for public use all the right, title, interest, and estate of the defendants in the lands described in the complaint. The land is situated in and on each side of the Los Angeles river, several miles above, and north of, the city of Los Angeles. The questions arising in the case involving the right of the plaintiff to condemn the property, and the nature and extent of the defendants' estate and interest in the land to be taken, have been determined by the court. The only question you are to decide is the amount of compensation which the defendants are entitled to before their estate and interest in the land can be taken as proposed.

"(2) This compensation is to be composed of two parts or elements: First, the value of the interest and estate of the defendants in the land described in the complaint; second, the amount of the damages which will accrue to the other land of the defendants, which is part of the same parcel as the land to be taken, by reason of the severance of the land to be condemned, and the construction of the works thereon as proposed by the plaintiff. For the purpose of assessing this compensation and damages, the right is deemed to have accrued at the date of the summons, which is June 27, 1893; and the actual value at that date is the measure of value for all property taken, and the basis of damages for all property injuriously affected.

"(3) The defendants' estate in the lands in controversy is an estate in fee simple, but it is subject to the right of the city of Los Angeles in the waters of the Los Angeles river. This river flows through the land to be condemned. If the city of Los Angeles had no interest in the river waters, then the defendants would have all the rights of riparian proprietors in those waters. As it is, their rights as riparian proprietors are impaired and diminished to the extent that the rights of the city affect those rights.

"(4) The city of Los Angeles is situated on the river below these lands, and is the owner of the right to take from the Los Angeles river all the water that is reasonably necessary to give an ample supply for the use of its inhabitants, and for all municipal uses and purposes for which the city may require water. This right is measured by the necessity, and, if the needs increase in the future, the right will expand to include all that the needs require. This right of the city is paramount and superior to the rights of the defendants in the waters of the river.

"(5) The defendants therefore have no right to so use or divert the water of the river as to diminish the same so that it will not furnish the amount needed for the supply of the city aforesaid, and, in determining the value of the land to be taken, this fact must be considered; and the value of the land for which defendants are entitled to compensation is its value, subject to the above-stated right of the city.

"(6) After the wants of the city are supplied, however, the defendants have the right to use the water of the river on their lands for any and every purpose which does not interfere with the equal rights or injure the lands of other riparian proprietors along the river above and below this land. These rights include a reasonable use of water of the river on the land for irrigation, domestic purposes, watering stock, or other lawful purpose; also, to obtain power by means of the fall of the stream on the land, returning the water to the stream before it leaves the land; also, the benefit of having the water flow in its accustomed manner through the land. The right to use the water to irrigate the land through which it runs is subject to the condition that other riparian owners along the stream have the same right, and, if the water is not sufficient for all, neither has a right to use more than his reasonable share. All these rights are incident to the land, because the river borders on the land; and they are not mere appurtenances, but are part and parcel of the land itself.

"(7) In exercising this riparian right the defendants have no right to carry any of the waters of the Los Angeles river off of their riparian land for use on land not riparian, nor can they sell it for use on land not riparian; and all surplus waters must be turned back into the stream.

"(8) Rights in a subterranean water course or stream are governed by the same rules as a surface stream of water; and the only rights that the defendants, as owners of the lands sought to be condemned, would have in any subterranean water course flowing through their lands down to and through the lands of others (whether said stream flowed on such lower lands above the surface, or beneath the surface of the ground), would be to make the same, but no other, use that they would be entitled to make had such waters flowed on the surface.

"(9) A riparian proprietor is not entitled to divert, for any purpose except for purposes for which he is entitled to make use of on his riparian lands as specified in these instructions, any portion of the waters of a water course or stream, whether surface or subterranean; and he cannot by any indirect means make such diversion where he would not have been authorized to do so directly. Therefore a riparian proprietor cannot, by sinking tunnels or making other excavations under the sides or underneath the bed of such water course, draw away for use on non-riparian lands any of the waters flowing in such water course, although said excavations may not directly touch said stream. If, for instance, the water of stream percolates into the banks or bed thereof to a considerable but limited distance, and such percolating water is stationary or has very little motion, said riparian proprietor would have no right to make an excavation so as to draw off said percolating water, if the effect would be to cause any of the running waters of said stream to leave the same in order to fill up the voids left in the banks or bed from which said percolating waters were drawn by such excavation, any more than if said excavation was made so as to tap said stream directly.

"(10) The mere fact that some of the subterranean water forming part of the stream on the lands sought to be condemned may be lost before reaching the point where the same would have gone into and made up part of the surface or subterranean stream of the Los Angeles river would not give the defendants the right to divert an amount of said subterranean waters in said lands equal to or less than the amount so lost, if such diversion would have the effect of diminishing the waters, surface or subterranean, of the said river at any point above the south line of the pueblo lands of the city of Los Angeles.

"(11) Whatever additional market value the land may have had by reason of these rights and advantages, so far as they do not interfere with or impair the rights of the city aforesaid, this value the defendants are entitled to, as a part of the value of the land, before it can be taken; and this value you must include in your estimate of the value of the land sought to be condemned.

"(12) In addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land, and which does not constitute a part of the water of the river. This is usually called 'percolating water.' There is, however, no magic in the word 'percolating'; and the fact that any witness may apply that word, or refuse to apply it, to any particular class of waters of which he may speak, is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of waters is distinct from, and much greater than, their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of it on this land, and they do not own its corpus, or its body, or the very water itself; and they have no right to take it away from the land and use it on other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there is in this land, not a part of the stream, they are the absolute owners of it, to the same extent and as fully as they own the soil or the rocks or timber on the land. Therefore, if by any means they can separate this water from the land, they have an absolute right to the water thus separated, and may conduct it away and sell or dispose of it anywhere as they see fit, subject only to the limitation that they may not excavate or do anything on the land for the mere purpose of intercepting such water, and preventing same from flowing into the stream or water course on the land of another, and without intending to make any beneficial use of it themselves. Whatever additional market value this land may have had by reason of the presence therein of water of this class, or by reason of the feasibility of separating it from the land, or of using it on the land, or of conducting it to some other place for use or sale, or of the great market value of such water for such purposes, or by reason of all these things combined, or by reason of any other lawful benefit or advantage which this water gives, this additional market value inures to the benefit of the defendants, and is a part of the compensation to which they are entitled in this case, as the value of the land to be condemned.

"(13) It will be necessary, therefore, for you to determine what waters upon or in this land are a part of the waters of the stream, and what waters are not of the waters of the stream. This question is a question of fact, to be determined by you from the evidence, under the instructions of the court.

"(14) The Los Angeles river is composed of its main stream and any branches it may have, whether surface or subterranean.

"(15) While a water course must have a bed and banks or sides, yet such bed may consist of any material which keeps the waters from penetrating below a certain depth, and such banks or sides may consist of any material which has the effect of confining the waters within circumscribed limits.

"(16) It does not always follow that water which does not flow on the surface in a visible stream is for that reason not a water course, or not a part of the water of a stream which does at some place run on the surface; nor need it flow in a defined channel underground, as a solid body of moving water of any particular dimensions, in order to constitute a water course. If you find from the evidence that there is a bed or a river bottom filled to a considerable depth with sand, gravel, or other porous material, meandering over which a stream runs on the surface, and through and in which the water moves underground, enough of it rising to the surface to supply the surface stream, and the other portions of the underground water moving with a much less velocity than the surface stream, and through a wider or larger space in and through the interstices of the porous material, but in the same general direction as the surface stream, and in connection with it, and in a course and within a space reasonably well defined,—the conditions being such that the existence and general direction of the body of water moving underground can be determined with reasonable accuracy,—then that portion of the water thus moving underground should be considered as a part of the water course, as well as that part which flows over the surface. If such water course exists, it is immaterial, so far as the water course is concerned, from or through what lands the waters flow in reaching the channel, or whether they reach the same by percolation or by clearly-defined streams.

"(17) So, also, if you find that the water coming down on the surface in the streams known as the 'Tejunga,' 'Little Tejunga,' and 'Pacoima' creeks, in the northeastern portion of the watershed, is discharged on the plain known as the 'San Fernando Basin,' and there sinks in the sand, washes and flows down southwardly underground through sand, gravel, or other material easily permeable by water, and along the courses and its channels which have been made by the streams of water from these same creeks flowing on the surface, but which channels were long ago filled up with this porous material; that these waters now flow in these channels beneath the surface to the land in controversy; that on this land there is a range of hills extending easterly and westerly, so as to change the course of these underground channels, and combine or collect the water into one general body of water, and force the same to turn and move eastwardly in a similar channel through these lands, and on down along the general course of the Los Angeles river; that upon arriving at this land a portion of the water rises to the surface, and flows aboveground as the Los Angeles river, and the remainder flows underground along in the same general direction, and in connection with the surface stream, in porous material formerly deposited by the same stream in its bed,—then all this body of water, both above and below the ground, should be deemed a part of the same stream from its sources to its outlet.

"(18) If the jury find that on the lands sought to be condemned there is situated the river bottom of the Los Angeles river, extending the whole length of said land, and occupying nearly the whole thereof, and containing all of the subterranean waters of said land, and filled to a considerable depth with permeable material, consisting of loam, sand, gravel, and bowlders, mixed together, and interspersed with irregular and broken strata, masses, or pockets of clay, and cemented sand or gravel, lying in place substantially as deposited by the forces of nature, and that as the same lies in place the natural voids or interstices of such material generally throughout the whole of said river bottom are equal to from one-fifth to one-third of the entire mass; and that the subterranean waters in said lands enter the same chiefly from the north and partly from the west sides thereof, from lands composed of substantially the same materials as the lands sought to be condemned, said waters so entering under pressure caused by gravity; and that the south boundary of said river bottom is formed of an impermeable dike of rock known as the 'Cahuenga Hills,' and said waters entering from said north side are prevented from continuing their flow to the south and are dammed up by said wall of rock, and that all of the subterranean waters in said river bottom are thereby forced to fill all of the said interstices and void places in the material of which said river bottom is composed, to a height in some places equal to, and in some places greater than, the level of the surface stream of the river; and that there are no impenetrable and continuous barriers extending through the said mass in said river bottom in any direction so as to interrupt and prevent the substantial continuity and contact of all of said subterranean waters; and that some of said subterranean waters, to the amount of about one thousand miners' inches constant flow, measured under a four-inch pressure, being so brought to the surface, enter into and form part of the surface stream of the Los Angeles river on said lands, so that the amount of said surface flow at the point where the same leaves said land on the east is increased by about one thousand inches over the amount of its surface flow at the point where it enters said land on the west; and that the remainder of said subterranean waters move underground to the east, although with a varying velocity, and much slower than the said surface stream, but in the same general direction with it, off of the lands sought to be condemned, and still continuing in and through the river bottom of the Los Angeles river, which is composed of like permeable material as aforesaid, and bounded and confined on the southerly, as it turns to the south, on the westerly side thereof by the same continuous dike of rock, said waters still maintaining their substantial continuity; and that part of said waters rise from time to time as they flow in said river bottom and feed the surface flow of said river, and the remainder of said waters continue to move underground in said river bottom as aforesaid, and that said waters continue to move in that manner for several miles after leaving the lands sought to be condemned, and until said river bottom enters within the limits of the city of Los Angeles, crossing its northern boundary,—then the jury must find that all of the subterranean waters contained in the land sought to be condemned are a part of the waters of the Los Angeles river.

"(19) On the other hand, the law is that innumerable little streams finding their way through the soil, or seeping or percolating through the material of which it is composed, do not become water courses simply because the amount, when exposed, is visible. A water course must consist of beds, banks, or sides, and water, and the water must be flowing in a channel or course more or less defined. It is not necessary that the water should flow continually, or at all times of the year; but neither is a mere swale, in which extraordinary freshets flow, sufficient to answer the definition. To maintain the right to a water course or brook, it must be made to appear that the water usually flows in a certain direction and in a regular channel, with banks or sides, though it need not to be in a straight line. Waters, whether under or above ground, having no certain general course or definite limits, such as those merely percolating through the strata of the earth and those diffused over its surface, are not water courses, and are not subject to the rules of law applicable to water courses. To entitle an underground stream to the consideration of the law, it is necessary that it be a water course, in the proper sense of the term. Percolations which spread themselves in every direction through the earth do not constitute water courses. Water moving by force of gravity in a valley or basin of wide extent,—say, twenty-four by twelve miles at the extreme extent,—and moving generally through the hole or through a large portion of the basin, along through the natural voids or interstices of the earth, composed of alluvial or other deposit lying throughout the entire basin, and made up of loam, sand, gravel, and bowlders, mixed together, and interspersed with irregular and broken strata or masses of clay or cemented sand and gravel, and lying in place as originally deposited by the forces of nature, do not constitute a water course, but are a part of the land, and belong to the owner of land as fully as any other constituent part of it.

"(20) If you find from the evidence that the lands sought to be condemned are situated at the lower portion of, and form a part of, the San Fernando basin or watershed, near or at its outlet, and that said basin is about twenty-four miles long and about twelve miles wide at the widest point, and that said outlet is from two thousand feet to three miles wide, and bounded and defined on the southern side by the rock of the Cahuenga range, and on its northern side by a similar rock of the Verdugo hills, and that the earth of which the basin is generally composed, including said outlet and the land sought to be condemned, is an alluvial or other deposit made up of loam, sand, gravel, and bowlders, mixed together, and interspersed with broken or irregular strata or masses of clay or cemented sand and gravel, and lying in place as originally deposited by the forces of nature, and that as the same lies in place the natural voids or interstices of such earth generally throughout the basin, including the defendants' lands and said outlet, are equal to from one-fifth to one-third of the bulk of the entire mass, and that such entire deposit lies upon a grade or slope towards and through the outlet of such basin, and that all the water falling in the watershed of such basin, which is not lost in storm, run off, or by evaporation, or in supporting plant life, or held immovable in the ground, sinks into the earth composing such basin, and thence by force of gravity moves down through such voids or natural interstices of the earth throughout the greater portion of the entire mass to the outlet of the basin, through which it passes, without forming anywhere in the mass any definite course or channel in which it can be ascertained with reasonable accuracy that such water is moving in greater quantities or with greater velocity than in other places, so as to be concentrated in a stream either above or below ground, then such waters so moving through such outlet, or through or in defendants' land in the natural voids or interstices of the earth, do not constitute a subterranean flowing stream or water course, but they belong to the owner of the soil in which they may be found, and the portion of them which may be found in the land of the defendants is the property of the defendants. But if such water does collect underground and flow in certain courses or channels through coarse, permeable material therein, where the existence and general course of the flowing or moving body of water can be easily determined, then the water so moving in such channels would constitute a water course, although not visible on the surface, and although the space through which the channel extends may be largely filled with the material through which the water flows. The burden of proving that waters moving in the ground are flowing in a natural water course or in a defined channel, or are a part of a stream, is upon the plaintiff in this action. The presumption is that they are not part of a stream or water course, nor flowing in a definite channel.

"(21) A stream which flows along and in a natural channel, at some places flowing on the surface, and at some places sinking in porous material which has been deposited in and has filled the channel, and there passing down along in the same channel underground, and again rising to the surface and flowing as a surface stream, is no less a stream or water course at the points where it flows under the surface than at the places where it runs on the surface. And, if part of the water remains moving underground at the places where the surface stream flows, all of the water, both above and below the surface, constitutes the stream. And if at places the channel widens very much, and is filled with gravel, sand, or other porous material, in which the water spreads so as to fill the voids of the porous material, forming the semblance of an underground lake or reservoir, with no water appearing on the surface therein, but with the water passing on beneath the ground down the widened channel, and afterwards reappearing below as a surface stream, then the water would be as much a part of the stream while it was contained in such underground lake or widened channel as while it was flowing on the surface. And, on the other hand, water which has not formed part of such stream, and is not moving in such underground channel, but comes from surface water, or from rains and floods sinking into the ground and passing through the soil by gravitation, having no general direction, although it may eventually find its way into some stream or water course and materially add to the water thereof, yet while so passing through the ground it is not a stream or water course, but is part of the soil, and is the property of the owner thereof.

"(22) In determining the actual value of the land taken, you are to take into consideration all of those factors which enter into and make up its value: The altitude of the tract; the capability of taking to the city of Los Angeles, and to the country east and west of it, by gravity, the waters which may be collected on said land, without taking the waters of the natural stream; the amount of water which can thus be collected; the fact that the land sought to be condemned is so situated as to constitute the best place along the Los Angeles river for obtaining a water supply, and conducting the same either to the city or other tracts east and west of it; the needs of water in different places within the reach of this tract of land, and of the water which may be thus collected thereon. All are circumstances to be considered by you in determining its actual value.

"(23) If the jury believe from the evidence that the subterranean waters in the land sought to be condemned are percolating without any definite channel, and that the same are not a subterranean water course or stream; and if they believe that such waters come onto said lands from the lands of others above, or pass from the lands sought to be condemned down to the lands of others lying below, and that such upper proprietors could, by the construction of tunnels or other works, cut off or divert said waters, or some part thereof, from the lands sought to be condemned, or that such lower proprietors could construct tunnels or other works on the lands lying below the lands sought to be condemned, which would have the effect of draining or depriving the lands sought to be condemned of their subterranean waters, to the extent that the owners of the land sought to be condemned could not make a practical use thereof, or of some part of said waters,—then the jury are instructed that such upper and lower proprietors would have the same rights so to appropriate said waters on their lands as the defendants would have on the lands sought to be condemned; and the jury must take those facts into consideration so far as they diminish or destroy the value of the rights of the defendants to said waters, or such portion thereof as could be so diverted or drained so as to deprive defendants of the practical use thereof."

We will now take up the specific objections of the defendants to these instructions in the order in which they are stated. The first is to instruction No. 10. It might be a sufficient answer to the objection now urged in the argument to say that it is not one of the objections stated at the trial, and specified in the exception then taken. But, waiving that point, it seems clear to us that, unless the entire theory of the instructions in regard to underground streams and percolating waters is wrong, this instruction is right, or at least is harmless. The fault found with it is that it denies the right of defendants to divert any part of the underflow on their lands, whether the water diverted would ever reach the surface stream or not. But the instruction is limited to subterranean water which is a part of the stream, as in other instructions defined; and, if it is a part of the stream, it cannot be diverted, whether it would come to the surface or not. It belongs to the stream, and must flow on to the lower riparian proprietor. His right to the subsurface portion of the stream is identical with his right to the surface flow, and is entitled to the same protection. As to the criticism that the instruction is meaningless, it must be admitted that it does not clearly explain itself. But the respondent points out that it refers to a claim made by defendants that a large portion of the subsurface flow was somehow lost from the stream between their land and the city, and therefore they could divert an equal or smaller quantity without injury. If such a claim was made, the instruction was perhaps necessary. If it was not made, the instruction was harmless.

Counsel next criticise instruction No. 12, complaining that it confounds percolating waters and waters of the stream in such a manner as to render the court's view of the law absolutely unascertainable, and to give the jury to understand that, notwithstanding water may be percolating, it may still be a part of the stream. We think the meaning of this instruction is entirely clear, and that the only question is as to its soundness in point of law. The court certainly did intend in this instruction, and in many others, to tell the jury that water passing through the voids of any loose, permeable material filling or partially obstructing the channel of a stream is still water of the stream. If it all sinks beneath the surface, the whole stream is subterranean. If a part sinks, and the remainder flows upon the surface, that which is invisible is as much a part of the stream as the surface flow. The difference between counsel and the superior court at this point seems to be that to them all water passing through sand, gravel, and bowlders is percolating water, and the mere fact of percolation is inconsistent with the idea of a stream, while to the court there is no such inconsistency when the material through which the water forces itself fills a well-defined channel, with impervious sides and bed, through which a considerable body of water flows from its source to its resting place. If this view of the court is correct, the instruction is neither erroneous nor obscure.

The quotations made by counsel from instructions Nos. 13, 14, 15, 16, 17, 18, and their criticisms thereon, are all directed to the proposition that the court understood, and intended the jury to understand, that nothing is essential to the constitution of a subterranean stream, except that the general direction of the flow of the water is discoverable; that in this sense the whole San Fernando valley is a subterranean stream, and the jury might as well have been instructed in terms to find that there was in this land no percolating water, the property of the defendants. We do not think the instructions referred to, taken by themselves, necessarily bear this construction; and certainly when considered in connection with those numbered 19 and 20, and others, it clearly appears that the court was not giving, or intending to give, a definition which would make the whole San Fernando basin a subterranean stream. The instructions, taken all together are applicable, in their definition of a subterranean stream, exclusively to the comparatively narrow outlet of the valley between the Cahuenga range and the Verdugo hills, where all agree that the entire rainfall of the valley passes out, partly on and partly beneath the surface, between the rocky and comparatively impervious mountain sides on either hand. It is true, this pass, on the surface, is from 1½ to 2½ miles in width, and that in it borings have been made over 100 feet in depth before encountering bed rock; but here is not only water moving in a definite direction, but also sides and bed to the channel in which it is moving, and these, also, are comprehended in the court's definition of a subterranean stream. Another objection to these instructions, particularly to No. 16, is that they charge the jury upon questions of fact. We cannot see that these instructions are at all objectionable upon this ground. What a subterranean stream must be in order to bring it within the law of riparian rights is a question of law, and the entire scope of these instructions includes nothing but a statement of the facts which the jury must find from the evidence in order to determine whether there is a subterranean stream, and, if so, how much of the water in the land is part of that stream. This is in no wise a transgression of the province of the court. Another objection to several of these instructions is that there was no evidence upon which to base them. We think, however, that there is not only some evidence, but very substantial evidence, contained in the record, tending to prove every material portion of the various hypotheses stated in the instructions.

Before proceeding to a consideration of the numerous exceptions of the appellants to the rulings of the superior court upon the instructions requested by them, it will be convenient to first dispose of the main question in the case, viz. the proper definition of a subterranean stream. There is no dispute between the parties, and no conflict in the authorities, as to the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams. The cases in which this and cognate questions have been raised and decided are innumerable, and it would be an endless task to review or even to name them. No case involving directly the rights of parties in subterranean streams has been decided in this court, but the law, as applicable to the present case, is well epitomized in section 48 of Kinney on Irrigation, as follows: "Subterranean or underground water courses are, as their names indicate, those water currents that flow under the surface of the earth. A large portion of the great plains and valleys of the mountainous regions of the West is underlaid by a stratum of water-bearing sand and gravel, and fed by the water from the mountain drainage. This water-bearing stratum is of great thickness. The water is moving freely through it, is practically inexhaustible, and, if it can be brought to the surface, will irrigate a large portion of the country overlying it. In and near the mountains many streams have a bed which was originally a rocky cañon, but has been filled up with bowlders and coarse gravel. In this débris a large portion or all of the water sinks from sight, to reappear only when some rocky reef crosses the channel and forces the water to the surface. The movement of this water through the porous gravel, owing to the declivity of the stream, is often quite rapid, and a considerable volume may thus pass down the channel hidden from sight. These water courses are divided into two distinct classes,—those whose channels are known or defined, and those unknown and undefined. It is necessary to bear this distinction in mind in our discussion, as they are governed by entirely different principles of law. And in this connection it will be well to say that the word 'defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference. Regarding the laws governing these two classes, it must be known that if underground currents of water flow in well-defined and known channels, the course of which can be distinctly traced, they are governed by the same rules of law that govern streams flowing upon the surface of the earth. The owner of land under which a stream flows can therefore maintain an action for the diversion of it, if such diversion takes place under the same circumstances as would enable him to recover if the stream had been wholly above ground. But for this purpose the underground water must flow in known and well-defined channels, so as to constitute regular and constant streams, in order that the riparian owner or appropriator may invoke the same rules as are applied to surface streams, or otherwise the presumption will be that they have their sources in the ordinary percolations through the soil. This rule practically disposes of the second class of subterranean waters,—those whose channels are unknown and undefined,—although there are undoubtedly a great many underground streams whose waters flow in confined channels, but whose courses are not known; and, following the above rule, these are all classed with percolating waters." The point to be specially noted here is the meaning ascribed to the words "defined" and "known." "'Defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference." In this case the boundaries of the channel and the existence and course of the underground stream were unknown and undefined, except so far as they could be inferred; but there was a great amount of evidence from which a reasonable inference could be drawn that the channel was bounded and defined by the sloping sides of the Cahuenga and Verdugo hills meeting underground, and that there was a subsurface flow corresponding with the surface flow from west to east out through the gap. Without any excavation beneath the surface, or other test or experiment, all this could be inferred from the topography of the country, the amount of rainfall, and the gradually augmenting volume of the surface stream in its approach to the narrowest point in the pass. And the court was certainly justified in submitting to the jury the question whether the subsurface flow was a part of the stream, unless the mere fact that it was forcing its way through sand and gravel and bowlders deprived it of the character of a stream. Upon this point we are satisfied that the view of the superior court was the reasonable and just view, and not opposed to anything that has ever been decided in this court.

This is in fact the pioneer case of its kind, so far as this court is concerned. There have been cases here in which injunctions were sought to prevent owners of land from digging or trenching or tunneling in their own premises, upon the ground that they were cutting off the subterranean sources of springs and streams; and they have been uniformly decided in accordance with the accepted doctrine as to rights in percolating waters,—the doctrine which defendants contend is applicable here. Those most nearly in point and most relied on are Hanson v. McCue, 43 Cal. 178; Railroad Co. v. Dufour, 95 Cal. 615, 30 Pac. 783; and Gould v. Eaton, 111 Cal. 639, 44 Pac. 319. But in none of these cases was there any evidence comparable to the evidence here of an underground stream. Gould v. Eaton comes nearer to this case than either of the others, but in that case it was found by the lower court that the portion of the water as to which there was any controversy was merely feeding the stream by percolation. And even in that case, which went as far as any case has ever gone in favor of the doctrine that percolating waters are a part of the soil, and belong to the owner of the land, it was conceded, if not decided, that no water can be abstracted from a surface stream by tunneling beneath it, notwithstanding the water must pass from stream to tunnel by percolation, or filtration through the soil. In this case there is a great amount of evidence tending to prove that the defendants could not take any material quantity of water out of their land without abstracting an equivalent amount from the surface stream; the reason being that the water of the surface stream would necessarily sink into the loose, porous material underneath, to fill the voids occasioned by the drawing off of the water from below. This, however, is a matter involved in another aspect of the case, the present inquiry relating exclusively to the proper definition of a "subterranean stream." Upon this point we hold that the instructions of the court contain a sound and correct statement of the law as it applies and ought to apply to streams of the character of the Los Angeles river. To hold otherwise would be destructive of rights long supposed to be certain and assured. Upon the doctrine contended for by defendants, the whole of the Los Angeles river could be diverted from the city, and the sole water supply of a community of over 100,000 people completely cut off; for it is not alone the defendants who own water-bearing lands in the San Fernando valley, and, if they can abstract and convey to distant points the water in the land sought to be condemned, others can do the same thing. There would be nothing to prevent the driving of tunnels through the Cahuenga range at a dozen points, and tapping the water below the level of the surface stream in such a manner that, by extending filtration galleries in sufficient number, the whole flow of the river could be abstracted. Once concede that the defendants may draw off the subsurface flow, or any part of it, the same privilege must be conceded to others; and the man or the corporation that can put in the largest tunnel at the lowest level will get the lion's share, while the inhabitants of Los Angeles will get none. The doctrine, therefore, while ruinous to those who have built up a populous and prosperous city upon the faith that they were secure of a supply of water for domestic and municipal purposes, would afford no security to the defendants, or to any one in their situation; for what they could take from the city others could take from them.

We come now to consider the instructions asked by defendants, and refused by the court. There was no error in refusing instructions 15, 16, 17, and 18, for they had been given substantially in the charge of the court. Instruction No. 19 was refused as misleading. We do not see how the jury could have been misled by this instruction as requested, but it, like the others, had been given in substance, and without any improper qualification, and therefore it was not prejudicial error to refuse it. The instructions 20 to 25, inclusive, were all properly refused upon the grounds stated by the court. They all related to percolating waters and subterranean streams, and, so far as correct, had been given in substance. Instruction 31 had been given in substance, and its refusal is justified upon that ground. No. 32 was not law. Nos. 34 and 35 were given in a modified form in instructions Nos. 19 and 20, above quoted. These modifications were certainly proper, and probably necessary to prevent misunderstanding. No. 36 was properly refused as containing the propositions which the modifications just referred to were designed to exclude. It declared that the question of percolating waters or running streams is not affected by the fact that the subsurface flow has a definite direction corresponding with that of the surface flow, etc. These facts do very materially affect the question in this case, and would deserve serious consideration in any case. Instruction No. 33, requested by defendants, contains a sound proposition, viz. that no act of the legislature of California can diminish or change the rights of the defendants in these lands derived from their predecessors, the Mexican and Spanish grantees. But this was a question with which the jury had nothing to do. The court had determined the rights of plaintiff as successor to the pueblo, and had instructed the jury what those rights were. Whether its instructions on this point were correct is a matter to be considered when we come to those instructions; but, whether correct or incorrect, they necessarily controlled the verdict of the jury, to the exclusion of all questions as to the effect of the acts of the legislature.

7. We come now to another series of instructions given and refused, relating to the rights of the plaintiff as successor to the pueblo. It must be borne in mind that this was one of the issues in the case which by agreement of the parties was tried by the court. The instructions given to the jury on this point are therefore to be regarded as embodying the findings and conclusions of the court upon that particular issue, and treated accordingly; the only question being whether the decision of the court as to the extent

of the city's right in the waters of the river is sustained by the evidence. Instructions 3 to 6, above quoted, embody the views of the court as stated to the jury, and it is claimed that they are erroneous in several particulars. It is still more strongly insisted that the court erred in refusing instructions 12, 13, and 14 requested by defendants, which read as follows:

"(12) The rights of the ancient pueblo of Los Angeles, whatever they may have been, were not attempted to be granted by the legislature to the city of Los Angeles, except to the extent of four square miles, and could not, under any circumstances, have extended beyond four square leagues.

"(13) The use to which the pueblo was authorized to apply the water was such purposes as appertained to the Spanish pueblo, under the civilization of those times; and it did not extend to the cultivation and irrigation of parks, or the creation and maintenance of artificial lakes therein, or supplying waters for an outfall sewer.

"(14) The said pueblo of Los Angeles had no paramount rights to the use of the waters for any purpose, as against those grantees of the Mexican government under whom the defendants here claim; but the raising of stock and tilling the land granted by the Mexican government to these grantees were as much parts of the policy of the Spanish and Mexican government as the founding of pueblos and promoting the progress of those towns. And rights to the use of water by the grantees of these ranchos for domestic uses and stock and agricultural purposes were protected by the laws and policies of those governments, as well as the interests of inhabitants of towns."

In discussing this branch of the case it will not be necessary to take up seriatim the particular exceptions reserved by the defendants to the giving and refusal of these various instructions. It will be sufficient to consider a few general propositions to which they give rise.

The pueblo of Los Angeles embraced 4 square leagues (something more than 17,000 acres) of land. The city of Los Angeles, as originally incorporated, embraced the same area; but by successive amendments to its charter its area has been about doubled by the addition of lands outside of, but contiguous to, the original pueblo. Within the city several parks have been laid out, in which there are artificial lakes of considerable size, with lawns and shrubberies requiring irrigation. An outfall sewer has been constructed, through which the sewage of the whole city is carried to the Pacific Ocean, requiring a large amount of water. The population of the city exceeds 100,000, and it is rapidly increasing. The defendants hold their lands as successors to several Spanish and Mexican grantees, under patents from the United States based upon the original grants. They claim that, even conceding the rights of the pueblo and the city's succession to those rights (a concession which they make only for the purposes of the argument on this point), they are still, by virtue of their ownership of the lands in question, entitled to the exercise of full riparian rights, except so far, and so far only, as those rights are impaired by the paramount rights of the pueblo as they existed before the change of flag, and without any legislative addition thereto. This claim, we think, is clearly just. The legislature of California could grant nothing to the city of Los Angeles which belonged to others; and the rights of the city, as successor to the pueblo, in the lands of riparian proprietors holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself. This being so, the facts above detailed regarding the growth and extension of the city, and the municipal uses to which it is applying the water drawn from the river, give rise to the questions upon which the charge of the court and the instructions requested by the defendants so radically differ. By instruction No. 4, above quoted, I understand the court to have charged the jury that the defendants had no right, as owners of these lands, to take any water from the river for irrigation, watering stock, or even for domestic purposes, if by so doing they would deprive the inhabitants of the present or future city of Los Angeles of an ample supply for all domestic and municipal purposes. I think this instruction is erroneous. If the paramount right of the city is only the right of the old pueblo to which it succeeded, I cannot see how such right covers the requirements of that large portion of the present city outside of the four leagues constituting the pueblo. The inhabitants of that limited territory, to whatever number they may increase, enjoy the full pueblo right, but beyond that territory the right does not extend. The city, of course, has the power to provide water for all its inhabitants and for all public purposes throughout its extended limits; but if, in order to supply the territory outside of the pueblo boundaries, it finds itself compelled to encroach upon the riparian rights of landowners along the river, it ought to pay for those rights, the same as for any other private property taken for a public use. This is not the same proposition involved in the case of Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762, but it is governed by the same principle, and that case is authority, if authority were required, for my conclusion upon this point. As to the public purposes for which the city may use water in the exercise of its paramount right, the question is not of such easy solution. The view of the defendants is set forth in the instructions requested by them, numbered 13 and 14, supra. No. 14 I think erroneous, because it denies to the pueblo any paramount right for any purpose. And No. 13, I think, is also erroneous, in limiting too strictly the purposes for which the city, as successor to the pueblo, has a paramount right to the use of the water of the river. It is certain that irrigation of the pueblo lands was one of the purposes for which the pueblo could take the water, and the fact that some of those lands have been converted into ornamental parks does not impair the right to irrigate them. An outfall sewer is something which I suppose was never contemplated in the foundation of a Spanish or Mexican pueblo, but this was because the modern system of water supply for domestic purposes and modern methods of house drainage were then unknown. These improvements have made an outfall sewer necessary for the health and convenience of the inhabitants of Los Angeles, and since the water was granted or dedicated as much for the health and convenience of the pueblo as for any other purpose, and since it has been practically settled that the pueblo right expands with the increasing needs of the inhabitants, the right to drain the city by means of an outfall sewer, and to keep the sewer in a state of efficiency by the necessary flushing, must be held to be fairly within the pueblo right. But the maintenance of artificial lakes, by which undoubtedly a large quantity of water is lost through absorption and evaporation, never was necessary for the support or health or convenience of the inhabitants of a pueblo, however much it might have contributed to their pleasure, and I know of no principle upon which their right to use the waters of a river for such a purpose could have been deemed paramount to the ordinary rights of riparian proprietors. It was not only the policy of the Spanish and Mexican authorities to foster the growth of the pueblos, but also to encourage the raising of stock and other rural industries to which the use of water for domestic purposes, the watering of stock, and irrigation were essential; and it is not to be believed that in the primitive condition of society in those times, when the settlement of the country and the support of its inhabitants was the primary consideration, the most favored pueblo would have been allowed to consume in the maintenance of ornamental fountains and artificial lakes water necessary to the sustenance of an essential branch of industry.

8. But the appellants go still further, and contend that when the land in controversy was granted to their predecessors there was no pueblo of Los Angeles, and consequently no pueblo right to which any of their rights could be subordinated. This contention is based upon certain executive orders of departmental officials made in pursuance of a Mexican law of 1837, by which the pueblos containing less than a certain minimum of population were deprived of their ayuntamientos. Under this law the ayuntamiento of Los Angeles was abolished or suspended for a time. But we do not understand that the pueblo was extinguished, or its rights to the waters of the river at all impaired, by the abolition of the ayuntamiento. The only result was that its affairs were administered by a prefect, or other officer appointed by the central authority, instead of by a local council. This question, however, ought to be considered closed by the previous decisions of this court in the Vernon Irrigation Company's Case and others. All of the laws and public documents upon which its solution depends are within the judicial cognizance of the courts, and whether they were actually noticed, or not, in previous decisions, they must be deemed to have been considered and allowed their due weight. The question is one of law, rather than of fact, and its decision in one case is a precedent in others.

9. Another series of the instructions given and refused deals with the measure of compensation applicable generally in condemnation suits. Of the instructions above quoted, those numbered 2, 11, 22, and 23 relate to this matter. Exceptions were taken to these instructions, and also to each of the following:

"(25) In determining the actual value at the date of the summons, you are not to take, as the measure of that value, what an owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property; and in making that estimate you should consider the use for which the property is suitable, having regard to the existing business or wants of the community, or such as might have been reasonably expected in the immediate future. You will also consider the fitness of this land for agriculture, and its value for that purpose, and for fruit or stockraising, for the timber growing on it, as well as the water which may be in the soil, not a part of the river; and from these and all other uses to which the property may be put, from which profit may be derived, and from all the evidence on the subject, you will determine its actual market value at that date.

"(26) The market value of the land is not necessarily the value of the land in its present or prospective use to the owner, nor is it the value which it would be to the city as a location for head works, nor the sum which the city must be compelled to give for it by reason of the necessity it may be under to obtain it, nor is it the sum that could be derived from the land for any special purpose for which it may be suitable. All these things, if shown by the evidence, may be considered as bearing on the question, but only so far as it may appear that they affect the actual market value at the date of the summons, and the thing you are to determine is such actual market value at the date stated.

"(27) Although you may believe from the evidence that by reason of things done, discovered, or ascertained since June 27, 1893, it now appears that the land was then more valuable for any purpose or use than it was then known to be, yet you cannot consider such additional value unless you believe also that these things were sufficiently known or obvious in June, 1893, to affect the market value at that time, and did so affect it.

"(28) If the jury find that any of the underground waters of the lands sought to be condemned are not a part of the waters of the Los Angeles river, they can consider that fact in fixing compensation only so far as it tended, if at all, to affect the actual market value of the land at the date of issuing the summons; disregarding any acts done upon the lands, or information acquired concerning said waters, since said date.

"(29) You are entitled to consider the evidence regarding the quantity of subterranean waters in the lands in question, and their value, only in arriving at a just determination of the market value of the lands sought to be condemned on the 27th day of June, 1893. Wherefore, if you believe that said waters did not give said lands an additional market value at that date, or that if an additional market value were given, but the same did not equal the real value of said waters, then you must place on said lands a valuation equal only to the market value which they then had, including such additional market value which said waters gave to said lands, irrespective of the true value of said waters. If, for instance, said lands could not have been sold in the market on said date (the owners having had abundant time to find a purchaser, such as would generally be taken by an owner trying to sell like property) for more than a certain sum, then you must not find the value of said lands to be greater than said sum, although in fact you may believe that the waters in said lands made them worth more than that sum."

One of the objections to these instructions which the appellants urge in the argument here is directed against the charge, repeated in several places, that the value of the property at the date of the summons must control. The hardships of this rule, when applied to a case in which so long a time elapses between the issuance of summons and the trial of the cause as happened in this instance, are strongly stated by counsel; and their argument against the constitutionality of this feature of the statute would not be undeserving of consideration, if they were in a position to urge it. But the fact is, this portion of the charge was given in form and in substance as they requested it in the instructions proposed by themselves, and they cannot, therefore, claim that the court erred in allowing it.

Another objection is that the court confuses "actual value," which is the true measure of compensation (Const. art. 1, § 14, and Code Civ. Proc. § 1249), with "market value" and "actual market value" in such a way that the different instructions are either self-contradictory or unmeaning. We do not think the instructions are self-contradictory, and their meaning we take to be this: "Actual value" is the measure of compensation, but "market value" is the criterion of actual value, and the definition of market value is given in the instructions numbered 25, 26, etc. If, then, these instructions lay down a correct rule for ascertaining actual value, the charge as a whole is not erroneous. In most respects the charge is sustained by previous decisions of this court. Town Co. v. Neale, 78 Cal. 63, 20 Pac. 372; Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681. But there is one objection strongly urged in this case which was not involved, and could not have been considered, in any case formerly decided here. In several of these instructions the jury are told, in effect, that in estimating the value of these lands they must not take into consideration any fact discovered since the summons was issued. In other words, to use the illustration put by appellants, if a gold mine worth millions of dollars had been discovered in this land the day after the issuance of summons, the city could take the land by paying its value for agricultural purposes. This conclusion, it is true, follows logically from the proposition that market value at the date of the summons is to control, and that is the idea upon which the instructions are based. But I think this is a mistaken idea. The thing to be ascertained is not market value, but actual value (Code Civ. Proc. § 1249); and the only reason why market value is taken as the criterion of compensation in ordinary cases is because it is in such cases the true measure of actual value, —the only practical test. But, in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land at that date was greater than its market value,—in other words, when it appears that market value is no criterion of actual value,—those discoveries should be taken into consideration. As such discoveries were claimed in this case, I think the court erred in giving and refusing the instructions referred to.

10. The giving of instruction 9 is complained of upon the ground that there was no evidence upon which to base it. Unless we have greatly misunderstood the defendants' position, the instruction meets one of their claims to percolating waters; but, if they do not claim the right to undermine the surface stream and draw off its waters, the instruction did them no harm. It stated the law correctly. And so, also, does instruction 23 lay down a correct rule, clearly applicable to the case. The point for the jury to determine was the value given to these lands by percolating waters not a part of the stream,— waters which the owners of the land had a right to convey to a distance for sale. In considering the value of such waters, it was certainly material to consider at the same time whether the defendants might not at any moment be wholly deprived of them by the exercise on the part of others of the same

right in their lands claimed by defendants with respect to their own. Instruction No. 29 requested by defendants, and refused by the court, has so remote an application to the questions to be decided by the jury that its refusal cannot be deemed an error. Instruction No. 33 requested by defendants was properly refused, because it related in great part to the issues to be determined by the court. Instructions 34, 35, and 36 requested by the defendants were given in a modified form, and the modifications were proper.

11. A great many exceptions were taken to rulings of the court on objections to testimony and documentary evidence. Some of the questions raised by these exceptions have been practically decided in discussing other points. As to the rest, it is sufficient to say that, although some evidence was admitted that does not appear to have been clearly relevant, it could not have been prejudicial. The evidence actually admitted without objection took a wide range, and the most of the objections were to questions asked of expert witnesses on cross-examination. In respect to such questions the court is necessarily invested with a large discretion. In this case some objections were sustained that might have been overruled without error, and some were overruled that might have been sustained; but we cannot see that the court abused its discretion in any instance, or that it would have made an appreciable difference in the result if the ruling had been the reverse of what it was.

12. It is contended that the evidence is insufficient to justify the verdict of the jury or the findings of the court. Since the conclusions above stated involve a retrial of the issue submitted to the jury, I deem it unnecessary to notice the first branch of this proposition, and my remarks will be confined to the second. Does the evidence sustain the findings upon the issues tried by the court? I think that there is substantial evidence to sustain every finding that is material. The taking of the 315 acres may not have been shown to be absolutely and certainly essential for the supply of the present needs of the city; but in view of the rapid increase of its population and its probable increase in the future, in view of the possible necessity of enlarging the number and of changing the location of the filtration galleries in order to insure an ample supply of water at all times and for every emergency, the court was justified in finding that it was a wise and prudent measure to secure the entire tract. And there was evidence to sustain the finding that, unless the city had the exclusive control of the surface, there was at least a possible danger that the water supply might be polluted by stock herded or pastured there. This, however, is not very material, because it bears only upon the question of taking a fee-simple estate, and the right to take such estate rests securely upon the fact that the land is taken for a reservoir. The third finding, which relates to the paramount right of the city as successor to the pueblo, is sustained by the evidence, except in so far as it carries the meaning of those portions of the instructions above considered which are pronounced erroneous. The evidence does not show any formal adoption by the city, prior to the commencement of the action, of the detailed plan of these head works alleged in the complaint, but it does show a previous adoption of engineer's report, recommending, in general outline, and in all essentials, the plan here set forth in detail. It shows, also, by a series of resolutions and orders of the council, a fixed purpose on the part of the city to own and control its own system of water supply, and a resolution of the council directing the city attorney to commence this proceeding as soon as the ordinance of June 8, 1893, should be signed by the mayor. This probably accounts for the rather precipitate action of the city attorney in filing the complaint the same day that the ordinance was passed, and before its publication. This, however, would have been but an irregularity in the absence of the resolution. The object of publishing laws and ordinances before they take effect is to warn those who are to be bound by their provisions. In a case like this, where an ordinance has been duly passed and an order for its publication has been duly made, the act of an officer obeying its directions, in anticipation of its publication, is at least ratified and made good when the publication is complete. Moreover, in this particular class of cases the action is not commenced until the summons is issued. Code Civ. Proc. § 1243; Railway Co. v. Porter, 74 Cal. 261, 15 Pac. 774. It appears, also, that since the commencement of the action it has been followed by other orders and resolutions of the council providing means for carrying out the proposed plan, and complying with the terms of the judgment sought. In view of all these facts, the objection that the action was commenced without authority, in pursuance of a plan not formally adopted, seems too purely technical to be regarded. Other specifications under this head relate to findings of facts merely probative, included in the issue submitted to the jury, and need not be further considered.

13. At the beginning of the trial of this action the parties made an arrangement with the official reporter, out of court, in pursuance of which he furnished each of them a daily transcript of his notes at an agreed rate of compensation. The cost of defendants' copy was $767.45, and this sum they included in their bill of costs. On motion to retax, the item was stricken out by the court. This is assigned as error, and section 274 of the Code of Civil Procedure, as amended in 1885, is cited in support of the assignment. But this amendment has been held unconstitutional (Smith v. Strother, 68 Cal. 194, 8 Pac. 852), and the case is governed by section 274, as amended in 1880, and construed in Barkly

v. Copeland, 86 Cal. 493, 25 Pac. 3. The court did not err in this ruling.

For the reasons stated in the foregoing opinion, I think the judgment and order of the superior court should be reversed, and the cause remanded for a new trial as to the single issue of compensation and damages,—the issue, that is to say, which was submitted to the jury on the former trial.

TEMPLE, J. I concur in the views expressed by the Chief Justice, except as to that part of the opinion in which certain rulings made by the trial court are declared erroneous.

1. The first has regard to the time when the property is to be valued. The statute declares that the right to the property shall be deemed to accrue at the date of the summons, "and its actual value at that date shall be the measure of compensation." The Chief Justice concedes that ordinarily market value is the true measure and the only practical test of the actual value; still, "in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land at that date was greater than its market value,—in other words, when it appears that market value is no criterion of actual value,—those discoveries should be taken into consideration." Such discoveries are claimed in this case. Code Civ. Proc. § 1249. It is said, if a gold mine worth millions of dollars had been discovered in this land the day after summons was issued, the city could take the land by paying its value for agricultural purposes. The supposition is an impossible one. A gold mine of the known actual value of millions could not be so discovered. The phrase "actual value" is here used in opposition to the phrase "market value." It is difficult to give any meaning to it when so used, but in regard to a gold mine it must have reference to the amount which could be taken out of it over and above the cost of extraction. This could not be known until the mine was worked out, and therefore whenever it was valued necessarily the value could not be the actual intrinsic value, as defined, but would necessarily be its market value. So the proposed value only changes the statutory date at which the right of the city is deemed to accrue, and when the value is to be estimated. It is contended that the right must be deemed to have accrued and the valuation be made after other elements of value have been discovered. The phrase "actual value" is sometimes used in contradistinction to "market value," to indicate that property is valued too high to make it a good investment. If the market value of the land was $100 per acre, it would not be permissible to show that the real or actual value was less, and that the market value was inflated. The owner could get the market value, and less would not make him whole. The government can take private property for its uses at any time, conditioned only that the public shall compensate the owner,—that it shall pay what it is worth when taken. This value must be the market or exchange value, for there can be no other. Value, which determines the price at which the owner must sell, must be the exchange or market value, and "actual value" means "actual market value."

2. It is said the paramount right of the city to the water of the river does not extend to water required for residents in that part of the city which is not within the boundaries of the pueblo, and that the court erred in charging the jury, in substance, that all riparian rights were subordinate to the right of the inhabitants of the present and future city to the use of water for all domestic and municipal purposes. It is argued that the city has succeeded to the rights of the old pueblo, and its rights cannot exceed the rights of the pueblo itself. If so, I do not see how the city can take water, even for that portion of the city which is within the ancient boundaries, for uses which were not only unknown to the inhabitants of the pueblo, but which, owing to the plan of the settlement, could not have been thought of as possible uses. Relatively only a small portion of the territory was devoted to building lots. Provision was made for agricultural and pastoral pursuits, and large portions of the territory were laid out in montes (wood lots) dehesas (commons for cattle), ejidos (places for threshing grain, and recreation), and many other tracts were kept for the community. But this was a plan for a primitive village, to aid and encourage the settlement of the country. The sites for pueblos were carefully chosen in pursuance of the royal regulations of Spain, whose policy was that the government should determine where towns and cities should be built. Unquestionably it was contemplated and hoped that at least some of them would so prosper as to outgrow the simple form of the rural village. It is in the nature of things that this might happen, and when it did, and the communal lands were required for house lots, we must presume that under Mexican or Spanish rule they could be so converted, and that, when the population increased so as to overflow the limits of the pueblo, such extension could be legally accomplished. Had this happened under Mexican rule, can it be doubted that the right vested in the pueblo would have been construed to be for the benefit of the population, however great the increase would be? I cannot see why the interpretation of the original grant should be more narrow than of a title acquired by condemnation. If the city should now in this proceeding purchase the riparian rights for the use of the city, must it do so again whenever its present limits may be enlarged?

Suppose in 1850 the little city then existing had condemned for its use all riparian rights, and had no other right to the water. The extent of a taking by condemnation is always limited to the necessity which justifies it.

That which is not used still belongs to the owner. The title to water would not be acquired, but only the use; and as against the riparian owners, in such a case, the city could not have taken water not needed by the city and its inhabitants. In 1850 the city contained only a small population, and its corporate limits were less even than the pueblo limit. In the supposed case, could the landowners now contend that the larger city could not, under the right acquired in the condemnation proceedings, supply the inhabitants of the additional territory? As to such a claim I think there would be but one opinion, and that would be that in the condemnation proceedings all possibilities as to the future growth and requirements of the city were taken into consideration.

3. I have never been able to see anything in the objections to the outfall sewer. It seems to me, if the city cannot maintain this, it cannot be a city at all, and retain the water rights of the pueblo.

4. The last matter of difference relates to water used in the ponds and artificial lakes. The real objection to this seems to be that it looks like extravagance or waste. We feel that, where water is so precious, it should not be used for mere matters of taste and fancy, while those who need it for useful purposes go without. In the forum of morals this may be so, but the needs of a city are understood to include such uses, as well as for the supply of absolute necessities. It would be intolerable to invest in outside authority a right to superintend and limit such uses. While, therefore, I am not prepared to say that the discretion of the municipal authorities could not under any circumstances be interfered with, I do not see how we can do so here. It is clearly a municipal use which is familiar in municipal history. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; GAROUTTE, J.; HARRISON, J.

124 Cal. 671

In re SCOTT'S ESTATE et al.

(S. F. 1,821.)

(Supreme Court of California. June 6, 1899.)

WILLS — PROBATE — APPEAL — NOTICE OF APPEAL—SERVICE ON LEGATEES—DISMISSAL—TIME OF APPEAL—STIPULATION.

1. Contestants to the probate of a will gave notice of a motion for a new trial, and prepared a statement to be used therewith, which was presented to the court for settlement, and, when notice of a motion to dismiss the appeal for failure to file the transcript within 40 days after perfecting the appeal was given, proceedings were still pending for a settlement of the statement. *Held*, that under court rule 2 appellant was entitled to 40 days after the settlement of the statement within which to file his transcript.

2. On motion to dismiss the appeal the court's settling such statement must be assumed to be within its jurisdiction, as, if error was committed in considering it, such error would be considered at the hearing of the appeal, and not on motion to dismiss.

3. Where on appeal it is shown that a motion for new trial was entertained by the court, and denied, it will be presumed that a statement which accompanied it was settled by the court, and became a record, and was used on the hearing.

4. Where a notice of appeal from an order admitting a will to probate is not served on all the legatees, the appellate court is without jurisdiction to hear the appeal as to any of the parties.

5. Where, before a hearing on a contest to the probate of a will, the court appoints an attorney to represent all persons otherwise unrepresented, and the order appealed from recites that such attorney appeared, and represented such persons, and the notice of appeal is served on him, the appeal will not be dismissed because of an objection that all adverse parties were not personally served with notice of the appeal.

6. Where an appeal purports to be from an order admitting a will to probate, entered on a certain date, and it is shown at the hearing that that was the date on which the order was entered at length on the records, the 60 days within which to appeal from such order will run from that date.

7. A stipulation by parties to a will contest, reciting that, to settle the date of the order admitting the will to probate, it is agreed that it was entered on the day on which it was filed, will not change the time from which the right of appeal begins to run, since a party's right of appeal dates from the actual entry of the order, and cannot be determined by the stipulation of the parties.

Department 1. Appeal from superior court, city and county of San Francisco.

Contest by E. W. Scott to the probate of the will of Angelia R. Scott, deceased. From an order admitting its probate, contestant appeals. On motion to dismiss the appeal. Denied.

Philip G. Galpin and A. E. Bolton, for executors. A. Everett Ball, for contestant E. W. Scott.

HARRISON, J. Motion to dismiss the appeal. The appellant filed a contest in the superior court to the probate of the will of Angelia R. Scott, and the issues made upon his contest were tried, and decided in favor of the proponents of the will. The findings of the court, and its direction that the will be admitted to probate, were filed September

12, 1898, and on October 12, 1898, an order in pursuance thereof was entered. A notice of appeal from this order was given by the appellant herein November 2, 1898, and on December 2, 1898, he filed and served a second notice of appeal from the order. February 23, 1899, the proponents of the will gave notice to the appellant of a motion to dismiss his appeal for failure to file the transcript within 40 days after perfecting the appeal, and upon the further ground that the notices of appeal were defective, and had not been served upon all the adverse parties.

1. The contestant gave notice of a motion for a new trial September 21, 1898, and thereafter prepared a statement to be used upon this motion, which, with the amendments, were presented to the judge of the superior court for settlement, and at the time the notice of the motion herein was given proceedings were pending before the judge of the superior court for the settlement of this statement. Under rule 2 of this court the appellant was entitled to 40 days after the settlement of this statement within which to file the transcript. The respondents have presented certain affidavits purporting to show irregularities in the proceedings for the settlement of the statement, by which they claim that the judge had no jurisdiction or authority to settle the same, and which they presented to him as objections to its settlement by him; and therefore contend that, as this statement cannot be considered upon the appeal from the order, it forms no excuse for the delay in filing the transcript. It was shown, however, at the hearing herein, that subsequent to the giving of notice of this motion the judge of the superior court had in fact settled the statement, and we must hold that the appellant had 40 days after such settlement within which to file the transcript. Upon a motion to dismiss the appeal we must assume that the act of the judge in settling the statement was within his jurisdiction, and that he was authorized to settle it. If the respondents would claim that he committed error in so doing, such error must be considered at the hearing of the appeal, and cannot be reviewed upon a motion to dismiss the appeal. It is further urged that, as the notice of intention to move for a new trial was not served upon all the parties to the proceeding, it was ineffective, and for that reason the statement could not be used upon the hearing of that motion, and, consequently, is not available upon the appeal from the order admitting the will to probate. It has been frequently held that an appeal from an order denying a new trial will not be dismissed upon the ground of any defect in the proceedings in the superior court leading up to the order (Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221; Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082; In re Bullard's Estate, 114 Cal. 462, 46 Pac. 297), as this would involve an examination of the action of the court below, which can properly be had only upon the hearing of the appeal. If an appeal has been properly taken from an order subject to be reviewed in this court, it cannot be dismissed upon the ground that the court below improperly made the order. Neither can we, under the same principles, consider the character of the notice of intention to move for a new trial. It was shown at the hearing herein that the motion for a new trial had been entertained by the court, and denied, and it will be presumed that the statement that had been settled by the judge, and which thereby became one of the records of the court, was used upon the hearing of this motion.

2. The notice of appeal which was given November 2, 1898, was directed to the proponents of the will and their attorneys, but did not purport to be a notice to any of the legatees or devisees under the will. As the effect of a reversal of the order admitting the will to probate would be to deprive the legatees of whatever interest in the estate of the decedent is given to them by the will, it is evident that they are interested in maintaining the order appealed from, and are, therefore, adverse parties to the appellant upon this appeal. The respondents concede that the notice was served upon those legatees who had appeared at the hearing upon the contest, with the exception of the Protestant Orphan Asylum, for whom an appearance had been made by George W. Haight as its attorney; but it is not shown that there was any service made upon this legatee or its attorney. As no service of the notice of appeal was made upon this legatee, it cannot be bound by any order or judgment made upon the appeal, and this court is therefore without jurisdiction to hear the appeal, even as between the other parties.

3. The notice of motion to dismiss the appeal of December 2d states as one of the grounds thereof that it was not served on all the adverse parties to said appeal, but in the printed points filed in support of the motion it is stated by the respondents that this notice of appeal was "addressed and served on all parties who had appeared." A large number of the legatees appeared by attorneys of their own selection, and before the hearing of the contest the court appointed E. D. Sawyer as attorney "to represent any and all absent heirs and creditors otherwise interested in or otherwise unrepresented" in the matter, and it is recited in the order appealed from that the attorney thus appointed for the persons otherwise unrepresented appeared at the hearing upon the contest. As the notice of this appeal was served upon this attorney as well as the others, it appears that all the adverse parties were before the court. We are not inclined to dismiss an appeal upon grounds or for defects in procedure that are purely technical, when it is apparent that the appellant has complied with the substantial requirements for per-

fecting his appeal, and is prosecuting the same with diligence and in good faith. The right of an appeal to this court from the superior court is given by the constitution in all such probate matters as may be provided by law; and statutes making such provision, and regulating the procedure therefor, should be liberally construed.

The other ground stated in the notice of motion for the dismissal of this appeal is that it was not taken within 60 days after the entry of the order appealed from. The notice of appeal purports in terms to be from an order made and entered in the superior court on the 11th day of October, 1898, and, as it was shown at the hearing herein that that was the date upon which the order admitting the will to probate was entered at length in the records of the court, the 60 days within which to appeal from the order began to run at that date. Home of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119; In re Pearsons' Estate, 119 Cal. 27, 50 Pac. 929. Annexed to the affidavit of the moving party herein is a copy of a stipulation filed in the court below November 21, 1898, between the attorneys for some of the parties to the proceeding therein, including the contestant and the proponents of the will, as follows: "Some confusion having arisen in the above-entitled cause as to the date of the actual entry of the order admitting the will to probate and appointing the executors, which said orders were signed and filed in this court on the 12th day of September, 1898, for the purpose of settling said date so that the same shall be fixed and certain, it is hereby stipulated for all purposes that the said orders were actually entered, as provided by law, on the same date the same were filed, to wit, on the 12th day of September, 1898;" and the respondents urge that by reason of this stipulation the appellant is precluded from contending that the appeal was within 60 days after the entry of the order. The time within which the appellate jurisdiction of this court may be invoked is determined by statute, and not by a stipulation of the parties. The Code provides that an appeal may be taken from an order admitting a will to probate "within sixty days after its entry," and it has been held that their rights in respect to an appeal are determined by the date of its "actual entry." Coon v. Grand Lodge, 76 Cal. 354, 18 Pac. 384. The action of the superior court does not become definite and certain until it is entered at length in its records. Prior to that time it is in the breast of the judge, and, until it shall be so entered, his decision may be changed from time to time, according to his views. It is only when his decision has become the judgment of the court, and thus passed beyond his recall, that the appellate jurisdiction of this court may be invoked. Brady v. Burke, 90 Cal. 1, 27 Pac. 52. If parties could, by their stipulation, bring before this court for review a decision of the superior court before it had been entered in that court, it would be within their power to invoke our action upon most questions, and we might be called upon to affirm or reverse orders that had never been made, or judgments that had never been entered. It does not appear for what purpose the above stipulation was entered into, the only recital therein being the "confusion" that had arisen as to the date of the actual entry of the order. There does not, however, appear to have been occasion for any confusion, as the date of filing and the date of entry are distinct and separate acts, and performed at different times. In fact, the date of its entry would seem to be as important a part of the record as the entry itself, and as readily ascertained. Code Civ. Proc. § 672. See, also, Menzies v. Watson, 105 Cal. 109, 38 Pac. 641. But, whatever may have been the cause of the confusion, we hold that the stipulation did not have the effect to deprive the contestant of the right to review the action of the superior court, or to change the time from which his right of appeal should begin to run. There is nothing in the stipulation which, by its terms, purports to express such a purpose, and, in the absence of express terms to that effect, we cannot assume that the parties thereto intended something which they were unauthorized to do. We do not mean to hold that parties may not be bound by an express stipulation when it would be inequitable to disregard it, or when, by reason thereof, others have been induced to take action which would cause them detriment in case the stipulation were disregarded. There is, however, no room to invoke this proposition in the present case. There is no element of estoppel which the respondents can invoke against the appellant. They parted with no right by reason of the stipulation, nor did they obtain any right therefor which they are now asked to surrender. The motion to dismiss the appeal which was taken November 2, 1898, is granted. The motion to dismiss the appeal of December 2, 1898, is denied.

We concur: GAROUTTE, J.; VAN DYKE, J.

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125 Cal. 159

SAUNDERS v. LA PURISIMA GOLD-MIN. CO. et al. (Sac. 642.)

(Supreme Court of California. June 20, 1899.)

SCHOOL LANDS—CHARACTER OF LANDS—DETERMINATION—CONCLUSIVENESS.

Under Act Cong. March 3, 1853, granting certain agricultural lands to the state for school purposes, and providing that mineral lands shall not be subdivided into sections, public lands belonging to the state under said act, if agricultural, which the proper United States officials have platted into a section and classified as agricultural lands, and concerning which the receiver of the public land office has certified that the state's title thereto under said act is free from adverse claims, are not, after their disposal by the state, subject to re-entry as mineral lands; the determination of the United States officials that the lands were agricultural being conclusive against a collateral attack.

In bank. Appeal from superior court, Tuolumne county.

Action by Harriet H. Saunders, as administratrix, against the La Purisima Gold-Mining Company and others. Judgment for plaintiff, and from an order granting a new trial she appeals. Reversed.

J. B. Curtin, for appellant. J. P. O'Brien, for respondents.

VAN DYKE, J. This action is to determine conflicting claims to a tract of land, being a portion of section 36, township 2 N., range 13 E., Mt. Diablo meridian, containing 600 acres, located in Tuolumne county. On September 1, 1870, the official United States survey of said township was completed, and the lands therein sectionized. On the 18th day of February, 1871, the official plat of said township was approved by the United States surveyor general for California, and filed in his office. In this official plat of said township, section 36 was marked and returned as being agricultural land and unoccupied. On the 7th day of December, 1871, the commissioner of the general land office directed the register of the United States land office at Stockton, in which district said land was located, to withhold from sale or disposal, among other lands, said township 2; and on April 27, 1880, the secretary of the interior, by an order, revoked said withdrawal; and thereafter on September 6, 1884, the register of said United States land office issued to the state of California his certificate in due form, reciting that there were no persons occupying or in possession of any portion of said section 36, and there were no homestead pre-emptions or other valid claims thereto, or to any part thereof, adverse to the state of California. On the 1st day of September, 1890, the state of California issued to Robert B. Parks its patent in due form for the premises in controversy. Thereafter, on December 11, 1895, by proper mesne conveyance, the title to said lands was granted to, and became vested in, the plaintiff's intestate, Henry H. Saunders; that said Saunders thereupon entered into possession, and with his family occupied said tract of land up to the time of his death, June 20, 1897, and the plaintiff thereafter continued in such possession. In August, 1896, defendants Elder and Maguire entered upon a portion of said described lands, and commenced to run a tunnel and work a quartz claim, and thereupon filed a notice of mining location, designating the same as "the north extension of the La Purisima claim." This action was commenced in August, 1897. Defendants Elder and Maguire rely upon said mining location, and contend that said land is mineral land, and never passed to the state of California, and that the patent issued therefor is void. All the other defendants were defaulted. On the trial defendants offered "to prove that the land in controversy—namely, the north extension of the La Purisima Quartz Mining Claim—was expressly excepted from the grant to the state of California by the act of congress approved March 3, 1853, as the same is mineral land." Plaintiff's objection to this offer was sustained by the court, and judgment went for the plaintiff. Thereafter, upon motion of the defendants, the court granted a new trial on the ground, as stated in the order, "for the sole reason that the court erred in sustaining the objection to said defendants Maguire's and Elder's offered evidence as to the mineral character of the land in controversy." This appeal is from the order granting a new trial, and the question presented here is whether the court did or did not err at the trial in excluding the offered evidence.

The respondents rely upon Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611, in support of the order of the court granting them a new trial. Although the facts in that case are different from those in this, still it must be confessed that said case furnishes support to the contention of respondents. The opinion seems to rely upon Mining Co. v. Consolidated Min. Co., 102 U. S. 167, and it is said with reference thereto: "That decision is controlling, and must be followed here. The question then remains, were the disputed premises at the time of the grant mineral land,—that is, known to be valuable for minerals?" The facts, as found in Hermocilla v. Hubbell, were that, during the year 1850, and continuously ever since, and when the said patent was issued, on the 10th day of December, 1870, and at the time of the survey of said lands (being a portion of the sixteenth section), "they were, and have been, and now are, known to be public mineral lands of the United States, having therein known valuable mineral deposits"; whereas, in the United States case, referred to by the commissioner as controlling, and to be followed by this court, the facts were that there were three mining claims on the land in controversy,—one located in 1851, another one in 1853, and the other in 1863,—the last being seven years before the public survey of the tract, which was in 1870. The mining patent was applied for on these locations nearly two years before the state patent was issued, and subsequently, and within a year thereafter, the United States patent was issued on said mining locations. Hence the contest in that case was between two conflicting patents; whereas, in Hermocilla v. Hubbell, the contest was in the nature of a collateral attack upon a state patent, on the ground that the land was mineral land. It is said in the latter case: "The question then remains, were the disputed premises at the time of the grant mineral lands,—that is, known to be valuable for mineral lands?" But another and equally important question seems to have been overlooked by the court in that case, and that is, by whom and at what time are the facts to be ascertained and determined as to the character of the land at the time of the grant, whether mineral or nonmineral? And another question of equal importance is as to the effect of a patent, issued by competent authority, purporting to convey such land.

The decisions of the supreme court of the United States upon both of these questions are so numerous and so uniform (and the decisions of this court are in the same line, with few exceptions) that both questions now ought to be considered well settled. The first is that by the laws of congress providing for the patenting of certain public lands, upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that is, if a large body of public lands be subject to sale or other disposition, but subject to reservation of such parts as may be found to be of a particular character, as swamp or mineral land, the land department has jurisdiction to determine the character of any part thereof, and its decision is conclusive. In Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, Mr. Justice Field, speaking for the court, says: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlooked our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby evidence of a title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of a class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceeding for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." In this case it was shown that the land in question was surveyed and sectionized; whereas, the act of congress directed that, in case of mineral lands, it should not be sectionized, and that the plat of survey showing the land to be agricultural land—in other words, not mineral—was returned and properly approved. As a further measure of precaution, and to allow abundant opportunity for a full investigation and ascertainment of the character of the land, the disposal of the same was suspended for a number of years, and finally, it having been determined that it was of the character of land subject to be granted to the state, a certificate was issued by the proper United States authorities to the state of California, certifying its right to the section of land in question under the grant of 1853. The state's patent thereupon issued to the plaintiff's grantor long prior to the intrusion of the defendants for the purpose of mining. Under the rule just cited, this concluded the investigation as to the character of the land, except on a direct proceeding to set aside the patent on the ground of fraud or other invalidity.

The case of Gale v. Best, 78 Cal. 235, 20 Pac. 550, seems to have been overlooked—at any rate, it is not noticed—in the preparation of the opinion in Hermocilla v. Hubbell, supra. In that case the plaintiff claimed under a patent to a tract of land under a railroad grant. The defendants claimed by right of possession, upon the ground that it was mineral land, and that all mineral lands are reserved in the grant of congress to said railroad company. In affirming the judgment of the court below, this court, after reviewing quite fully the cases bearing upon the question, says: "Our opinion is that where a patent issues for public land under a law which provides for its disposition as agricultural land,—either to a railroad company or to pre-emption or homestead claims,—and there is no reservation in the law except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural." This case was referred to and approved in Dreyfus v. Badger, 108 Cal. 58, 41 Pac. 279, which, it will be seen, was some time after the Hermocilla Case, relied upon by the respondent here. Dreyfus, the plaintiff, relied upon a state patent issued on state lieu school lands, and the defendant, as a pre-emptioner, antedating his right as such prior to the patent by the state. In affirming the judgment of the lower court, this court says: "A defendant may defeat an action of ejectment by showing that plaintiff has no title. But where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for the disposal of the land patented, upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. 'And this rule applies to the determination of the particular character of the land which is the subject of the patent.' This was expressly held in Gale v. Best, 78 Cal. 235, 20 Pac. 550, where we alluded to the authorities at some length, and, basing our conclusion on decisions of the supreme court of the United States (citing a number), we declared the law to be as above stated. These cases involved patents of the general government; but, upon principle, the rule applies with equal force to a patent of the state government. Moreover, it has been so expressly held in this court in Doll v. Meador, 16 Cal. 295, where it was decided that 'the patent is the record of the state that the land was subject to location under the grant of the United States, and has been located'; and Ah Yew v. Choate, 24 Cal. 562, where it was held that the patent is also 'a record of the judgment of the state, by its officers duly appointed for that purpose, and that the conditions and characteristics of the land were not such as to constitute it mineral, within the meaning of the provisions of the statute.'" Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896, is to the same effect, and is referred to and approved in Dreyfus v. Badger.

To quote from the numerous adjudicated cases in the United States supreme court would be a waste of time, and lengthen this opinion beyond reasonable limits, and it will be sufficient merely to refer to some of them. Steel v. Refining Co., supra; Smelting Co. v. Kemp, 104 U. S. 644; French v. Fyan, 93 U. S. 69; Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380; McCormick v. Hayes, 159 U. S. 332, 16 Sup. Ct. 37. See, also, Cowell v. Lammers, 10 Sawy. 250, 21 Fed. 200.

The cases relied upon by the respondents, when examined, it will be seen, do not conflict with the general tenor of the decisions already cited. In those cases the lands in question were shown not to have been subject to sale or disposition at the time the right alleged accrued on which the patent was issued, and the patents, therefore, were issued without authority of law. For instance, Burfenning v. Railway Co., 163 U. S. 321, 16 Sup. Ct. 1018, involved title to certain islands in the Mississippi at Minneapolis. At the date of the homestead selection in that case on which the patent was issued, these islands were within the limits of said city; and the invalidity of the patent was based upon the fact that "lands included within the limits of any incorporated town, or selected as the site of a city or town," were by the laws of congress excluded from the right of pre-emption and homestead claims. The court of course sustained that contention on the ground that the action of "the land department cannot override the express will of congress, or convey away public lands in disregard or defiance thereof." At the same time the court announced this as a rule: "It has undoubtedly been affirmed over and over again that in the administration of the public-lands system of the United States questions of fact are under the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department one way or the other, in reference to these questions, is conclusive, and not open to litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined,"—citing Johnson v. Towsley, 13 Wall. 72; Smelting Co. v. Kemp and Steel v. Refining Co., supra; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380; McCormick v. Hayes, 159 U. S. 332, 16 Sup. Ct. 37.

As already stated and held in numerous cases, the grant by congress to this state of the sixteenth and thirty-sixth sections, by the act of congress of 1853, was a grant in præsenti, and, if at that time there were existing no known minerals or other exceptions noted in the grant why the lands should not pass to the state, it at that moment became the land of the state. The investigations of the officers of the land department in this case show that the land in question did not fall within any of the exceptions or limitations contained in the act; and subsequently, and long prior to any claim on the part of the defendants, the land was properly certified to, and patented by, the state to the plaintiff's grantor. Any rule which would permit intrusion upon the premises so conveyed and patented by the state, under such circumstances, long after the lands had passed into the hands of presumably innocent third parties for value, would be a reproach to our laws and jurisprudence.

If such claims as that presented by the defendants here were sanctioned by the court, a patent to lands in this state, instead of being a muniment of title, would simply be an invitation to parties to invade the premises for the purpose of ascertaining whether facts and conditions existed prior to the grant or patent so as to avoid the same; and it would be the same whatever the nature of the land might be. In case of a patent to mining lands, an investigation could be had years after the date of the patent, and after the title to the ground had passed to innocent third parties, to determine whether it was not agricultural land, and more valuable for that purpose than for mining; or, in case of a pre-emption or homestead claim, patented by the United States, an investigation could be set on foot at any period, and as against any party, whether innocent or otherwise, who might be the holder of the title, to ascertain whether the land was, at the initiation of the claim on which the patent is based, of the character subject to pre-emption or homestead,—for instance, that it was mineral land, or swamp or overflowed land, or any other class falling within the exceptions specified in the laws of congress. Such a condition as this would be simply intolerable, and there would be no confidence or certainty in land titles in this state. The court below properly sustained the objection to the offered testimony, and its judgment was correct, and should have been allowed to stand. The order granting a new trial is reversed.

We concur: BEATTY, C. J.; GAROUTTE, J., HARRISON, J., McFARLAND, J., TEMPLE, J., HENSHAW, J.

124 Cal. 694

PEOPLE ex rel. PIXLEY v. LODI HIGH-SCHOOL DIST. OF SAN JOAQUIN COUNTY. (Sac. 522.)

(Supreme Court of California. June 6, 1899.)

SCHOOLS AND SCHOOL DISTRICTS—ORGANIZATION OF HIGH-SCHOOL DISTRICT—ELECTIONS—PETITION—TAXATION—STATUTES.

1. Pol. Code, § 1670, subds. 14, 15, as amended in 1895, providing that the high-school board shall furnish to the board of supervisors an estimate of the cost of building a high school, and each year thereafter the amount of money required to conduct the school for the year, and that the board of supervisors shall levy a special tax upon all the taxable property of the district "sufficient in amount to maintain the high school," is not unconstitutional, as conferring legislative power on the high-school board.

2. Such statute is not void, under Pol. Code, §§ 1830–1839, providing that a special tax cannot be levied in any of the common-school districts without an election.

3. Pol. Code, § 1670, subds. 14, 15, providing that the high-school board shall furnish to the board of supervisors an estimate of the amount required to run the high school for the year, and that the supervisors shall levy a special tax sufficient to maintain the high school, such tax to be "computed * * * and collected in the same manner as other taxes," is not void as fixing no maximum rate and providing no rule of computation.

4. Pol. Code, § 1670, providing for the organization of high-school districts in school districts with a population of more than 1,000, and providing, in subdivisions 14 and 15, for the levy of a special tax in each district by the board of supervisors, upon the estimate of the high-school board, to maintain the high school, is not void as special legislation, in that it takes from the operation of the general law for the levy of taxes a certain class of school districts, and gives special powers to the high-school board and board of supervisors.

5. A petition for an election for the creation of a high-school district, under Pol. Code, § 1670, providing that "wherever * * * a majority of the heads of families * * * shall unite in a petition to the * * * board of school trustees," etc., which is directed to the "trustees of S. school district," instead of to the "board of trustees," is sufficient.

6. Such petition is sufficient, although it does not state in the body that the signers constitute a majority of the heads of families of the district, where appended to it and made a part of it is a certificate to that effect signed by the school-census marshal.

7. A petition by the school trustees to the county superintendent of public schools to call an election to organize a high-school district is sufficient, although it is unverified, and is not authenticated by the clerk.

8. A petition by the school trustees to the county superintendent of public schools to call an election to organize a high-school district is sufficient, although the petitioners are designated as "trustees," instead of "board of trustees."

9. Where the evidence is not contained in the record, it will be presumed that it was sufficient to sustain the findings.

10. Where one of the judges appointed by the superintendent of schools to conduct an election to determine whether a high school should be established in a school district fails to attend, and the other judges choose a substitute, instead of his being appointed by the electors present, the irregularity will not vitiate the election, where the result was not changed thereby.

11. It is a sufficient compliance with Pol. Code, § 1597, providing that "the polls must not be opened before nine o'clock a. m. nor kept open less than four hours," if the polls are open from 2 o'clock p. m. until sunset on May 23d.

12. Where an election notice was posted more than 15 days before the election, it need not be proved that it remained posted each day after it was posted.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action, on the relation of Reuben Pixley, to exclude the Lodi high-school district of San Joaquin county from exercising any power as a high-school district. Judgment for defendant, and plaintiff appeals. Affirmed.

Atty. Gen. Fitzgerald and Minor & Ashley, for appellant. W. C. Green and Nicol & Orr, for respondent.

CHIPMAN, C. Action to exclude defendant from exercising any power as a high-school district. Defendant had judgment, from which, and from an order denying motion for a new trial, plaintiff appeals.

Appellant contends: (1) That section 1670 of the Political Code, as amended in 1895, which provides for the organization of high schools in cities, incorporated towns, and school districts having a population of 1,000 inhabitants or more, violates section 1, art. 14, of the amendments of the national constitution, in that it deprives the taxpayer of his property without due process of law; that it also violates section 12, art. 11, of the constitution of this state, because it confers legislative powers upon the high-school district, and also violates section 25, art. 4, of that constitution, because it is a special law. And (2) it is contended that the proceedings taken in organizing defendant corporation did not comply with the requirements of law.

1. The feature of the Political Code, found in subdivisions 14 and 15 of section 1670, which relate to the levy of a special tax for the support of these schools, is especially assailed. Subdivision 14 of this section, as it was amended in 1895, requires the high-school board to furnish to the authorities whose duty it is to levy taxes,—in this case, the board of supervisors (Chico High-School Board v. Board of Sup'rs of Butte Co., 118 Cal. 115, 50 Pac. 275),—the 1st day of September, "an estimate of the cost of purchasing a suitable lot, of procuring plans * * * and erecting a building * * * and of conducting the school for the school year," and "each year thereafter to present to said authorities * * * an estimate of the amount of money required for conducting the school for the school year." Subdivision 15 provides that: "When such estimate shall have been made and submitted, it shall be the duty of the authorities whose duty it is to levy taxes in said * * * school district * * * to

levy a special tax upon all the taxable property of said * * * school district, sufficient in amount to maintain the high school. Said tax shall be computed, entered upon the tax roll, and collected, in the same manner as other taxes are computed, entered and collected." The same question was here under the act of 1891 (St. 1891, p. 182). As the law then read, it was held unconstitutional, because it left the amount of the tax wholly to the discretion of an executive officer, leaving no discretion in the board of supervisors; thus delegating legislative power to the county superintendent. McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836. After that decision, and probably to obviate the infirmity in the law of 1891, the provisions of the Code were amended as shown above. Appellant insists that the law as amended is still obnoxious to the same objections as pointed out in McCabe v. Carpenter. We cannot so regard the statute. In the former act it was provided that "an annual tax shall be levied * * * the amount of said tax being estimated by the county superintendent of schools," and it was made the duty of the board of supervisors "to levy such rate as will produce the amount estimated to be necessary for such purposes." Under the statute of 1895 the estimate of the superintendent of schools is but advisory, and the discretion is left with the supervisors to determine the amount and levy the tax "sufficient * * * to maintain the high school," not necessarily "such rate as will produce the amount estimated" by the superintendent, as formerly; and "said tax shall be computed, entered upon the tax roll, and collected, in the same manner as other taxes are computed," etc. So far as we can see, the taxpayer has the same right under this law to be heard, and has the same notice, as he has under the law which provides for fixing the tax levy by the supervisors to meet the estimate furnished by the school superintendent for the county-school fund. Pol. Code, §§ 1817–1819.

It is said that this is a special tax, and that because a special tax cannot be levied in any of the common-school districts without an election, as provided for in sections 1830–1839, except as specified in sections 1817–1820, the law is unconstitutional. We know of no limitation upon the powers of the legislature to authorize by general law a tax for a special purpose without first submitting the proposition to a vote of the electors. Having voted that they will organize a high school under a law which gives to the supervisors the power to levy a special tax to support the school, there would seem to be no occasion for submitting the question to a vote of the people a second time, except it might be to determine the rate. But that is a function within the powers of the supervisors, which we think the legislature could confer, and has conferred, upon them. There is reason for submitting the question for special tax to the voters in the common-school districts which does not exist in the high-school districts. The common school is supported by the general school fund and school tax, no part of which can be used for other schools.

The objection that the law fixed no maximum rate, and provides no rule or method of computation of amounts to be raised, is without merit. The law says that the supervisors shall compute the tax in the manner as other taxes are computed, and the rate is governed necessarily by the amount found by the board to be sufficient for conducting the school for the school year, or for constructing the necessary buildings, as the case may be. We cannot assume that this discretion will be abused, in order to take away the power by which that discretion is exercised. We must rather assume that the supervisors will exercise such wise discretion as alone guides and limits them in fixing the rate of taxation to meet other county expenditures,—for example, building bridges, as to which their powers are unlimited.

Section 25 of article 4 of the constitution contains 33 subdivisions specifying certain matters relating to which "the legislature shall not pass local or special laws." Appellant designates the following subdivisions as violated by section 1670: "(10) For the assessment or collection of taxes; (11) providing for conducting elections * * * except on the organization of new counties;" "(19) granting to any corporation * * * any special privilege," etc.; "(27) providing for the management of common schools; (28) creating offices, or prescribing the powers and duties of officers, in counties, * * * election of school districts;" "(33) in all other cases where a general law can be made applicable." Section 6 of article 9 of the constitution provides that "our public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools and technical schools as may be established by the legislature, or by municipal or district authority; but the entire revenue derived from the state school fund, and the school tax, shall be applied exclusively to the support of primary and grammar schools." Section 5 of the same article makes it the duty of the legislature to provide a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year; and section 1 declares that "a general diffusion of knowledge and intelligence" is "essential to the preservation of the rights and liberties of the people," and therefore "the legislature shall encourage by all suitable means the promotion of intellectual * * * improvement." The common or free school is made the special and exclusive beneficiary of the state school fund and the school tax, but all the enumerated educational instrumentalities belong to our public school system, and may be authorized and their support provided for by the legislature. Under the constitutional admonition the legislature has provided a system of public schools, consisting of the primary, grammar, and high school, the latter of which is designed to be preparatory to admission in the state university. Graduates of the grammar school are admitted into the high school without examination. It cannot be doubted that it is within the power of the legislature to provide a plan for the organization and establishment of high schools, and we do not understand that the people of the state in this action are attempting to discredit a power expressly given the legislature by them in our organic law. The objection is to the plan itself, and not to the power to prescribe a plan. The plan is by no means complex or anomalous. By section 1670, as amended by the act of 1895, "any * * * school district having a population of one thousand inhabitants or more may, by a majority vote of the qualified electors voting at the election held for the purpose * * * establish and maintain a high school at the expense of such * * * school district." It is made the duty of the board of school trustees whenever a majority of the heads of families in any school district, as shown by said census, shall unite in a petition to that board "for the establishing and maintaining of a high school therein," to petition the county superintendent of schools "for a determination of the question"; and it is made the duty of the county superintendent thereupon to call an election for that purpose, to "be conducted in the manner prescribed for conducting school elections." The election officer must report the result to the county superintendent within 10 days from the holding the election, and, if a majority have voted in favor of the school, it is made the duty of the county superintendent, within 15 days after receiving the returns, to call a meeting of the board of school trustees of the district, who shall at said meeting determine the location and name of the high school. The board of school trustees constitute the high-school board, and "shall have the management and control of said high school." Their powers and duties shall be such as are now or may hereafter be assigned by law to boards of school trustees. Other provisions prescribe the course of study, and for admission of pupils. The high school is thus constituted. Then follow the provisions in subdivisions 14 and 15 already considered, relating to revenue to support the school. It is claimed that the section is special legislation, because it takes from the operation of the general law for the levy of taxes a certain class of school districts, and it applies to these districts alone, and vests in the board of supervisors a power to levy a tax which the general laws of the state do not give that board, and gives to the high-school board initiatory powers with respect to taxation not possessed in any other district. All this may be true, without making the law special legislation in the sense the term "special" is used in the constitution. It was within the power of the legislature to constitute these schools, and to provide for their support by methods different from those adopted for like purposes as to other schools. In a sense, the provisions had to be special, for no part of the state school fund or general school tax could be used to support the high school. The law is general in its operation, for it applies alike to all cities, incorporated towns, and school districts having a population of 1,000 inhabitants or more; and it is general in its purpose, for it gives to all inhabitants of the state similarly situated equal opportunity to avail themselves of the benefits to be derived from these schools. The nature and objects of these schools suggest a classification different from the common-school corporation, and rationally justify the diversity in the legislation as to them. People v. Railroad Co., 105 Cal. 576, 38 Pac. 905. While it is true, as suggested by appellant, that the taxpayer is compelled to pay a special tax to support the high school, without being heard upon the amount of his tax in the manner he may be heard before being compelled to pay a special tax to support the common school,—i. e. by voting at an election called for the purpose, —the act is not for that reason special legislation. We do not feel called upon to discuss the several specific objections above noted. We think the high-school act here involved meets the definition of a general law, as pointed out in the case last cited.

2. The objection that the proceedings did not comply with the requirements of the law is not well taken. The petition is directed to the "trustees of Salem school district, of the county of San Joaquin" (naming them). This was sufficient, without directing the petition to the board of trustees. It states the population of the district to be more than 1,000. It gives the boundaries of the proposed district, and shows that they include the whole of Salem school district. The body of the petition does not state that the signers constitute "a majority of the heads of families" of the district, but appended to it, and forming a part of it, as submitted to the trustees, is a certificate signed by the school-census marshal for Salem school district, in which he certifies that the petition "contains the names of a majority of the heads of families in the above-named school district, as shown by the last school-census report." Section 1670, supra, provides that "whenever a majority of the heads of families * * * shall unite in a petition to the * * * board of school trustees," etc. We think the petition was sufficient. Frederick v. City of San Luis Obispo, 118 Cal. 391, 50 Pac. 661.

It is objected that the petition of the trustees to the county superintendent of public schools to call an election was insufficient, because it is unverified and is not authenticated by the clerk; also, because it begins, "We, the undersigned school trustees," and contains, "Now, therefore, we, the undersigned trustees, and your petitioners will ever pray," and bears these names over the word "Trustees," and is indorsed, "Petition by Trustees," etc. The point is that the act requires a petition to the board of trustees and a petition by the board of trustees. The section requires the trustees "to petition the county superintendent of schools to call an election in * * * said school district, for the determination of the question." No form of petition is prescribed. This petition was sufficient. It was quite full and specific as to the purpose for which it was presented, and was prima facie authority to the county school superintendent.

It is claimed that the evidence is insufficient to support the finding that the petition was signed by a majority of the heads of families in the district. There was evidence that the signers to the petition were heads of families, but no direct evidence appears in the transcript that they constituted a majority of the heads of families. It appears, however, that the census marshal correctly took the census of all the heads of families, and that the original sheets used by the marshal and showing this census were before the school trustees when the petition was presented to them, and were also used at the trial of this case. They furnished evidence from which, by comparison of the names on the petition with those on the sheets, the fact could be determined whether a majority of all the heads of families signed the petition. We must presume that this evidence was sufficient, inasmuch as it does not appear in the record. It was the duty of the defendant to make out its case at the trial, but on the appeal by plaintiff it became the duty of the latter to show error affirmatively. If for any reason these census sheets did not prove what they purported to show, they should have been printed in the record. It was admitted at the trial that the district had a population of over 1,000.

It is claimed that the county superintendent of schools had no power to nominate the election board. The statute, in terms, directs the county superintendent to call the election, and to appoint three qualified electors of the district to conduct the election. He named J. D. Huffman, C. M. Ferdun, and R. L. Graham. Graham was sick and did not attend, and an elector, S. W. Sollars, was chosen to fill the vacancy. Huffman testified: "I was one of the officers appointed to conduct the election. R. L. Graham did not attend. * * * Upon ascertaining this fact the officers of the election and three or four other electors present selected Mr. Sollars in Mr. Graham's place. He was a bystander and freeholder. He took the oath and acted. I was one of the judges, and Mr. Ferdun the other. We were electors." On cross-examination he testified: "I don't know but what I and Mr. Ferdun named Mr. Sollars between us, without reference to any other of the electors present. I don't know anything as to the details of that part of it. There was no record made of any kind. It was a kind of free and easy affair. We all had a chip in it. I think we conferred with the others. I don't know." The complaint sets forth in an exhibit the returns of the election board to the county superintendent which the law requires to be made. The returns certify to Graham's absence on account of sickness, and the appointment of Sollars in his stead. Then follows the verified statement that an election was held May 23, 1896, "to determine whether a high school shall be established and maintained, or not, in said Salem school district." The returns recite the names of the inspector, judges (Sollars among them), the clerks, and sets out the oath of office, with signatures attached. A list of 174 voters is given, followed by a certificate signed by the inspector, judges, and clerks, certifying that 174 electors voted at the election. The tally list is set forth, showing the vote to have been: "For the high school, one hundred and forty; against the high school, thirty; blanks, four." And this is attested and signed by the inspector, the judges, and clerks. It was held in Sprague v. Norway, 31 Cal. 174, where an inspector appointed by the supervisors did not attend, and the judges filled the vacancy, instead of his being appointed by the electors present, that it was not such irregularity as vitiated the election in that precinct, provided the result of the election was not thereby changed. Approved in Keller v. Chapman, 34 Cal. 635; Preston v. Culbertson, 58 Cal. 198. See, also, 1 Dill. Mun. Corp. § 197; Atkinson v. Lorbeer, 111 Cal. 419, 44 Pac. 162.

It is objected that the polls should have been opened earlier and closed earlier; citing People v. Caruthers School-Dist., 102 Cal. 184, 36 Pac. 396. Section 1597, Pol. Code, provides that, in districts such as this one, "the polls must not be opened before nine o'clock a. m., nor kept open less than four hours." The notice of election required the polls to be kept open from two o'clock p. m. until sunset. This was a sufficient compliance with the law.

The superintendent of schools directed the notice of election to be published in the Lodi Sentinel, a weekly newspaper published in said district, and the proof is that it was so published. Appellant is in error in claiming that the notice required publication in the Lodi Weekly Sentinel.

It is objected that the notice did not remain posted for the fifteen days required by law. The proof is that it was duly posted on May 6, 1896. The election was held on May 23d following. It was not necessary to prove that the notice remained posted each day after it was posted.

There are numerous other assignments, but we find none importing prejudicial error. The judgment and order should be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

125 Cal. 6

JOHNSON v. BANK OF LAKE. (S. F. 956.)[1]

(Supreme Court of California. June 8, 1899.)

ATTORNEY AND CLIENT—ACTION FOR FEES—LIMITATIONS.

The liability of a corporation on a contract of employment of an attorney accrues, within the meaning of the statute of limitations (Code Civ. Proc. § 359), when the services are performed, and not when the contract is made.

Department 2. Appeal from superior court, Lake county.

Action by F. E. Johnson against the Bank of Lake. Judgment for defendant, and plaintiff appeals. Reversed.

T. J. Sheridan and Garret W. McEnerney, for appellant. M. S. Sayre, for respondent.

HENSHAW, J. Plaintiff, by appropriate allegations, sought to enforce a liability against the Bank of Lake, as a stockholder of the Lakeport Agricultural Park Association. By his first cause of action he charged for the value of his services, as an attorney at law, rendered to the association, at its request, in defense of an action in which it was a defendant, "in consideration of which the Lakeport Agricultural Association promised, undertook, and agreed to pay the plaintiff the reasonable value of the said services whenever thereto requested." The second cause of action charged for moneys expended by plaintiff for the association at its request, and under its promise of repayment. The third cause of action was for the value of the services of J. J. Bruton, rendered under a like employment as attorney at law in the same litigation; Bruton's claim having been assigned to plaintiff. The court found the employment, the value of the services, and the expenditures of moneys, all as pleaded in the complaint; but it found that defendant's plea of the statute of limitations was a good plea, "because the employment of plaintiff and of Bruton to perform the services which they did perform was made prior to the time when the defendant became a stockholder, although the services were actually performed and rendered after the date when defendant became such stockholder." Judgment therefore passed for the defendant, saving as to a small portion of the money expended. As to this money no question is made upon this appeal.

Section 359 of the Code of Civil Procedure provides that an action against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the liability was created. Section 322 of the Civil Code declares that the liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred. The point then here presented is: When, under this contract, was the liability of the corporation created? If it was created at the time of the employment, as the trial court held, its judgment is admittedly proper. If it was created at the time when the services were fully performed, then the defendant corporation is liable in the amount sued for. In McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, this court had occasion to construe a contract of the city of Fresno which was to continue for five years, and which involved the expenditure of $4,900 per annum, payable quarterly. It was called upon to construe the contract under the provisions of the constitution prohibiting cities from incurring indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, in connection with the charter of the city, which declared, "The trustees shall not create, audit, allow or permit to accrue any debt or liability in excess of the available money in the treasury." It was contended on behalf of the city, as it is contended by respondents here, that the liability was created and incurred at the time when the contract was entered into. But the conclusion reached and expressed by this court was that "at the time of entering into the contract no debt or liability was created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created was that which arose from year to year in separate amounts as the work was performed." To the same effect is State v. McCauley, 15 Cal. 429. In accordance with this same construction may be cited Garrison v. Howe, 17 N. Y. 458. In each case the time of the creation of the liability is to be determined by the terms and conditions of the contract itself. In the case at bar it is apparent from its reading that the association's liability to pay arose only after performance by the attorney of the requested services. Before the services had been rendered, the attorney could no more have exacted payment under the contract than could McBean, in advance of his rendition of the services, have required from the city of Fresno the aggregate amount of payments contemplated by his five-years contract. The judgment appealed from is therefore reversed.

We concur: TEMPLE, J.; McFARLAND, J.

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[1] Rehearing denied July 7, 1899.

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125 Cal. 1

GRAY et al. v. ESCHEN et al. (S. F. 1,021.)

(Supreme Court of California. June 7, 1899.)

TROVER — FINDINGS — VERDICT — INSTRUCTIONS—APPELLANT SHOWING ERROR.

1. In an action to recover for rock carried away by one who purchased only the débris of a blast, testimony by one of defendants that they took the dirt, and plaintiff took the rock, and that the stuff taken out of the quarry by defendants was of no value at all, and that they did not at any time take away any rock that was above six inches in diameter, together with the testimony of another, who was around the place frequently, that he never saw defendants haul away any rock, and that the material defendants' teams hauled from the quarry was all fine stuff, together with testimony of another that defendants took out waste, small dirt, and small bits of rock, is sufficient to justify a verdict that defendants did not take away the whole of the rock thrown down by the blast.

2. A finding of fact on conflicting evidence will not be disturbed.

3. In an action by a lessee to recover for rock alleged to have been wrongfully carried away from the premises by one who purchased the débris of a blast prior to plaintiff's lease, evidence that all the quarry that was blasted was without the lines of the lessor's lot, if believed by the jury, will justify a verdict for defendants.

4. In an action by the lessee of a quarry to recover for rock alleged to have been carried away from the leased premises by one who purchased the débris of a blast from the lessor prior to the lease under which plaintiff claims title to the rock, an instruction that, if the jury find that the lessor was not the owner of the land from which the rock was blasted, then their verdict must be for defendants, is not erroneous, where there is some evidence that the blast did not occur on the lessor's land.

5. It is not error to give an instruction which, standing alone, may have left the meaning of a word indefinite, when, read in connection with the other instructions, its meaning is clear.

6. In an action by a lessee to recover for rock alleged to have been wrongfully carried away from the leased premises by one who purchased the débris of a blast from the lessor prior to the lease under which plaintiff claims title to the rock, an instruction that if the jury find that the rock, or any part thereof, was blasted out of L. street without the license of the proper authorities of the city, then their verdict must be for defendants, is not erroneous, where there is some evidence that it came out of L. street, and not the leased premises.

7. A lessee of premises, who by the terms of the lease acquires the material detached by a blast made prior thereto, only acquires title to so much of the material as had not been sold before the lease.

8. A record not showing what modifications of the instructions were made by the court, or in what respect or at whose request the instructions were given, a statement by the court, embodied in the record, that it is understood that every portion of the charge is deemed excepted to by counsel, and every omission or modification is also deemed excepted to by counsel, is insufficient to base error on, as the proceedings are presumed to be regular, and it is incumbent on appellant to show that there was error.

9. A party cannot complain of an instruction given at his request.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by G. F. Gray and others against James Eschen and others. From a judgment in favor of defendants, plaintiffs appealed. Affirmed.

Fisher Ames, for appellants. Boyd & Fifield, for respondents.

COOPER, C. Action to recover $1,580 for goods, wares, and merchandise alleged to have been sold and delivered by plaintiffs to defendants. Verdict and judgment for defendants. Motion for new trial, and order denying the same. This appeal is from the judgment and order.

It is claimed by plaintiffs that the evidence is insufficient to justify the verdict, in certain particulars specified. The first specification is as follows: "That it appears from the evidence that John Kelso, at the time of giving the alleged permission to the defendants to take away materials from said quarry, merely gave or granted to them the right to take away what is known as 'waste' or 'débris,' whereas they took away, not only such waste or débris, but the whole of the rock which had been thrown down by the blast." The complaint is in the general form of assumpsit for goods, wares, and merchandise sold and delivered. There is no evidence in the record of any sale, but plaintiffs, in support of their complaint, attempted to prove the taking by defendants of certain broken rock claimed to have been the property of plaintiffs. On February 23, 1895, defendants paid to one John Kelso $100, for which a receipt was given as follows: "To waste on property on the corner of Lombard and Montgomery streets, one hundred dollars. Paid February 23, 1895. John Kelso, by Saml. L. Lent." On July 30, 1895, the said Kelso gave a lease of a lot of land on Lombard and Montgomery streets to plaintiffs, which lease expressed that it was "for the purpose of having the rock removed therefrom, and the said lots graded to the level of the present grade," etc. Prior to February, 1895, said Kelso had blasted the bluff in the vicinity of Lombard and Montgomery streets, by which blast several thousand tons of rock, débris, etc., were thrown upon the land in the vicinity, and upon the lot so leased by said Kelso to plaintiffs. The rock and earth had been loosened by the blast before the receipt was given to defendants by Kelso for the $100. The portion of the rock so lying upon the ground, and claimed to have been taken away by defendants after July 30th, is the property alleged to have been sold and delivered to defendants. The specification therefore is directed to the fact that defendant not only took away "waste or débris," but the whole of the rock which had been thrown down by the blast. Defendant Eschen testified: "Gray Bros. were hauling the clean rock. They were engaged in doing that until they got all the clean rock hauled away. We took the dirt, and they took the rock. * * * The stuff we took out of that quarry of Kelso's was of no value at all. * * * We didn't take away any rock at any time while we were there that was above six inches in diameter, and we were there from February, the time we made the purchase, until about the 20th of May." The witness Burke testified: "I remember this fall of rock in the Kelso quarry. After the 30th of July, 1895, the character of the material which Captain Eschen's teams drew out of there was all fine stuff. * * * I was around there all the time, off and on. I always seen the stuff they were hauling. * * * I never saw them haul away any rock." The witness Minor testified: "I know the kind of material that our men took out of that quarry after the 30th of July, 1895. They took waste and small dirt,—small bits of rock." There is other testimony of the same character, but the above is sufficient. This evidence was approved by the verdict of the jury, and it therefore was sufficient to show that defendant "did not take away the whole of the rock which had been thrown down by the blast."

The second specification of insufficiency of evidence is as follows: "It appears from the evidence that not more than fifteen per cent. of the materials thrown down by the blast was waste or débris, which the defendants, if they had any right to remove any material from the quarry, could legally have removed, and that as a fact the defendants did remove nearly all if not the entire one hundred per cent. of the material so thrown down." If all the evidence in the record showed that not more than 15 per cent. of the materials thrown down by the blast was "waste or débris," then this specification would be well taken, provided the fact were a material and controlling one. But there is certainly a very sharp conflict in the record as to the amount or percentage of the blast which was rock, and the amount which was débris. The witness Minor said: "As to the coarseness or fineness of that rock, I can say that, while Mr. Kelso quarried there, I suppose there was about from fifty to seventy-five per cent. of it that was débris. I call 'débris' anything that he did not want. Anything that he did not call 'rock' I called 'débris.' * * * Only twenty-five per cent. of the entire mass was rock larger than your fists." The witness Kelso testified that any rock smaller than six inches was called "débris." This testimony shows that more than 15 per cent. of the materials thrown down by the blast was "waste or débris." From this we cannot say that the evidence is insufficient to justify the verdict in either of the respects specified. Under the Code, and the rule many times repeated by this court, we are not at liberty to consider the insufficiency of the evidence in any other respects than those specified. Moreover, the witness Murdock testified that he was present when the blast exploded, and that he worked for Kelso, and that "all the quarry that was blasted was within the lines of Lombard street." If the jury believed this evidence, which they had the right to do, then the verdict would be justified upon the ground that the rock did not come off the lot leased to plaintiffs, and plaintiffs had no title to it.

The plaintiffs' counsel, in the bill of exceptions and statement, specifies six errors of law occurring at the trial, by reason of the court giving certain instructions to the jury, but in his brief argues only four, and we will examine only those urged in the brief.

The first instruction complained of reads as follows: "If you find and believe that John Kelso was not the owner of the land from which the said materials were blasted, and had no interest or estate in said land which gave to him the right to blast them out, and the only right to said materials derived to the plaintiffs was derived from John Kelso, your verdict will be for the defendants." It is not claimed but that the instruction is correct as an abstract proposition of law, but it is said there was no issue as to the ownership by John Kelso of the lands from which the said materials were blasted. The plaintiffs, under the issues made by the pleadings, had to prove that they were the owners of the "merchandise sold and delivered" to defendants. To prove such title they introduced what is called a "lease" from John Kelso to them, and the whole theory of the plaintiffs is that the rocks were taken from the premises described in this lease. If Kelso did not own the land from which the materials were blasted, the plaintiffs, as we understand the case, could not recover. There was testimony that all the blasting was within the lines of Lombard street. If this is true, then the rock did not come from the lands described in the lease to plaintiffs, and Kelso was not the owner of the lands from which the materials were blasted. It is claimed that it was error for the court to use the words "said materials," because the term is so indefinite that the jury may have considered that it meant rock as well as waste material. The court in other parts of its instruction referred to said materials as those taken by defendants, and told the jury that they were to determine from all the facts and circumstances what materials were included within the term "waste." Applying the rule that all the instructions are to be read together, as supplementing and explaining each other, the instruction could not have been misleading.

The second instruction complained of reads as follows: "If you find and believe that the said materials, or any part thereof, was blasted out of Lombard street without the license of the proper authorities of the city and county of San Francisco, then your verdict will be for the defendants, so far as all the materials which so came out of Lombard street, if any, are concerned, but not necessarily as to the other materials." The reasons given as to why the first instruction was not prejudicial error apply to this. There was testimony in the record that the blasting was out of Lombard street.

The third instruction complained of is as follows: "If you find and believe that said materials came out of the fifty-vara lot on the southwest corner of Lombard and Montgomery streets, and that all the allegations of the complaint are true, then your verdict for the value of said materials, exclusive of waste, will be for the plaintiffs." The instruction was certainly favorable to plaintiffs, and could not have injured their case, unless they were entitled to recover for waste. Defendants had bought of Kelso, and paid for, the waste, long before the lease was made to plaintiffs. If defendants and plaintiffs both claim title from a common source, as counsel elsewhere states in his brief, it appears to us that the plaintiffs only took from Kelso that which had not before been sold to defendants.

The fourth and last instruction complained of reads as follows: "On the contrary, if you find and believe that the defendants took and removed materials other than waste, and that the complaint is true, then your verdict for said materials, other than waste, so taken and removed, will be for the plaintiffs." This instruction is practically the same as the third complained of, and for the same reasons the giving of it was not error.

We have considered the alleged errors in giving the instructions, but we might well have held that proper exceptions were not taken to them. The court, in giving the instructions, said, "I give you the following instructions, based upon those given by the respective counsel, and in some instances they have been modified by the court," and then proceeded to read or give the instructions. They were not numbered, and there is nothing in the record to show whether any particular instruction was given at the request of the plaintiffs or of the defendants, or, if modified by the court, in what respect or what was the instruction modified. The respective counsel asked, after the instructions were read, "that certain exceptions to the instructions given by the court be reserved." The court stated, "It is understood that every portion of the charge is deemed excepted to by each counsel, and every omission or modification is also deemed excepted to by each counsel." We cannot possibly say from this record that there was a single omission or modification. It does not appear that plaintiffs excepted to any instruction, or any portion of any instruction. If the instructions, under the statement of the court, are deemed excepted to by plaintiffs, we are totally in the dark as to whether such instruction was given at the request of plaintiffs or of defendants. It certainly could not avail plaintiffs' counsel to except to an instruction offered by himself. It is presumed that the proceedings in the court below were regular, and, where error is claimed, it is incumbent upon appellants to show it affirmatively. Applying the rule to the instructions given in this case, we must presume that each and every one of the instructions were given at the request of plaintiffs' counsel. We find nothing in the record to show that plaintiffs excepted to any one of the instructions so given, but the court said that they might each be deemed excepted to. It cannot avail counsel to deem his own instructions "excepted to." In Bernstein v. Downs, 112 Cal. 205, 44 Pac. 557, certain instructions were given to the jury at the request of plaintiff. Counsel for defendants said: "We except to the instructions asked for and allowed by the court on the part of the plaintiff." This court held this was not a specification of the particular errors upon which the party intended to rely, and in the opinion said: "There certainly should be at least an exception to each of the instructions, by number or other designation; otherwise, the attention of the court is not called to any one particular alleged error." If counsel in this case had said at the conclusion of giving the instructions, "I except to every portion of the charge, and every omission or modification thereof," it could not plausibly be claimed that the exception was sufficient. If it would not have been sufficient for counsel to have made the exception in this form, it certainly was not sufficient "that he be deemed to have made it." In the case of Cockrill v. Hall, 76 Cal. 195, 18 Pac. 318, the exception was, "To each and every part and to the whole of said instructions the plaintiff duly excepted." This court held the exception insufficient, and in discussing the exception said, "This was nothing more than an exception taken to the whole charge of the court, without bringing to its attention any special point where error was claimed to have been committed." Under the rule laid down in the above cases, we do not think, even if the instructions contain error, that plaintiffs can avail themselves of it on this record. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

125 Cal. 15

DOYLE v. REPUBLIC LIFE INS. CO. et al.

(S. F. 1,113.)

(Supreme Court of California. June 8, 1899.)

APPEALABLE ORDER—NEW TRIAL.

1. An order refusing a motion to vacate a default judgment and permit defendant to answer to the merits is not a final judgment, but an order made after final judgment, from which appeal is required, by Code Civ. Proc. § 939, subd. 3, to be taken within 60 days.

2. There can be no new trial of a "motion."

3. A subsequent order refusing to vacate an appealable order regularly and advisedly made is not appealable.

Department 2. Appeal from superior court, San Mateo county.

Action by John T. Doyle against the Republic Life Insurance Company. There was a judgment for plaintiff, and from an order refusing to vacate the judgment, and a denial of a new trial of this motion, Samuel D. Ward, receiver, appeals. Dismissed.

Vincent Neale, for appellant. G. W. McEnerney, for respondent.

HENSHAW, J. Plaintiff had obtained judgment against the Republic Life Insurance Company, a corporation organized under the laws of the state of Illinois. The service of the summons was by publication and mailing, and the defendant corporation suffer default. One year, less 11 days, after entry of this judgment, S. D. Ward asked that it be vacated, and that he, as receiver of the defendant corporation under appointment of the circuit court of Illinois, be permitted to answer to the merits of the action. His motion was denied by an order given on May 12, 1896. Thereafter he moved for a new trial of this motion, and by its order of May 8, 1897, the court denied his latter application. He took his appeals from both of these orders after that date.

Neither of these appeals can be entertained. The order of the court refusing Ward leave to answer was not a final judgment, but was an order made after final judgment. His appeal therefrom was not taken within 60 days. Code Civ. Proc. § 939, subd. 3. It must therefore be dismissed. The order denying the motion for a new trial of the petition for leave to answer is not appealable—First, because the practice of moving for a new trial of a motion is one neither countenanced nor permitted by our procedure (Code Civ. Proc. §§ 590, 656); and, second, because a subsequent order refusing to vacate an appealable order, which has been regularly and advisedly made, is not appealable. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103. Both of the appeals are therefore ordered dismissed.

We concur: TEMPLE, J.; McFARLAND, J.

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125 Cal. 41

SMELTZER v. MILLER, County Auditor.

(S. F. 964.)

(Supreme Court of California. June 9, 1899.)

COUNTIES—LETTING CONTRACTS—ADVERTISEMENT FOR BIDS.

That the board of supervisors may cure previous informalities in letting contracts by subsequent ratification has no application where the board, by failure to advertise for bids for county printing, as required by Pol. Code, § 3766, as amended in 1895, had no power to make the contract in the first instance.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county.

Action by M. J. Smeltzer against George S. Miller, auditor of Monterey county. Judgment for defendant, and plaintiff appeals. Reversed.

J. K. Alexander, for appellant. S. F. Geil and P. E. Zabala, for respondent.

GRAY, C. All the questions involved in this appeal were stated by this court, thoroughly discussed, and settled on the former appeal herein. Smeltzer v. Miller, 113 Cal. 163, 45 Pac. 264. Prior to that appeal the trial court had sustained a demurrer to the complaint, and this court, after reciting parts of the complaint, held that it stated a cause of action, and that the demurrer should have been overruled. It appears that, on the return of the case to the trial court, an answer was filed, and a trial had, and the fifth and sixth findings of the court are as follows: "(5) That on, to wit, the 7th day of June, 1894, the board of supervisors of said county of Monterey made and entered in the minutes of said board the following orders, to wit: 'This being the time fixed to hear the report of the committee heretofore appointed to propose the rate of county printing and furnishing blanks for one year, from June 10, 1894, to June 10, 1895, said report is presented to the board, and by the board accepted, and so fixed, and the following prices as proposed by the committee are adopted, to wit: For printing the proceedings of board of supervisors, per square of two hundred and forty ems, nonpareil, twenty-five cents. For ordinances, orders, notices, reports, etc., sixty cents per square for first insertion, and twenty-five cents per square for each subsequent insertion. For delinquent tax list, sixty cents per square for first insertion, and twenty-five cents per square for all subsequent insertions. On motion of J. T. Porter, seconded by T. J. Field, it is ordered that the minutes of the board of supervisors, and all orders, ordinances, and notices made by the board, and all printing ordered by the board of supervisors of Monterey county, be and are hereby awarded to the Salinas Weekly Index, a weekly newspaper printed and published in Salinas City, for one year, commencing June 10, 1894, and ending June 10, 1895.' (6) That during the entire year of 1895 said board of supervisors of said Monterey county failed, neglected, and refused to advertise for bids for publication of the delinquent tax list of said county of Monterey for the year 1894–95, and said board of supervisors of said Monterey county failed, neglected, and refused to contract or award any contract for said publication with the lowest or any bidder after ten days, or any public or any notice that such contract would be let; that no sealed proposals or bids were ever received by said board of supervisors for the publication of said delinquent tax list, and the making of the orders of said board of supervisors mentioned in finding 5 were the only provisions made by said board of supervisors for the publication of said or any delinquent tax list."

These findings show that the printing of the tax list was not even awarded to the newspaper mentioned, and, further, that there was no advertising for bids, and no contract made with the board of supervisors for printing the tax list; that section 3766 of the Political Code, as amended in 1895, was not complied with; and that the complaint, as set out and held sufficient in the former opinion of this court, was absolutely true. This court has had occasion to approve its first decision herein in the case of Harris v. Cook, 119 Cal. 454, 51 Pac. 692. The case at bar is clearly distinguishable from Power v. May, 114 Cal. 207, 46 Pac. 6, and the other cases cited by respondent, holding that the board of supervisors may cure previous informalities by subsequent ratification and recognition of liability. In Power v. May, the board had the power to make the contract which it subsequently ratified (see Power v. May [Cal.] 55

Pac. 796); but in the case at bar the board never had the power to make the contract for the printing, for the reason that they had not advertised for bids as required by the statute, and therefore they could not call into existence by subsequent ratification a contract that they had no power to make in the first instance. The former decision of this court herein is not only correct, but it is the law of the case. I advise that the judgment be reversed, and the court below directed to enter judgment on the findings for the plaintiff in accordance with the prayer of his complaint.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to enter judgment on the findings for the plaintiff in accordance with the prayer of his complaint.

125 Cal. 16

PEOPLE v. HILL. (S. F. 1,596.)

(Supreme Court of California. June 9, 1899.)

ELECTIONS—CLOSING POLLS — DISFRANCHISEMENT—MUNICIPALITIES.

Under Salinas City Charter, § 5, providing that the general law shall apply to city elections as far as practicable, but that the polls shall not be opened later than 2 p. m., nor closed before sundown, the vote of wards closing before sundown should be disregarded, notwithstanding the general law had subsequently fixed an earlier hour, this law being made applicable to state and county elections only; and this though a majority of the voters are thus disfranchised.

Department 2. Appeal from superior court, Monterey county.

Action by the people against W. J. Hill. There was a judgment for plaintiff, and defendant appeals. Affirmed.

S. F. Geil and C. F. Lacey, for appellant. Atty. Gen. Fitzgerald and Renison & Jones, for the People.

TEMPLE, J. This action is for usurpation of the office of mayor of Salinas City. The city was reincorporated by special act of the legislature passed in 1876. In section 5 of that act it is provided, as to municipal elections, among other things, that "all provisions of law regulating elections for state and county officers shall apply, as far as practicable, to elections under this charter. The polls for all elections shall be opened at such hour as may be designated by the mayor and common council in giving notice of said election; provided, that the hour for opening the polls shall in no case be later than the hour of two o'clock p. m., and the polls shall not be closed until sundown of the same day." A municipal election was held on the 14th of March, 1898, at which Francee, at whose instance this suit was brought, and Hill, defendant, were candidates. The proclamation calling the election directed that the polls should be opened at sunrise and closed at sundown. The general election law for state and county officers directed that the polls shall be closed at 5 p. m. There are three wards in the city. In two they followed the state law, and closed the polls at 5 o'clock p. m., which was found to be one hour and six minutes before sundown. Counting the votes from all the wards, Hill would have a majority of 24, and he was declared elected by the council. Rejecting the votes cast in wards 1 and 2 as illegal, Francee would be elected by a majority of 22; and this conclusion was reached by the trial court, and Hill takes this appeal.

It is contended by the appellant that the language of the section, providing that, so far as practicable, the general election law shall apply, indicates the intent that the general law should govern all city elections. If this were so, it is difficult to see why anything was said in the charter about the time for opening and closing the polls, and in regard to many other things mentioned in section 5. It is suggested that it was intended to provide that the polls need not be opened until 2 o'clock p. m., but to make no change as to the hour of closing, for then the general law directed that the polls be closed at sundown, which time was afterwards changed to 5 o'clock p. m., and, we may add, might be changed to 2 o'clock p. m. But it seems perfectly manifest that the permission given to the council by its proclamation to fix a later hour for the opening of the polls than that fixed in the general law, and the requirement that the polls must not be closed before sundown, are parts of the same provision. The absolute requirement is because of the power given the board to delay opening the polls. Where but few votes would be cast, it is not necessary that the polls should be kept open all day; but it is a wise provision which directs that, even then, voters may know that at all events the polls will be kept open for a certain designated portion of the day. Even if this were not so, there is no more ground for holding that the provision that the council may designate a different time for opening the polls than that fixed by the general law shall stand as an exception, than that the imperative requirement of the charter that the polls shall not close before sundown shall exist as an exception, notwithstanding the general law. As already stated, both are coupled with the provision making the general law applicable, and are purposeless if notwithstanding the general law is to control in such matters; for the general election law must always provide for opening and closing the polls. The charter, being a law for a special case, is not in conflict with a general law which provides otherwise. Even a general law subsequently passed does not repeal laws expressly made for special cases, unless an intent that the general law shall have such effect is manifested in some mode in the general law. This intent may be shown in various ways, but assuredly cannot be found in a statute which is expressly made applicable to state and county elections only. The decisions rendered in Staude v. Commissioners, 61 Cal. 313, Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615, People v. Henshaw, 76 Cal. 436, 18 Pac. 413, and other cases cited, have no bearing whatever upon this matter. In those cases the statutes expressed a design to control and repeal the special laws, and the only questions considered were as to the power of the legislature to pass such laws,—not as to the construction of the statutes. Here it is the charter which makes the general law applicable so far as it is so, for in form and words the general law excludes the idea that it has any application to the charter election. Provision in a statute for a special case is not deemed repugnant to the general law, but an exception. But as the general law is in terms not applicable to this particular case, and the attempt is to show that it is expressly made applicable by the special law, neither the decisions cited nor the rule of interpretation are of consequence here.

It is said that under the ruling a majority of the voters are disfranchised, and that under such circumstances no one should be declared elected. No authority is cited for this proposition, and clearly it is for the legislature to determine the effect of such a failure. Whichever way the rule is made, unscrupulous managers can take advantage of it to defeat the popular will, if they are permitted so to do. It is not like the case where a majority of votes are cast for one who is ineligible. There the votes are legally cast and counted, but a person has been elected who is not qualified to serve, and it is also true that the opposing candidate did not receive a majority of the legal votes. There the votes may be canvassed, and full return made of the result, which will be received and counted; but in this case the election in the offending precincts is declared void, and no election was held therein. There are therefore no returns to canvass. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(125 Cal. 57)

FOX v. MACKAY et al. (S. F. 1,039.)[1]

(Supreme Court of California. June 14, 1899.)

CORPORATIONS—CONTRACTS—DUTY OF STOCKHOLDERS.

Stockholders of a corporation, who do not control its directors, owe no duty to the corporation not to conceal from the directors the fact that they are interested in another corporation with which the directors of the former are about to make a contract, and hence such a contract is valid, notwithstanding such concealment.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Theodore Fox against John W. Mackay and others. From an order denying a motion for new trial, plaintiff appeals. Affirmed.

H. G. Sieberst, for appellant. W. E. F. Deal and Edmund Tauszky, for respondents.

GAROUTTE, J. Plaintiff brings this action as a dissatisfied stockholder and on behalf of the Consolidated California & Virginia Mining Company, which corporation is made a party defendant. The defendant the Comstock Mill & Mining Company was never served with process, and is not interested in the litigation. John W. Mackay and John P. Jones are the real parties defendant. The corporation represented in this litigation by plaintiff has 216,000 shares. Plaintiff is the owner of 5 shares of this stock. By the bill a conspiracy is charged against Mackay and Flood to defraud the Consolidated California & Virginia Mining Company. It is claimed that at all times prior to Flood's death Mackay and he controlled this mining corporation, and that subsequent to Flood's death Mackay alone controlled it. That upon December 23, 1885, the mining company entered into a three-years contract with J. P. Jones for the milling of its ores; that this contract was entered into by the connivance and procurement of Mackay, Flood, and Jones; that Mackay and Flood were interested with Jones in the profits of the contract, and also controlled the directors of the mining company, and that the contract was greatly to the disadvantage and loss of the mining company, and that by Jones' contract he agreed to transport the ore from the dump to the mill and mill the same for six dollars per ton, returning to the mining company at least 70 per cent. of the pulp assay. It is next alleged that upon January 8, 1886, the Comstock Mill & Mining Company was organized by Jones, Mackay, and Flood, and that this milling contract was thereupon assigned to said milling company. It is further charged that upon December 24, 1886, this milling contract was modified and changed at the instigation of Mackay, Flood, and Jones, to the great loss of the mining company. It is further alleged that 41,000 tons of ore were milled, and less than 70 per cent. of the pulp assay returned upon such ore. By the bill, reduced to its lowest terms, it is claimed that Mackay and Flood are the moving, controlling parties in both corporations, and by the contract of milling and the unskillful and careless manner of milling, and by violations of the contract of milling, they defrauded the mining company out of immense sums of money. After the introduction of evidence upon issue joined, findings of fact were made by the trial court. These findings of fact are strong against the allegations of the bill, and, unless overthrown, stand as a stone wall forever barring a recovery by the plaintiff. Realizing these conditions, plaintiff has assaulted the findings as without support in the evidence. A few errors of law in the admission and rejection of evidence are relied upon by plaintiff, but we find them of such minor importance as not to demand consideration.

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[1] Rehearing denied July 11, 1899.

Defendants also urge certain grounds as fatal to plaintiff's cause of action. It is claimed that plaintiff was not a stockholder upon the books of the mining corporation at the times these various frauds are alleged to have been committed. It is said that the record discloses plaintiff to be a mere speculator and professional litigant, making this class of litigation a specialty, and that he purchased these five shares of stock of the corporation for the sole purpose of giving him a status as a party plaintiff, and that, therefore, he has come into a court of equity with bad motives. It is urged that plaintiff made no demand upon the corporation to bring the action. Laches is also relied upon, and likewise ratification by the stockholders is claimed. Although some of these defenses present interesting legal propositions, we pass them by with little discussion in view of the conclusion arrived at after an examination of the evidence and findings of fact. The record largely justifies the claim of defendants as to the somewhat equivocal position plaintiff occupies in this case. It is not entirely plain that he is one of those dissatisfied stockholders whom the law had in mind when it authorized such a one to inaugurate this character of litigation. Plaintiff's good faith in bringing the action is to some extent an open question. It is not conclusively shown that the best interests of the corporation were the moving factors in his mind in prosecuting this suit. These statements are justified when we consider that plaintiff, as the holder of 5 shares of stock of the corporation, stands alone, for, as far as we may be allowed to see, the holders of the remaining 215,995 shares are entirely satisfied with the corporation's past business management. They are fairly justified, in view of the fact that plaintiff held this particular five shares of stock but for a single month, and purchased them for the purpose of giving him a standing as plaintiff in this action, and also in view of the further fact that he brought five other actions of the same character against five other mining corporations upon the date that this complaint was filed. The findings are full and complete, and cover every substantial allegation of the bill. We see no good purpose to be subserved by setting forth in this opinion a detailed recital of the evidence which tends to support these findings, but might well content ourselves in saying that, after a careful reading of the record, we are satisfied that the trial judge was justified, under the evidence, in finding the facts as they are set out. If the case were to be reversed by reason of the insufficiency of the evidence, then, for the guidance of the trial court upon a second trial, we would point out in detail where the weak spots are found. But the rule may well be otherwise when the court deems the evidence sufficient. Yet, in view of the importance of the litigation, and the labor involved in the trial and the preparation of the record upon appeal, a few of the most important contentions of plaintiff will be noticed.

As to the milling contract of December, 1885, entered into with the mining company by Jones, the court has found that it was a fair contract for the mining company, and was honestly performed, and there is an abundance of evidence to support that finding. Indeed, there is hardly a substantial conflict of evidence upon the issue. If the contract made was a fair contract, and honestly performed, it would seem to be immaterial as to the part Mackay, Jones, and Flood took in making it. But, waiving the question as to what a court of equity might do with them if they had participated in the making of the contract, we find any participation absolutely denied by the evidence of both Mackay and Jones. Mr. Mackay testifies: "That at no time since November 17, 1883, either individually or with others, did he own or control a majority of the stock of the defendant. That he has not since that time taken any part in any election of any board of directors of the company, or attempted to control any action of the board of directors, or any member thereof. That he had nothing to do with their election, or influencing the stockholders or anybody else as to who should be elected, and never asked a shareholder for a proxy. I never asked or requested Mr. Havens, or anybody else connected with the company, to get proxies to be used at any stockholders' meeting. I have attended no meeting of the board of directors of the company since November 17, 1883." Mr. Jones testified: "I have taken no part whatever in the election of any board of directors of the company. I never spoke to any of the directors about their becoming directors, nor have any of them ever spoken to me; have never done anything to secure the control of the board of directors of either of these companies; had nothing to do with it; never took any interest in it; could not have told you who they were. I have not procured, either directly or indirectly, in any manner, shape, or form, the election of any director of the company, or made any attempt to do such a thing; never made any attempt in any manner to control the action of any board of directors of either of the companies that I have mentioned. I have never controlled, or sought to control, the affairs of the mining company, and I have never taken any part in its affairs at all." It is sufficient to say that the finding of the trial court was directly in line with this testimony.

The transactions evidenced by this litigation cover a period of 71 months. During that time there were four months when the milling company failed to return to the mining company 70 per cent. of the pulp assay.

But these returns were not greatly below 70 per cent., and when we consider that many other months intervened between each of the respective four months, the failure at those times to return 70 per cent. becomes immaterial, for it is disclosed by both evidence and findings that the actual per cent. of the return by the milling company cannot be determined at the end of a single month, unless the run terminates at that time. This is accounted for by the reason of the clean-up made at the end of the run which raises the average of the return for every month during the run. Such was the fact in this case, as is disclosed by both evidence and finding. During this period of 71 months there were 4 months in which the returns were over 90 per cent. of the pulp assay, and 42 months in which those returns were between 80 and 90 per cent. Under this showing there is nothing whatever to indicate fraud in the milling of the ore, and nothing whatever to furnish any reason why a stockholder of the mining company should be dissatisfied.

The milling contract of December, 1885, was modified by the parties in December, 1886. It appears that during the year 1885 large bodies of richer ore were found, and for this reason and others—as, for example, the increase in the price and quantity of quicksilver required to mill the richer ores—the contract was modified, whereby the milling company received compensation for transportation and milling based upon a scale per ton according to the richness of the ore. This contract is declared by the trial court to be a fair one, and to be honestly and faithfully carried out. The evidence fully supports the finding. Even conceding that the evidence discloses a few instances where the milling company charged seven dollars per ton when they should have charged but six dollars, still there is nothing in such fact alone to indicate fraud. Indeed, it would seem that, if mistakes of this character did occur, the balance of the account resulting therefrom stands in favor of the mining company.

In view of the fact that neither Mackay nor Flood was ever a director of the mining company, and in view of the further fact that the findings supported by the evidence declare that neither collectively nor individually did they control the directors of the mining company, it would seem that many of the matters raised upon the motion for a new trial and discussed in appellant's brief become immaterial. Indeed, such findings supported by the evidence would seem to almost undermine plaintiff's entire case. Certainly, upon such a state of facts, the discussion of various matters of fact and law raised in appellant's brief become unnecessary. Plaintiff insists that the intentional concealment by Mackay and Flood of their interest in the contract of the milling company should weigh strongly against them. Yet conceding this claim of concealment to be true, still these men were not directors of the mining corporation, nor did they control its directors; and as mere stockholders they owed it no duty. Again, for the same reason, the ruling of the court relating to the admissibility of Holden's evidence as an expert could not possibly prejudice plaintiff's case. In fact, it would seem that some of the questions we have already discussed and declared against appellant's contention could well have been disposed of upon this ground. After a careful examination of the record, we see nothing which demands a retrial of the case. For the foregoing reasons, the order is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(125 Cal. 54)

FOX v. MACKAY et al. (S. F. 1,015.)[1]

(Supreme Court of California. June 14, 1899.)

CONTRACT FOR MILLING ORES—CONSTRUCTION—ACTION FOR ACCOUNTING.

1. Under a contract for milling ores which provides that "said ores, rock, and earth shall be worked in the usual and ordinary manner of working like ores, and returns therefrom shall not be less than seventy (70) per cent. of the pulp assay," the return is for an average of 70 per cent., and not on each ton of ore furnished.

2. Defendant contracted to mill ores furnished by plaintiff, and return 70 per cent. of the pulp assay. Plaintiff sued for an accounting, alleging fraud and conspiracy, and that less than 70 per cent. was returned by defendant on a certain number of tons of ore furnished. There was no allegation that the 70 per cent. had reference to the pulp assay, or how much it fell short of 70 per cent., or when the ore was furnished. *Held*, that such complaint was insufficient.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Theodore Fox against John W. Mackay and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. G. Sieberst, for appellant. W. E. F. Deal and Edmund Tauszky, for respondents.

GAROUTTE, J. This action is brought by Fox, a dissatisfied stockholder of the Consolidated California & Virginia Mining Company (a mining corporation), in behalf of the corporation, against the Comstock Mill & Mining Company, J. W. Mackay, J. P. Jones, and the Consolidated California & Virginia Mining Company. Mackay and Jones are the real defendants in interest. By the complaint, conspiracy and fraud are alleged against Mackay and Jones in the milling of the ores of the Consolidated California & Virginia Mining Company, and an accounting is asked. Under the contract entered into between the mining company and the milling company and Jones, by which the ores were to be milled, it was provided: "Said ores, rock, and earth shall be worked in the usual and ordinary manner of working like ores, and returns therefrom shall not be less than seventy (70) per cent. of the pulp assay." This appeal is taken from the judgment rendered against plaintiff, and the sole question raised revolves around a single allegation of the complaint, taken in connection with certain denials and allegations of the answer relating to the same subject-matter.

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[1] Rehearing denied July 11, 1899.

Plaintiff alleges that 734,000 tons of ore were milled under the said contract with Jones and the milling company, and, after alleging various other matters, declares: "And for the fraudulent purposes above stated said ores were milled and crushed by the said Comstock Mill & Mining Company in a very superficial and imperfect manner, so that an unusually small percentage of the precious metals was extracted therefrom and returned to the said Consolidated California & Virginia Mining Company, and plaintiff enumerates that less than seventy (70) per cent. was returned by said milling company to the said Consolidated California & Virginia Mining Company for more than 41,225 tons of the ore of the said Consolidated California & Virginia Mining Company, milled and reduced by the Comstock Mill & Mining Company." It is now claimed that this allegation of the complaint is admitted, and that by reason of such admission a breach of the contract as to a return of 70 per cent. of the pulp assay is shown, and that, therefore, judgment to that extent, at least, should have gone for plaintiff. For various reasons there is no merit whatever in the point urged. Passing, for a moment, the sufficiency of the denials found in the answer bearing upon this allegation of the complaint, we are satisfied the allegation itself is not sufficient to support a judgment. First, there is no statement in the allegation that the "seventy per cent." has any reference whatever to the pulp assay. As far as the allegation indicates, it may have been any other assay. Again, invoking the rule that the pleading should be construed against the pleader, we may assume that this shortage under 70 per cent. was the smallest fraction of 1 per cent., and, such being the case, the rule of "de minimis" would bar a recovery. Again, by any construction of this covenant in the contract, it may be fairly assumed that upon an honest and modern milling of the ore the milling company was bound to return an average of at least 70 per cent. of the pulp assay. Whether this average was to be based upon the daily or monthly output milled, or based upon the output for the entire life of the contract, we are not concerned; for it is plain that the milling company was not bound to return at least 70 per cent. of the pulp assay on each particular ton of ore milled. This is apparent, for no mode or means is provided under the contract by which such figures could be obtained. Indeed, the whole history of working and milling ore is opposed to any such construction of the contract.

We find no allegation that these 41,000 tons of ore were milled in any particular day or month or year. The pleading does not contradict the conclusion that the milling of this particular ore was scattered along at regular or irregular intervals throughout the entire life of the contract. If this allegation of the complaint is not strengthened by the allegations of the answer, we hold it insufficient; and the allegations of the answer, upon careful consideration, weaken, rather than strengthen, plaintiff's pleading. While we find a direct admission in the answer that for four certain months the return to the mining company was less than 70 per cent. of the pulp assay, yet we find the further allegation, "And that while the average for said months was less than 70 per cent., as above specified, yet the returns from all of the ore worked during said months were not less than 70 per cent. of the pulp assay; and that said average was made up in the succeeding months." It thus appears that, while the monthly returns for these four months fell below seventy per cent. of the pulp assay, yet thereafter additional returns came in from the ores milled during these months, which brought the percentage within the stipulations of the contract. For the foregoing reasons the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

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125 Cal. 72

ALLISON v. BOARD OF EDUCATION OF CITY OF SAN BERNARDINO SCHOOL DIST. et al. (L. A. 521.)

(Supreme Court of California. June 15, 1899.)

VETERANS—APPOINTMENTS IN PUBLIC SERVICE.

Act March 31, 1891, entitling a veteran of the war of the Rebellion to preference in appointment in the public service, does not entitle a veteran to a writ of mandate compelling a board of education to appoint him as janitor of a school building, where he fails to show that he is the only veteran desirous of the appointment.

Department 1. Appeal from superior court, San Bernardino county.

Proceeding in mandate by H. J. Allison against the board of education of the city of San Bernardino school district and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rolfe & Rolfe, for appellant. Jas. Hutchings, F. C. Chapman, and J. W. Stephenson, for respondents.

GAROUTTE, J. This is a proceeding in mandate to compel the board of education of the city of San Bernardino school district to prefer the plaintiff for appointment and employment as a janitor of the high school building of said city, and to retain and continue him as such, under an act of the legislature, approved March 31, 1891; he being an honorably discharged ex-Union soldier of the war of the Rebellion. This act is entitled "An act to provide for, insure and maintain preference in the appointment, employment and retention in public service and public works of the state of California, of honorably discharged ex-Union soldiers, sailors and marines of the war of the Rebellion." The petitioner was employed for the period of one year as janitor, and a few days prior to the expiration of the term was discharged and another party appointed to the place. After the expiration of the year, he began this proceeding. A demurrer was sustained to the petition, and this appeal was taken from the judgment entered thereon.

Respondents advance many reasons why the action of the trial court should be sustained. We will notice but a single one. The life of petitioner's contract with the board of education having expired before this proceeding was inaugurated, the purpose of the writ can only be to compel his appointment to the position by the board of education. But it appears that no vacancy exists in the position, and therefore the mandate sought must not only order an appointment of petitioner, but must first oust the present incumbent, and thereby create a vacancy. Even assuming that the scope of the writ of mandate may be so broad, still the showing made by the petition is not sufficient. If only a man with the qualifications of petitioner is entitled to the place, and the party filling the place has not those qualifications, still these facts alone do not show a case where petitioner is entitled to the writ. If a man filling the demands set forth in the act of the legislature has the preference, then this petitioner does not show but that there are hundreds of men possessing the qualifications that he possesses who are ready and willing and anxious to be employed as janitor by this board of education. If there be other ex-Union soldiers equally qualified with petitioner, he has no absolute right to the place, and the board cannot be compelled by mandate to appoint him. In other words, he would only be entitled to the writ upon a showing made that he was the only man coming within the provisions of the act who was desirous of the appointment. The petition before us entirely fails to make such a showing. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

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124 Cal. 677

HUTCHINSON et al. v. HUTCHINSON.

(S. F. 1,173.)

(Supreme Court of California. June 6, 1899.)

PARENT AND CHILD—ABUSE OF PARENTAL AUTHORITY—EVIDENCE—FINDINGS.

1. On returning after an absence of several months, a father found that his two daughters had, without his authority, drawn his wages and spent them, whereupon he whipped them. The next morning he again whipped them, and kicked one of them, because breakfast was not ready at the usual time. The daughters then ran away, and, after staying at a hotel for one day, were arrested. The father took them home, struck them, and sent them to bed. Shortly afterwards he missed a watch, and, the answers of the girls to his questions concerning it being unsatisfactory, he gave them a severe beating, using a cane and poker. One of the daughters testified that her father knocked her down, kicked her, and punched her in the stomach with his fist. The father admitted that he frequently whipped them with a cat o'nine tails. He had, before they ran away, thrown a teacup at one of them, struck one with a hammer, and on another occasion with a frying pan; his punishment leaving marks on the girls. *Held*, that the father had abused his parental authority, within Civ. Code, § 203, authorizing the freeing of the child from parental dominion, and compelling support, where a parent abuses his parental authority.

2. A finding that a father has brutally chastised his children, without sufficient cause; that on a certain occasion, believing the children had lied to him, he beat them in a manner wholly unnecessary; and that he had at various times brutally and unnecessarily beaten and otherwise abused them, using his fists, a frying pan, an iron hammer, a cat o'nine tails, etc.,—is not a conclusion of law, but a finding of fact, which warrants a judgment freeing the children from the parental dominion of their father, and requiring him to contribute for their support and education, under Civ. Code, § 203.

3. On an issue whether a father, in punishing his children, abused his parental authority, evidence of particular instances of falsehood and deception, practiced by the children on the father at a time prior to the alleged abuse of parental authority, are inadmissible, where the evidence fully disclosed their conduct at, and immediately preceding, the time in question.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Helen Eleanor Hutchinson and another, infants, by their guardian ad litem, against Joseph W. Hutchinson. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

W. T. Satterwhite (O. F. Meldon, of counsel), for appellant. Price & Braun, for respondents.

GRAY, C. The respondents are the twin daughters of defendant. Their age at the time of the trial was 16 years. They base this action against their father upon section 203 of the Civil Code, which provides as follows: "The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, * * * and when the abuse is established the child may be freed from the dominion of the parent, and the duty of support and education enforced." The judgment is that plaintiffs be freed from the parental dominion of their father, and that he pay to their guardian $25 a month for their support and education. From this judgment, and from an order denying a new trial, defendant appeals.

The evidence shows that defendant is a hard-working man, a machinist by trade, and as such earns from $60 to $80 a month; that his wife died some 10 years before the trial of this case, and that since her death he has had sole care of plaintiffs, until they ran away from home; that his family of late years has consisted of these two girls and his son Willie, who was some 10 or 12 years of age at the time of the trial; that defendant, by reason of his occupation, was necessarily away from home much of the time. In December, 1895, the father was obliged to leave his home in San Francisco, and remain absent from the city for several months. During such absence the daughters drew his wages from his employer, and invested much of them in clothes and theater tickets. When the father returned, and learned of this, he upbraided his daughters, whipped them, and sent them to bed. On the next morning he again whipped them, and kicked one of them, because they did not have breakfast ready at the usual time. They then decided to run away, and hid themselves in the basement of their dwelling, where they staid three days; after which they went to the Orlando House, and, after staying there one night, they were arrested by the police, and taken to the police station, and from there the father took them home, accused them of having men with them at the Orlando House, which they stoutly denied, struck them with his hand, and sent them to bed. A few days after this, in March, 1896, the defendant missed a silver watch, and inquired of the daughters concerning it. Their answers were unsatisfactory to him, whereupon he charged them with lying, and gave them an unmerciful beating, using therein a cane and a poker. The plaintiff Helen testifies that in the course of this beating the defendant took her by the throat and knocked her on the floor, kicked her on the side, and punched her in the stomach with his fist, and left her partially unconscious. The next morning the daughters ran away again, and lived for three weeks thereafter under the stairs leading to an empty house on Folsom street, when they were again taken in charge by the police, and conveyed to the city prison at the New City Hall. The defendant called on them there, and told them he would not take them home again, but would turn them over to the police authorities. Their father now becoming discouraged in his efforts to keep his daughters under control, they were, by his consent, taken to the Hill Home; from which place early in June, 1896, they were taken by their guardian ad litem herein, Mrs. Burnett, to her home on Broadway street, in San Francisco, their father agreeing to pay her $25 a month for their support. From that time down to the commencement of this action, some four months later, the children remained with Mrs. Burnett, to whom they have become much attached, and she desires them to remain with her. She testified that the children are mild mannered and gentle, and seem to be much in fear of their father. The father and daughters have been on friendly terms, and have gone walking together, and have corresponded, and he has visited them since they have been with Mrs. Burnett; but it appears he finally concluded that Mrs. Burnett was trying, in his own language, "to rule over" him in the matter of what the children should wear, and he threatened and intended to take the children away from her, against the will of all concerned except himself. There is also evidence tending to show that a short time prior to the children running away the defendant had thrown a teacup at one of them, and had struck one of them with a hammer, and at another time had thrown a frying pan at one of them; that he frequently whipped them with a leather strap about 18 inches long, an inch wide, slitted at the ends, and denominated a "cat o'nine tails." It also appears from defendant's testimony that this strap had been a cherished instrument of punishment in the family from the infancy of defendant's oldest child, now a young man some 25 or 26 years of age. It further appeared that from the whippings and beatings they received the girls sustained black and blue spots, bruised, swollen, and sore places on their bodies.

On this evidence the court found, as to defendant's treatment of plaintiffs, as follows: "That plaintiffs are mild, gentle, well-behaved, and obedient children. That defendant has not, at all times, treated the plaintiffs herein with the utmost kindness and affection, but, on the contrary, that he has cruelly and brutally chastised them, without sufficient cause, and in a manner wholly unnecessary to the enforcement of proper discipline. That the allegation in defendant's answer that he administered to said plaintiffs moderate and reasonable chastisement, in order to induce them to speak the truth concerning the whereabouts of a certain watch, which he believed them to have stolen, is untrue, but, on the contrary, on this occasion defendant cruelly and brutally kicked and beat said plaintiffs, in a manner wholly unnecessary to attain the ends which he sought. That defendant has abused his parental authority over said children, in this: That at various and numerous times during the months of February and March, 1896, he brutally, cruelly, unnecessarily, and with undue severity, beat, struck, and otherwise abused and maltreated them; that in said maltreatment, beating, and abuse he used his closed fists, a teacup, a frying pan, a strap, a cane, an iron hammer, an iron stove poker, and a cat o' nine tails."

It is argued on this appeal that the findings do not support the judgment; that there is no finding of facts as to the abuse of parental authority; and that the evidence does not support the findings. The judge of the trial court had all the parties interested before him, and was in a much better position than this court can be to judge, not only of the weight that should be given to the testimony of each of them, but also as to their character and disposition in other respects pertinent to the case. The first consideration of the trial court in a case of this character is, or should be, the welfare of the children. The statute upon which the action is based is enacted for the benefit and protection of children. The circumstances of the case, as developed by the evidence, were amply sufficient to convince the trial judge that the father had lost the confidence of his children, and with it the power to personally control them; for he admits that he despaired of controlling them further after they ran away the second time. This condition of affairs was undoubtedly the result of his harsh treatment of them. We deem it unwise for a father to attempt to control his daughters, of the age of 16 years, with a "strap slitted at the end," to say nothing of the frying pan and other instruments mentioned in the evidence; and when such an attempt results in a double failure, and the father thereafter seeks, against their will, to remove his daughters from the care of a woman who seems able to control them, without any showing that he has any other place for them, the trial court is fully warranted in the conclusion that such acts are an abuse of parental authority. The case made by the evidence is one which addresses itself peculiarly to the sound judgment and wise discretion of the trial court.

The findings of fact set out herein were not mere conclusions of law, as contended, but were amply sufficient, on the question of "abuse of parental authority," to support the judgment, and this is the only respect in which the sufficiency of the findings is challenged.

We see no error in the court refusing to allow defendant to prove particular instances of falsehood and deception practiced by plaintiffs prior to January, 1896. The court was fully enlightened as to their traits of character and disposition in that regard by the evidence as to their conduct more immediately preceding their running away from home. Seeing no reason to disturb the decision as it stands, and believing that the best welfare of plaintiffs is subserved thereby, I advise that the judgment and order denying a new trial be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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125 Cal. 21

LYNCH v. PEARSON. (S. F. 959.)

(Supreme Court of California. June 9, 1899.)

USE AND OCCUPATION—AGREEMENT OF SALE.

The doctrine that one who enters on premises, under an agreement or understanding that he is to be a purchaser, is not afterwards liable in an action for use and occupation, has no application where the entry is made under the owner, and the agreement of sale, which is afterwards rescinded, is with a mortgagee, whose title is acquired in subsequent foreclosure proceedings.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by William Lynch against Calvin Pearson. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. E. Church, for appellant. **Frank H. Short**, for respondent.

COOPER, C. Action to recover for use and occupation of premises. Judgment for plaintiff for $360. Motion for a new trial, which was denied. This appeal is from the judgment and order. The court below filed findings, and in the brief of the appellant no finding is attacked for insufficiency of the evidence, and we will therefore take the facts as found by the court below and as admitted by the pleadings. On December 14, 1892, defendant was living upon the premises described in the amended complaint, with his father, who was the owner thereof. Plaintiff was on said day the owner of a note secured by mortgage upon said premises. While defendant was so living upon said premises, and while plaintiff was so the owner of said note and mortgage, and on said 14th day of December, 1892, defendant and plaintiff entered into an agreement whereby plaintiff agreed to foreclose his said mortgage, and to bid in the lands therein described, and upon receipt of a sheriff's deed to execute to defendant a deed to said premises, subject to a certain prior mortgage held by one Gray, and to take and receive from defendant his note and mortgage for the amount due the plaintiff on such foreclosure proceedings; and in consideration thereof the defendant agreed to pay the costs and attorney's fees in the foreclosure proceedings. According to the agreement, plaintiff proceeded to foreclose the said mortgage, and on the 24th day of April, 1893, purchased the same at sheriff's sale, and received the usual certificate. Defendant was in possession of the premises at the time he made the said agreement, and never entered into possession thereof through or under plaintiff. After the plaintiff began foreclosure proceedings, and as necessary costs and attorney's fees in connection therewith, he paid the sum of $192.50, of which sum defendant paid $140 only. About October 1, 1893, the defendant and plaintiff rescinded the former agreement of December 14, 1892, and mutually released each other from the obligations thereof. After April 24, up to October 24, 1893, the defendant continued in the possession of the premises, and received the rents, issues, and profits thereof, and the value of such use and occupation during such time, to wit, from April 24 to October 24, 1893, was the sum of $500. There was not at any time any agreement between plaintiff and defendant as to the payment of rent, and the plaintiff never released the defendant from any obligation to pay rent. At the time the agreement of December 14, 1892, was made, the plaintiff had no title to the premises therein referred to, and defendant never entered into possession under said agreement. The court below deducted the sum of $140, which had been paid by defendant to plaintiff under the agreement of December 14, 1892, from the value of the use and occupation, and gave judgment for

$360, and we think the judgment is correct. It gave the defendant the benefit of the $140 which he had paid on the contract that had been canceled; and while, perhaps, the law in its strict construction would not have compelled it to be so applied, the court, in a spirit of equity, did so apply it. Appellant contends that the doctrine of vendor and vendee applied as between the plaintiff and defendant after December 14, 1892. It is the general doctrine that one who enters by virtue of an agreement or understanding that he was to be a purchaser is not afterwards liable in an action for use and occupation, but the doctrine does not apply to defendant in the case, for the reason that he did not enter under a contract with plaintiff. On December 14, 1892, defendant was already in possession of the premises by permission of his father, who was the owner of them. Plaintiff was not the owner, nor entitled to the possession, and hence had no power to put defendant in possession. The defendant testified that, after making the agreement with plaintiff, he leased the premises of his father. The agreement made with plaintiff was in fact an agreement by which the plaintiff was to take legal proceedings, and thus attempt to get the title. The defendant agreed to pay the cost of such legal proceedings, and plaintiff, if successful in getting the title, was then to convey to defendant on certain terms specified. Before the defendant had paid all the costs of such proceedings, and before the title had passed to plaintiff, the contract was rescinded by mutual consent. Plaintiff was the purchaser of the property at foreclosure sale. It was never redeemed. Defendant was the tenant in possession at the time of the sale, and so continued until the time for redemption expired. The value of the use and occupation was $500. These facts entitled the plaintiff to judgment. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(125 Cal. 65)

McKAY v. McKAY. (S. F. 1,059.)[1]

(Supreme Court of California. June 14, 1899.)

DIVORCE—JURISDICTION TO MODIFY DECREE—SUPPORT OF CHILDREN—EFFECT OF DECREE ON FATHER'S LIABILITY.

1. Under Civ. Code, §§ 138, 139, providing that the court may, before or after judgment, give directions for the custody of the children, and, when the divorce is granted for the husband's offense, compel him to provide for their maintenance, and may from time to time modify its orders, where the original decree, granted for the husband's fault, awarded the custody of the children to the mother, but made no provision for their maintenance, the court cannot thereafter modify the decree, and compel the husband to pay for their past or future maintenance.

2. Under Civ. Code, § 209, providing that, "if the husband receives his wife's children by a former husband into his family and supports them, it is presumed he does so as a parent," a divorced father of children in the lawful custody of their mother is not liable for their support in the family of her second husband.

3. Under Civ. Code, § 138, providing that "the court may before or after judgment give such direction for the custody, care and education of the children as may be necessary," where children in the lawful custody of their divorced mother have been supported by the voluntary act of herself or her second husband their father cannot be compelled to pay therefor.

Department 1. Appeal from superior court, city and county of San Francisco.

Petition by Emma J. McKay against Angus McKay for an order requiring him to pay for the past support of children awarded to her custody by a divorce decree. From an order granting the petition, the defendant appeals. Reversed.

W. S. Goodfellow, for appellant. E. P. Cole, for respondent.

HARRISON, J. A decree of divorce was rendered May 29, 1884, between the parties hereto, upon the application of the plaintiff, and for the offense of the defendant; and by the decree the care, custody, and control of the two minor children of the marriage, then aged 5 and 3 years, respectively, were awarded to the plaintiff. No provision was made in the decree for the maintenance of the children, or for the support of the wife. In 1886 the plaintiff became the wife of R. S. Polastri, and thereupon her husband took the children into his family, and subsequently brought them up and supported them as members thereof. March 2, 1897, the plaintiff filed in said cause a petition to the superior court for an order requiring the defendant to pay certain moneys for the past support of each of said children, and also for their future maintenance and education. After a hearing thereon, the court made an order requiring the defendant to "pay to the plaintiff the sum of three thousand seven hundred and fifty dollars for the past care, maintenance, education, and support of said minor children, and also the further sum of one hundred dollars a month until the further order of the court for the future support, education, and maintenance of said minor children." From this order the defendant has appealed.

1. Whether the court was authorized to modify the judgment entered in 1884 by adding thereto the provision requiring the defendant to provide for the care, custody, and education of the children, is to be determined by a construction of the provisions of the Code upon this subject. In jurisdictions where procedure is not regulated by statute, but is according to the rules and practice of the court, such authority is maintained upon the ground that, when chancery has once acquired jurisdiction over the subject-matter, it will continue to exercise that jurisdiction so long and as often as occasion shall require, for the purpose of making its decree effec-

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[1] Rehearing denied July 11, 1899.

tive. Holt v. Holt, 42 Ark. 495; Plaster v. Plaster, 47 Ill. 290. But, where the procedure is regulated by statute, courts have not this inherent power, and their jurisdiction over the subject-matter of the action, as well as over the parties, terminates with the entry of final judgment therein, except for the purpose of enforcing the judgment and carrying out its provisions, or for correcting any mistakes in the record upon proper application therefor. The judgment becomes final upon its entry, not only as to the matters actually determined, but also as to every other matter which the parties might have litigated in the cause and have had decided. Kamp v. Kamp, 59 N. Y. 212. In a majority of the states, however, express authority is given to the court by statute to make changes in its judgments from time to time as circumstances may justify. See Buckminster v. Buckminster, 38 Vt. 248; Campbell v. Campbell, 37 Wis. 206. But the changes which may thus be made are limited to the cases and conditions expressed in the statute by which they are authorized. In Erkenbrach v. Erkenbrach, 96 N. Y. 456, after holding that this authority in that state is purely statutory, the court said: "The statute carefully defines the various causes for which a divorce may be allowed, the relief which may be granted in such actions during the pendency thereof, and by its final decree, and the cases in which the courts may make further orders. The legislature has assumed to legislate upon the subject, and has defined the purposes for which an order may be made by the courts after final decree. By expressly authorizing an order to be made after judgment providing only for the 'care, custody and education of the children of the marriage,' it has impliedly prohibited such an order for any other cause." To the same effect is the provision of section 4 of the Civil Code of this state, which declares, "The Code establishes the law of this state respecting the subjects to which it relates." The Codes, however, are to be construed as a single statute; and upon this subject section 577, Code Civ. Proc., must be read in connection with sections 138 and 139 of the Civil Code. These sections are as follows:

"Sec. 138. In an action for divorce the court may before or after judgment give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

"Sec. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects."

In Howell v. Howell, 104 Cal. 45, 37 Pac. 770, it was held that, when the original decree of divorce made no provision for an allowance to the wife for her support, the court had no jurisdiction thereafter to make an order compelling the husband to pay alimony to her; that, if no order for its payment was included in the decree of divorce, there was nothing to "modify"; and that such subsequent order was void. Under the reasoning in that case it must be held that, by the failure to make provision in the decree for the maintenance of the children, the court had no authority under this section to make the order appealed from. The decision in Wilson v. Wilson, 45 Cal. 399, cited by the respondent, was made prior to the adoption of the Codes, and under a statute which expressly authorized the court to make an order subsequent to the judgment for the maintenance of the children of the marriage (St. 1851, p. 187, § 7), but cannot be regarded as an authority under the different provisions of the Code. Whether the court has power under section 138, Civ. Code, to make such subsequent order for the "care, custody and education" of the children, was not involved in the case of Howell v. Howell, and was expressly stated in the opinion therein not to have been considered. The statutes of New York (2 Rev. St. p. 148, § 59) contain provisions similar to those of section 138, Civ. Code; and in Erkenbrach v. Erkenbrach, supra, it was held by the court of appeals of that state, in construing this section of the statute, that as it authorized the court to make an order after judgment for the "care, custody and education" of the children of the marriage, it must be assumed that provision for the expenses reasonably to be incurred for the accomplishment of these objects was within the intention of the legislature in framing the section. This ruling was followed in McKay v. Superior Court, 120 Cal. 143, 52 Pac. 147, wherein it was determined that under the provisions of section 138, Civ. Code, the superior court had jurisdiction to entertain the application of the plaintiff, and to make an order thereon.

2. McKay v. Superior Court was an original application to this court for a writ of review, and the only question presented for consideration was the jurisdiction or power of the court to make the order; but whether the facts before the court justified it in the exercise of this power, or whether the order was broader in its scope than was justified by the evidence provided therefor, was not involved or presented for consideration. These questions are presented upon the present appeal, and, upon an examination of the evidence before the superior court, we are of the opinion that it was not authorized to include in its order any direction for the payment by the defendant of the expenses incurred prior to making the application. It clearly appears from the bill of exceptions that Mr. Polastri immediately upon his mar-

riage with the plaintiff took the children into his family, and that since that time he has cared for them, and paid all the expenses of their support and education; and the plaintiff testified that, so far as any compensation for past support is concerned, it would be to recompense Mr. Polastri for moneys that he has spent upon these children. Section 209, Civ. Code, provides: "The husband is not bound to maintain his wife's children by a former husband; but, if he receives them into his family and supports them, it is presumed that he does so as a parent; and where such is the case they are not liable to him for their support, nor he to them for their services." The plaintiff does not claim to have expended any money in the support or education of the children, other than that expended by Mr. Polastri, and under the provisions of this section he could have no claim upon the defendant for his support of the children. The provisions of section 138 cannot be made a substitute for an action, or give to him the right to assert through the plaintiff a claim which he could not himself make. Johnson v. Onsted, 74 Mich. 437, 42 N. W. 62. The provisions of section 138 are in their nature prospective, and the use of the term "direction" instead of "payment" implies that the action of the court is to be limited to the "care, custody and education" which the children are subsequently to receive under its directions. If the original decree had contained a provision upon this subject, such provision would have been the measure of the rights and liabilities of the parties to the suit, until the court should make some modification thereof; and, until the court had given some direction for the subsequent care and education of the children, there could be no liability on the part of the defendant for the expenses that might be incurred thereunder. Manifestly the court could give no direction for the care and education of the children prior to its order, and, in the absence of such direction, no liability would exist against the defendant, and no obligation could be created against him. In Kendall v. Kendall (Kan.) 48 Pac. 940, the minor children had been awarded to the mother, but no provision was made in the decree for their support. Subsequently, upon the application of the mother, the court directed the payment of a certain sum by the father for their support, and that this payment should commence at the date of the original decree. Upon appeal this portion of the order was reversed, and the court directed that the payments should commence at the date of the modification of the order, and not from the date of the original decree. In Washburn v. Catlin, 97 N. Y. 623, the general term had made an order requiring the defendant to pay the expenses incurred during the previous nine years, but the court of appeals modified this order by restricting such payment to the expenses incurred subsequent to filing the petition. The question of the father's liability for the care and support of his children after a decree of divorce, in which their custody has been awarded to the mother, has been frequently presented in actions brought therefor by strangers or by the mother, and courts have almost invariably held that an action against him to enforce such liability could not be maintained. Finch v. Finch, 22 Conn. 411; Ramsey v. Ramsey, 121 Ind. 215, 23 N. E. 69; Burritt v. Burritt, 29 Barb. 124; Harris v. Harris, 5 Kan. 46; Hancock v. Merrick, 10 Cush. 41; Brown v. Smith, 19 R. I. 319, 33 Atl. 466; Hall v. Green, 87 Me. 122, 32 Atl. 796. A contrary holding was made in Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471; but as was said in Brown v. Smith, supra, this case is opposed to the preponderance of American authorities upon the subject, and in a subsequent case in the same state (Fulton v. Fulton, 52 Ohio St. 229, 39 N. E. 727), the ruling therein was materially modified. So far as the right of the wife to recover for past expenses incurred by her is involved, the principle is the same, whether the application is made in an independent action, or through a motion in the original case. The jurisdiction which the court retains in the original case, either by express reservation in its decree, or which it has by authority of statute, to modify its judgment with reference to the custody and education of the children, or to make a new order in reference thereto, is not for the purpose of reimbursing her for any expenditures she may have voluntarily made in that behalf, but to provide for such expenses as may be subsequently incurred by reason of the direction that may be given regarding such care and education. The children are not parties to the litigation, and the jurisdiction thus retained, or which the court is authorized to exercise, is to be exercised in their behalf; but, if they have already been sufficiently cared for by the voluntary act of the mother or of strangers, the court is not empowered to compel the father to reimburse them for these expenses. See Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87; Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056. Section 208, Civ. Code, declares that "a parent is not bound to compensate the other parent or a relative for the voluntary support of his child, without an agreement for compensation." The order is reversed, and the superior court is directed to make such order in the premises as will be consistent with the views herein expressed.

We concur: GAROUTTE, J.; VAN DYKE, J.

125 Cal. 74

JOHNSON v. REED et al. (Sac. 539.)

(Supreme Court of California. June 16, 1899.)

JUDGMENTS—COLLATERAL ATTACK—MORTGAGES—FORECLOSURES—FRAUD.

1. The correctness of a judgment cannot be reviewed in an independent action on grounds available in the original action, which the party has sought to have reviewed by a motion for a new trial.

2. A judgment for plaintiff in a foreclosure suit is conclusive as against a collateral attack on the ground that the action was prematurely brought.

3. The fact that a third person induces the mortgagee to foreclose, though the former seeks to profit thereby by purchasing the property, is not a fraud on the mortgagor, so as to make such third person liable to him.

Department 1. Appeal from superior court, Butte county.

Action by one Johnson against one Reed and others to vacate a judgment of foreclosure and to cancel the execution deed. From a judgment for defendant Brooks, plaintiff appeals. Affirmed.

Geo. H. Maxwell and R. M. F. Soto, for appellant. L. L. Solomons, for respondent and defendants.

HARRISON, J. It is alleged in the complaint herein that in an action brought to foreclose a mortgage executed by the plaintiff to the defendant Brooks the defendants filed an answer setting up as a defense that the action was prematurely brought by reason of the fact that the time for the payment of the note secured by the mortgage had been extended to a date subsequent to the commencement of the action; that the cause was tried, and judgment rendered in favor of the plaintiff therein; that thereafter the plaintiff herein filed and served a notice of his intention to move for a new trial, and that a bill of exceptions based upon said notice had been settled, allowed, and filed in said action, and that an affidavit to be used on said motion had also been filed; that under said judgment the property described in the mortgage had been sold to the mortgagee, and a deed therefor executed to him; that, the proceeds of said sale being insufficient to satisfy the judgment, a judgment for the deficiency had been docketed against the plaintiff herein, and that an execution had been issued upon said deficiency judgment, and certain personal property sold by virtue thereof to one of the defendants herein. The complaint further alleges that prior to the commencement of said action the defendant, Charles W. Reed, induced the mortgagee to violate his agreement for the extension of payment and to commence the action for foreclosure before the said period of extension had expired, and agree with him that the said action should be prosecuted to final judgment and a sale thereunder, and that the property should be thereafter sold and transferred to him, the said Reed; that the mortgaged property was of much greater value than the amount of the mortgage debt, but that it was also agreed between them that upon the sale under the judgment a deficiency should be left, and that an execution should be issued upon said deficiency judgment, and certain personal property of the plaintiff herein sold thereunder; that the said agreement was carried into effect, and that all of the proceedings were had with the fraudulent purpose and design of said Reed to defraud the plaintiff of his interest in the mortgaged property. Plaintiff therefore asks a judgment vacating the judgment of foreclosure, and canceling and annulling the deed issued under the sale upon said judgment, and allowing him to redeem the property, and setting aside the sale of the personal property, and restoring him to the possession thereof. The defendant Brooks, who appears to be the only person served with the complaint, demurred thereto, and, his demurrer having been sustained, judgment was entered in his favor, from which the plaintiff has appealed.

1. It is not alleged in the complaint whether the motion for a new trial in the original action has been determined or not. In the absence of any averment upon the subject, it must be assumed that the motion is still pending and undetermined. The fact, as averred in the complaint, that one of the defendants therein had changed its attorneys, and that such attorneys had abandoned all the rights of that defendant upon the motion for a new trial, did not preclude the plaintiff herein from prosecuting his own motion therefor, or from appealing from the judgment therein. As all the facts upon which the plaintiff claims that the judgment of the court was unauthorized were set up in his answer to the foreclosure suit, it must be assumed that the court found that they were unsustained by the evidence. If such was not the fact, or if the judgment therein was rendered by reason of any error or irregularity in the procedure, such error must be cured through the proceedings for a new trial. If, however, it be the fact that that court has denied his motion for a new trial, the plaintiff must seek a review of that order by an appeal therefrom. The correctness of a judgment cannot be reviewed in an independent action upon grounds which were available to the litigant in the original action, and upon which he has sought to have it reviewed by a motion therein.

2. As the court, by giving judgment for the plaintiff in the foreclosure suit, must have found that the action was not prematurely brought, it is evident that the mortgagee, in bringing the action after the maturity of the obligation, was in the exercise of his legal rights, and that the action of Mr. Reed in inducing him to bring the suit was not with any fraudulent purpose, however much he may have sought to profit thereby. It may be added that the allegations in the complaint fail to establish any fraudulent purpose or conduct on the part of Mr. Reed. No fact is alleged which, either by itself or in connection with the other portions of the complaint, constitute a sufficient averment of fraud. The appeal

herein is without merit, and the judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

125 Cal. 32

SONOMA COUNTY v. STOFEN et al.

(S. F. 1,160.)

(Supreme Court of California. June 9, 1899.)

OFFICERS—CONVERSION OF FUNDS—ROBBERY—EVIDENCE—NEWLY-DISCOVERED EVIDENCE.

1. In an action on a county treasurer's bond for conversion of funds, to prove a defense of robbery the treasurer testified that in the morning, as he drew out the money trays, he was confronted by a man with an uplifted dagger, who ordered him to drop them; that this was the last he knew; that he felt no blow, but presumed he was struck, as there was a lump and a discoloration of skin on the back of his head; that, when he came to, he was in the vault, lying on his back, with his head under the opening of the door; that he remained there about eight hours, and from time to time kicked on the door with all his might, but did not strike the sheet-iron lining of the vault. His wife testified that she became alarmed at his absence in the afternoon, and got the court-house janitor to unlock the office; that two others were with her when she approached the vault door, but she was excited, and did not at first succeed with the combination, though she knew it; that, when she got the outer door open, she had to unlock the inner door, the key of which on the bunch of defendant's keys was in the lock; that, opening the door, her husband was found dazed and weak, and had a bruise and swelling on the back of his head. The two witnesses with her could not testify whether the inner door was locked or not, or whether she actually unlocked it. They testified to the distressed condition of defendant when released, but neither observed any injuries on him. *Held* that, though this evidence was uncontradicted, that the alleged robbers committed the deed on a business day, in a building containing the county officers; locked defendant in the vault; escaped with their plunder without leaving the slightest trace of their identity or whereabouts; that it was but a few days before the expiration of defendant's term, when he must account for the county funds; that a blow on the sheet-iron sides of the vault would produce a sound like a bass drum, that could be heard throughout the building, but defendant, though knowing of this, struck no such blow, and his blows on the door were not heard, though he testified he heard footsteps in the outer office; and that the vault was not shown to be locked, though it appeared to be, and was assumed to be by the rescuers,—created such suspicious circumstances as justified the jury in ignoring defendant's uncontradicted evidence.

2. Experimental evidence of the effect of kicking on the vault doors was competent in corroboration or disproof of defendant's assertion that he attempted to attract attention in this way, though neither the atmospheric conditions nor the arrangement of the building were exactly the same.

3. The effect of striking the sheet-iron sides of the vault was also competent, since it was a fair inference that if his story was true, and knowing the effect of such a blow, he would certainly have tried to attract attention in that way.

4. Evidence of an employé of the building that he saw a man with a grip leave the treasurer's office about the time of the alleged robbery, which he reported to defendant, but which defendant paid little attention to, because witness told him that a placard on the door announced the treasurer's absence on that day, was not newly discovered, simply because after the trial witness deposed he might have been mistaken about the placard.

Department 2. Appeal from superior court, Sonoma county.

Action by Sonoma county against Peter N. Stofen and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

J. R. Leppo, for appellant Stofen. E. C. Barham and J. A. Barham, for other appellants. Emmett Seawell, for respondent.

HENSHAW, J. This is an action brought by the county of Sonoma against Stofen, ex-treasurer of the county, and against his bondsmen, to recover the sum of $7,815.79, alleged to have been converted by Stofen while he was treasurer. The defendants denied the conversion, and set up as a defense that Stofen had been robbed of the money. Judgment passed for plaintiff, and defendants moved for a new trial. Upon denial of their motion, they appealed both from that order and from the judgment.

It is strenuously insisted that the uncontradicted evidence in this case establishes a robbery. The account of the affair given by the defendant Stofen is as follows: Upon the morning of the 28th day of December, a Friday morning, he had gone to his office in the county court house, in the city of Santa Rosa. He entered his office at about the usual hour, at 9 o'clock, or a few minutes thereafter. He opened the outer and inner doors of the vault in his office, and proceeded to take out the drawers or money trays for use in his daily business. Turning round with a tray in each hand, he confronted a man with an uplifted dagger, who ordered him to drop the trays. "This is the last that I knew. I felt no blow, and did not see him strike me, but I presume, as I put down the money, he struck me on the back of the head, because that is where I had a lump and discoloration of the skin. That is the last I knew until I came to in the vault, and I was lying on my back, with my head right under the opening of the vault door. The first thing that I realized after I came to, I raised up and bumped my forehead again on the metal. That threw my head back again on the floor, and I felt up around, and I felt the safe floor. Then I comprehended for the first time where I was. I remained in the vault until I was taken out by my wife. They said it was about half past 4 in the afternoon of the same day." He further testified that the money, which was in its proper place at the time he entered the vault in the morning, was taken. From time to time during his imprisonment in the vault he kicked upon the door with all his might, "and that made a great racket." Mrs. Stofen, wife of the defendant, testified that in the afternoon of that day, visiting the court house in search of her husband, she became alarmed at his absence. She procured the janitor to unlock the outer door of her husband's office, and entered the room with one or two others. She saw her husband's overcoat and hat on the desk, and became greatly excited. She thought she heard a noise in the other room, which was the room containing the vault, and Judge Moore said, "He is in the vault." She hurried to the vault door, and tried the combination, which she knew, but, being excited, she did not succeed the first time in opening the door. Judge Moore stood by her, endeavoring to calm her, and in time she succeeded in opening the outer door. Then she had to unlock the inner sheet-iron door, which was locked. The key of this door, upon the bunch of defendant's keys, was in the lock. Opening the door, her husband was found dazed and weak. There was an injury, a bruise upon the back of his head, a swelling and discoloration. J. H. Wise and A. P. Moore accompanied Mrs. Stofen when she unlocked the vault. Their testimony corroborated hers, saving that Wise says he could not say whether Mrs. Stofen actually unlocked the inner door or not, or whether the inner door was locked or not. Moore could not testify whether the inner door was locked or not. He states that as they were going from the front room to the inner room Mrs. Stofen, who was very much excited, exclaimed: "Oh, they have locked my husband up!" These two witnesses both agreed in their account of the distressed condition of Stofen when released from the vault, but neither observed any injuries to his person. This account of the robbery stands uncontradicted and unimpeached by any direct evidence in the case. So much must be conceded, and, under this concession, appellants contend that the decision is unsupported by the evidence. But, while it is true that uncontradicted evidence of a positive fact must generally be controlling, there are exceptional cases in which the jury or the judge as a trior of the facts is held justified in rejecting uncontradicted evidence, even the most positive. In Quock Ting v. U. S., 140 U. S. 417, 11 Sup. Ct. 733, 851, Mr. Justice Field uses this language: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his own account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced." To like effect are the cases of Blankman v. Vallejo, 15 Cal. 639, and People v. Milner, 122 Cal. 171, 54 Pac. 833.

Are any of these elements of doubt or suspicion present in this case, and, if so, are they sufficient to have warranted the court in finding against the defense of robbery? In this, as in all such cases where the question has arisen, the offered evidence is the evidence of a person directly interested in the outcome of the litigation. This fact itself is a circumstance of importance in weighing the testimony given. With the manner of a witness upon the stand, and with his deportment under examination, circumstances which have always been recognized as affecting one way or the other the credibility of his testimony, this court can have nothing to do; but, when the matter of defendant's testimony is considered and analyzed, it will certainly be shown to present features of suspicion and doubt. To begin with, it is extraordinary that in the city of Santa Rosa, upon the morning of a business day, one or more robbers could have thus assaulted the treasurer in a public building containing the courts and offices of the county officers, have robbed him, have locked him in the vault, and have escaped with their plunder without leaving the slightest clew to, or trace of, their identity or whereabouts. Again, the robbery took place but a few days before the expiration of the defendant Stofen's term of office, and consequently but a few days before it was necessary for him to turn over the county funds to his successor. This is but a circumstance, and nothing more, but it certainly gives room for suspicion that this extraordinary robbery should have taken place at so opportune or inopportune a time. Moreover, the vault in which the treasurer was locked was incased upon three sides with sheet iron, the fourth side being the iron door. These facts were well known to Stofen. A blow upon the sheet iron produces a loud, resonant sound, like that a bass drum, and can be heard for considerable distances throughout the building. Yet Stofen, by his own testimony, although he could hear sounds which he thought were steps in the corridor outside, never struck the sheet-iron walls of his prison. He did kick upon the iron door many times, he says, but there is upon this point at least negative testimony of the other occupants of the building that they never heard or noticed any such sound. Again, if it were established that Stofen was found locked in the vault, and that he could not so have locked himself therein, it would tend very strongly to corroborate his account of the robbery, for there is not the slightest pretense that there was any one in Santa Rosa upon that morning to act as his confederate; but upon this it is shown that the bolts of both doors to the vault may be shot in place by any one who is inside, and, while the shooting of the bolts does not lock the doors in the sense that the combination must be employed upon the one and the key upon the other to open them, yet it creates the appearance of their being locked. Mrs. Stofen and those who were with her assumed that the outer door of the vault was locked. The first time she essayed the combination she failed, and this of course actually set the lock. As to the inner door in which the bunch of keys was found, she testified that she unlocked it. She herself was under great excitement, and may have been mistaken. Certainly she was not a wholly disinterested witness, and neither of the two who accompanied her testified to the unlocking of this inner door.

It is the law of this state that robbery is a defense to an action for the recovery of public moneys. City of Healdsburg v. Mulligan, 113 Cal. 205, 45 Pac. 325. The evidence of one witness entitled to full credit is sufficient to prove the robbery. Code Civ. Proc. § 1844. But the evidence of a defendant so situated does not, as a matter of legal compulsion, command this full credit. Robbery is a defense which may be easily simulated, and the temptation to do so must needs be strong upon one who has misappropriated trust funds. In consideration of these facts, it is not insisting upon too much to say that the defense must be satisfactorily established. If it be an honest defense, this, in the great majority of instances, can readily be done. If exceptional cases shall arise where the defense is rightful, yet conviction of its truth is not brought home by the evidence, it must be remembered that the imperfect machinery of the law cannot always measure out perfect justice, and that public policy forbids putting a premium upon peculation by permitting this facile defense to be too lightly established. We think it unnecessary to enlarge further upon the question. What has been said is not designed as expressing this court's opinion of the evidence, but it is in illustration of the fact that the trial judge, who rejected the evidence of the robbery because of the circumstances of doubt and suspicion attending the account of it, was, under the exceptional features of this case, justified in so doing, and that his finding in this regard cannot here be disturbed.

Defendant Stofen testified that, while in the vault, he kicked many times upon the inner door with the heels of his boots, and that "it made a great racket." He further testified that he did not kick or strike upon the sheet-iron lining of the sides of the vault. He knew its general construction, and that there was a hollow space, several inches in diameter, between the sheet iron and the brick outer wall. Evidence was offered and admitted touching experiments made by striking with clenched hands and books of account upon the sheet-iron sides, and also of experiments made by striking or kicking upon the inner door. Witnesses stationed in different parts of the building testified to hearing the sounds of these blows, and that those from the blows upon the sheet-iron sides were much louder than those from the blows upon the door. The admission of this evidence is urged as error, because the atmospheric and climatic conditions are not shown to have been the same upon the two days. The condition of the court house was shown to have been different by the removal of one door between the treasurer's and sheriff's offices, and the replacing of the wooden panels in the upper portions of the other doors with glass; further, that it was not and could not be shown that in any blows struck by the experimenters they used the same amount of force as that employed by Stofen; and, finally, as to the blows upon the sheet-iron walls, that the evidence was pertinent to nothing in the case, for Stofen positively testified that he did not strike upon these walls at all. Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are, as near as may be, identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible; but a substantial identity must exist to give the evidence value. But this identity need not extend to nor be shown to exist as to conditions which could have had no casual operation upon the result. Thus, if a witness testified that at a given distance he had heard a gunshot, before experimental evidence in disproof could be admissible it might properly be required to be shown that the force and direction of the wind were the same upon both days. If the question were upon the stopping of a car within a specified distance by the use of a given brake, experimental evidence would be valueless, unless it were shown that the experiment was made under like conditions as to the car, the brake, the amount of force used to set it, and the state of the track. If a witness should testify that from a specified spot he saw a certain act, evidence that he could not have seen from that spot, because of an intervening building, would be worthless, unless it were also shown that the building was there at the time of the occurrence. So indefinitely might illustrations be multiplied, but, upon the other hand, it would be entirely immaterial in the instance last given whether the wind was blowing three or thirty miles an hour in one direction or another, while these would constitute most pregnant circumstances in determining how far a gunshot could be heard. So, in experimenting with the car brake, it might be of no consequence whether it was done by day or by night; but, to test the vision of a witness, obviously similar conditions of light would be most material. The experiments here made went to the volume of sound and the distance of its audibility. It is not apparent nor is it shown that different atmospheric conditions or the structural changes in the building would have materially affected the result, and as to the force used the experimenter testified that he employed moderate force, while Stofen testified that he kicked with all his might. The witnesses stationed about the building agreed substantially in their accounts, the differences being such as would naturally be expected from their varying distances from the origin of the sound. The blows upon the door could be heard distinctly, but were not such as would have been likely to attract attention. The blows upon the walls were loud and resonant, like the beating of a bass drum or the pounding of an iron boiler. The evidence as to the blows upon the door was admissible as experimental evidence. It was of little value, assuredly, since in the one case the witnesses stood with attentive ears to catch the expected sounds, while in the other case there was nothing to attract their particular attention. The admissibility of the evidence of the blows upon the wall rests upon a somewhat different ground. It was a matter of fair argument that, if his story were true, Stofen would have used every means to escape from confinement, and would have given an alarm; that, with his knowledge of the vault and of its construction, he would have pounded upon that part of it which naturally would have given out the greatest noise. It was permissible to support this argument by proof of the fact that, if he had done so, the alarm would certainly have been heard, and his prompt release would have been assured. That he did not do so certainly gives basis to an argument against the probability of his story, for it is to be remembered that according to that story he was incarcerated for nearly eight hours, and that he never struck upon the sheet-iron walls, and yet within his prison he could occasionally hear the footsteps of those passing outside.

In support of their application for a new trial, upon the ground of newly-discovered evidence, defendants presented the affidavit of one George E. Perry. Perry's affidavit is to the effect that upon the day of the alleged robbery he was in charge of the steam engine and heating apparatus in the Santa Rosa court house, during the temporary absence of his brother, who was the regular engineer in charge. In accordance with his practice, he made a tour of inspection of the offices in the building to note their temperature and observe whether or not the heater was performing its work. Upon this particular morning, at a few minutes after 9 o'clock, as he approached the door of the treasurer's office, the door opened, and a man stepped out carrying a leather valise in his right hand. His appearance surprised the affiant, who thought that the treasurer was out of town. He stopped in front of the man, and asked if the treasurer was in his office, to which the man replied, "Yes," and hurried on. He tried one of the doors of the office, and found it locked. He passed on to the other door, and found that also locked. He then concluded that the man had misunderstood his question, and had thought that he had inquired if that were the treasurer's office, and so attached no significance to the matter until the evening of that day, when he learned that the treasurer's office had been robbed. He further deposed that in July or October, 1896, he related these facts to the defendant Stofen, but also stated to him that, in attempting to open the side door, he noticed upon it a placard stating that the treasurer was absent or out of town, and that at the time he so stated he believed that such was the fact, but "I may be mistaken, and I now believe that I am." After he had told Stofen about the placard, Stofen seemed to take less interest in his narration. Aside from the rigorous scrutiny, amounting to suspicion, with which newly-discovered evidence, such as this, should be regarded, the court was justified in refusing to grant a new trial, because in fact it was not newly-discovered evidence. Affiant's statement is that he informed Stofen of these facts while this very action was pending. It was evidence of the highest importance to the defense to show that a man with a valise in his hand was seen coming out of the treasurer's office upon the morning of the day of the alleged robbery, and at the time of day which Stofen fixes as the hour of its commission, regardless of the question as to whether or not there was a placard upon one of the doors stating that the treasurer was out of town. Aside from the dubious circumstance that the affiant declares that his present belief is that he was mistaken as to the placard, even if he had adhered to his first story in this regard, the evidence would still have been of vital moment. It is conceivable that the robber himself might have placed such a placard upon the door to avert inquiry. But, whatever may be the truth as to all these matters, the fact is that knowledge of this evidence was in the possession of the defendant while his case was pending, and he did not see fit to avail himself of it. The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

125 Cal. 48

DAVIS et al. v. HURGREN et al. (S. F. 1,063.)

(Supreme Court of California. June 13, 1899.)

COUNTERCLAIM — ACTION ON CONTRACT — COSTS—PARTIES—NEW TRIAL—NOTICE—FILING.

1. An action for damages for the breach of a contract to deliver goods is an action arising on contract, within Code Civ. Proc. § 438, subd. 2, authorizing the pleading of a counterclaim arising on an independent contract in such action.

2. Defendant is entitled to costs as of course, where he recovers $1 on a counterclaim interposed to a complaint for over $300, on which plaintiff recovers nothing, under Code Civ. Proc. § 1022, giving plaintiff costs as of course on a recovery of over $300, and providing that de-

fendant shall recover costs, on recovering, in cases in which plaintiff would, on recovering, be entitled to costs.

3. Code Civ. Proc. § 639, requiring a notice of intention to move for a new trial to be filed within 10 days after the verdict or decision, is not complied with by delivering the notice to the clerk for filing without paying the requisite fee, where he refuses to file it because of such nonpayment, as he is required to demand the payment of such fee in advance, under St. 1895, p. 267.

Department 2. Appeal from superior court, Sonoma county.

Action by W. Davis & Son against Hurgren & Anderson. From a judgment for defendants and from an order denying a new trial, plaintiffs appeal. Affirmed.

Lippitt & Lippitt, for appellants. Barham & Miller, for respondents.

McFARLAND, J. This is an action to recover of the defendants $702 for the nonfulfillment by them of a contract to deliver to plaintiffs a certain amount of collar leather. The defendants by their answer deny the averments of the complaint, and set up as a counterclaim that plaintiffs are indebted to them for goods, wares, and merchandise sold, etc., in the sum of $300. The jury returned a verdict for defendants in the sum of $1. Plaintiffs appeal from the judgment, from an order denying their motion for a new trial, and from an order denying their motion to strike out defendants' cost bill.

1. The counterclaim of the respondents was one proper to be pleaded. The court below seemed to think that the evidence showed that the counterclaim was one "arising out of the transaction set forth in the complaint," and therefore belonged to the class of counterclaims mentioned in subdivision 1, § 438, Code Civ. Proc. The evidence, however, is not before us, and, assuming it to be founded upon an independent contract, yet, as plaintiffs' cause of action was clearly one "arising upon contract," the counterclaim was valid, under subdivision 2 of said section.

2. The principal point urged by appellants is based upon the court's denial of their motion to strike out defendants' cost bill. Assuming that this matter can be reviewed either upon the appeal from the denial of the motion to strike out, or from the general judgment, the ruling of the court below was correct. Plaintiffs' contention on this point is that respondents were not entitled to costs because the judgment in their favor was less than $300, but this contention cannot be maintained. Section 1022, Code Civ. Proc., provides as follows: "Costs are allowed of course to the plaintiff upon a judgment in his favor in the following cases: * * * (3) In an action for the recovery of money or damages when plaintiff recovers three hundred dollars or over;" and section 1024 provides that "costs must be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section 1022." If judgment had been merely for the defendants generally, the point here insisted upon would hardly have been made, but the fact that they recovered a judgment in their favor for one dollar does not change at all the specific provisions of the Code. This conclusion is clear upon principle, but the following authorities are directly in point: Dows v. Glaspel, 4 N. D. 251, 60 N. W. 60; Ury v. Wilde (Super. N. Y.) 3 N. Y. Supp. 791. In an action like the one at bar, unless the plaintiff is entitled to costs, the defendant recovers costs as a matter of course.

3. The transcript shows that the court "denied" the motion for a new trial, and also "dismissed" it, upon the ground that notice of intention was not filed with the clerk in time. The court ordered the clerk to enter as a minute order what really is an opinion of the court below, in which he states why the motion for a new trial was dismissed. A dismissal of a motion for a new trial is really nothing more than a denial of it. Warden v. Mendocino Co., 32 Cal. 655. In the case at bar the motion was made upon the minutes of the court, and after its denial and "dismissal" the appellant did not prepare or present any statement upon motion for a new trial, as is required by the statute in such cases. We cannot determine, therefore, whether or not the motion for a new trial was properly denied upon other grounds; and, as a reversal of the order denying a new trial would be in substance the granting of a new trial, it is difficult to see how, in the present state of the record, this court would be warranted in granting a new trial without having any means of ascertaining what the merits of the case are. But, assuming that we can consider the motion solely upon the reason which the court gave in its opinion for denying it, we do not think that any error was committed. Section 639, Code Civ. Proc., provides that a party intending to move for a new trial must, within 10 days after the verdict of the jury, file with the clerk his notice of intention. In the case at bar the 10 days expired on the 23d of February. On that day the appellants sent their notice of motion to the clerk, but the clerk did not file the same, because the fee therefor was not paid; and three days afterwards, at the request of the appellants, who then paid the fee, the clerk indorsed it as filed February 23d. The act of March 28, 1895 (St. 1895, p. 267 et seq.), provides that, on the filing of a notice of a motion for a new trial, the party filing the same must pay to the clerk a fee of two dollars, and that "county officers must * * * demand the payment of all fees in civil cases in advance" (page 272). The notice, therefore, was not filed in time. The mere fact that the clerk received it on the 23d did not constitute a filing. It was not his duty to file it without the fee. He did not file it, and he could not have been compelled to file it, on that day,

The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

124 Cal. 688

In re NEWMAN'S ESTATE. (S. F. 1,623.)

(Supreme Court of California. June 6, 1899.)

ADMINISTRATION—RIGHTS OF UNFAITHFUL WIFE—JUDGMENT—RESIDENCE.

1. After decedent's marriage in New Hampshire, he moved to California, corresponding with his wife and sending her money. While he was in California, his wife married and lived with her second husband for 15 years until his death, a child being born as the result of this marriage. She was awarded letters of administration on his estate, and a decree entered adjudging her to be his widow. Subsequently she resumed her correspondence with her first husband, informing him of her conduct, and on his death made application for letters of administration on his estate in California. *Held*, that her conduct did not deprive her of the right to such letters.

2. A decree of the probate court declaring a person to be the widow of a decedent is not conclusive as to such question, so as to bar her rights as widow of another to administer his estate.

3. Where a nonresident goes to California to procure letters of administration on the estate of her husband, declaring her intention to remain in the state, the question of her residence depends on her intentions.

4. That a wife has been unfaithful and violated her marital obligation does not disqualify her to act as administratrix of her husband's estate.

Department 2. Appeal from superior court, Contra Costa county.

Applications by Rose A. Newman and L. M. Cutting for letters of administration on the estate of George H. Newman, deceased. Letters granted to Rose A. Newman, and Cutting appeals. Affirmed.

Minor & Ashley, for appellant, Cutting. Hartley & Abbott and W. S. Tinning, for respondent Newman. R. H. Latimer, for respondent Gunter.

PER CURIAM. This is a contest for letters of administration. There were three petitioners,—the public administrator, L. M. Cutting, a cousin of the deceased, and Rose A. Newman, widow of deceased. Letters were granted to the widow, and Cutting appeals.

Rose A. Newman and the deceased intermarried in New Hampshire, November, 1856. He was then 19 years of age, and she was 16. Within a very short time after the marriage he came with his father to California. There was, however, no desertion, as the parties continued to correspond at least up to 1862, recognizing in all their letters their marital relation. He did not prosper in California, but occasionally sent her small sums of money. In 1864, she, knowing that her husband was still alive, and that he had not deserted her, and although, as she testified, she received a letter from him about a year before, went through the forms of marriage with one Colburn. She continued to live with Colburn in this adulterous and criminal relation for 15 years, when Colburn died. She had a daughter by this bigamous union, born in 1866. Colburn left an estate, which apparently went to the child, and petitioner, as his widow, administered upon it, and received an allowance from the estate as his widow. In 1883 petitioner, having heard that her husband was still alive, had the hardihood to write to him, and he, in ignorance of her criminal career, at once responded, recognizing his marital obligations. In this letter he said: "I was surprised to hear from you after waiting so long for an answer to my last letter [about twenty years]. I sent you some money to come out here on, and never got any answer. I have been looking for you ever since. You could have found out that I was here if you had written to me, instead of to the postmaster. * * * Why did you not write before, and let me know that you wanted help? I would have helped you. I wish you had come out here when I sent for you. I think it would have been better for you if you had. * * * Write and let me know if you received that money I sent you to come out on; if so, why you did not come. I believe it was in 1864. Inclosed you will find ten dollars," etc. It is evident that he had never had any thought of deserting her, and, unsuspicious of wrong on her part, sent her money while she was living in adultery with Colburn. After this letter they continued to correspond for about nine years. She says that she informed him by letter of her bigamous marriage, but his letters, put in evidence by her, disclose no such knowledge. Finally, about 1892, Newman ceased to write, but why is not made to appear. Newman died intestate in the county of Contra Costa on the 24th day of November, 1897, leaving an estate in said county. The order made awarding letters of administration to Rose A. Newman is attacked upon various grounds: First. It is denied that she has the rights of a widow in the estate of Newman. The marriage is not denied, nor is it claimed that the parties were ever divorced; but it is argued that in some way she is estopped by her commission of the crime of bigamy and her passing for 15 years as the wife of another, having a daughter born of this criminal union, her administering upon Colburn's estate, claiming the right so to do as his widow, and her utter disregard of her marital duties to Newman for some 20 years, and especially by the decree of the probate court of New Hampshire, adjudging her to be the widow of Colburn. That she was an unfaithful wife must be admitted. She testified that she married Colburn, knowing that her husband was living, and that she had received a letter from him about one year before her marriage. She knew she had not been divorced, and she also knew that her husband had not deserted her. But the statute does not make adultery on the part of the wife, of itself, a forfeiture of marital rights. It only authorizes a divorce. It might be a good law to ordain that, when one spouse has committed bigamy, all rights with reference to the estate of the other are forfeited; but there is no such law. There are cases in which it has been held that, when a wife leaves her husband and renounces conjugal obligations before his death, she cannot be such a widow as was contemplated by the legislature when it provided for her rights in reference to the husband's estate. Odiorne's Appeal, 54 Pa. St. 175. By the bigamous marriage, it might be held that the petitioner renounced her conjugal obligations; but, after the bigamous spouse was dead, she resumed her relations with Newman, who continued to recognize the relation, apparently even after knowledge of the facts. Suppose she had, in response to his letters, come to California, and they had lived together as husband and wife, could her rights as a widow have been denied even though it were proved that he was kept in utter ignorance of her delinquency? Of course not. The rights of a widow in the estate of her husband cannot be questioned on the claim that during the life of her husband she was unfaithful to her vows.

The case of Arthur v. Israel, 15 Colo. 147, 25 Pac. 81, was a hard case, and perhaps was well disposed of. There is nothing in it which has any bearing upon this case. The matter of succession is purely statutory, and it would be better for the legislature to provide for such cases, which may arise anywhere, rather than put the court to the necessity of such logic to do justice.

It is contended that the decree of the probate court of New Hampshire, adjudging that petitioner was the widow of Colburn, is conclusive that she was not the wife of Newman. Had she died in New Hampshire, leaving an estate, such decree could not have barred Newman; therefore it could not estop her. A probate decree, according to our rulings, is in rem, and concludes all the world as to the succession. The marriage relation of Newman and wife was not the res before the court in that proceeding. The law of New Hampshire declaring that cohabitation for a period of years is proof that the parties so cohabiting were married is cited, and it is contended that petitioner so cohabited with Colburn, and therefore was his lawful wife, and could not also have been Newman's. The laws of New Hampshire can declare how marriage shall be entered into there, but they assume that the parties are competent to marry. But if this were not so, and the laws of New Hampshire authorized married people to marry again in that state, such marriage would not be recognized here as a dissolution of the former marriage.

It is contended that petitioner was not a resident of California, and therefore was not entitled to letters. She testified that she came to this state because her husband left an estate here; that, if he had not left such estate, she would not have come, but that, being here, it was her intention to remain and make this her future home. The court found in her favor. Her intention constituted the material issue, and there certainly was evidence to support the finding. The difference between this case and the case of In re Donovan's Estate, 104 Cal. 623, 38 Pac. 456, is that there the court found against the petitioner as to the fact. In each case this court must abide the conclusion. It is said that the evidence shows that the petitioner lacks integrity, and therefore should not have been appointed. She was shown to have been an unfaithful wife, and to have violated her marital obligation; but that does not tend to show lack of integrity, within the meaning of the statute. In re Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532. We think the letters passing between the husband and wife were properly received in evidence. Order affirmed.

(125 Cal. 77)

SAN JOAQUIN VALLEY BANK v. DODGE et al. (Sac. 605.)[1]

(Supreme Court of California. June 16, 1899.)

WAY OF NECESSITY—PURCHASER AT MORTGAGE SALE — HOMESTEAD — EVIDENCE — PLEADING — AMENDMENT AFTER TRIAL—LIMITATIONS.

1. One claiming lands under a mortgage foreclosure sale, to which access cannot be had except over the lands of third persons, or over the homestead of the mortgagor, which was included in the mortgage, but was not sold, because the proceeds of the other lands were sufficient to pay the debt, is entitled to a way of necessity over such homestead, though the declaration of homestead was filed prior to the decree of foreclosure, and though Civ. Code, §§ 1240–1242, provide that a homestead can only be incumbered or conveyed by an instrument signed by both husband and wife, and is exempt from execution or forced sale.

2. The statute of limitations is available as a defense only when pleaded.

3. It is not an abuse of discretion to refuse permission to amend an answer, after the submission of the cause, by adding a plea of limitations.

4. A complaint to establish a way of necessity over lands is not insufficient because it alleges that defendant is the owner and entitled to possession of the lands over which the way is sought to be established, where it sets forth the ownership by the parties and plaintiff's right to the way.

5. Nor will it be held insufficient, on appeal, for failing to describe the way claimed, where it was neither demurred to nor objected to during the trial, and where the parties stipulated as to the proper description of the way in the event of a decree declaring it to exist.

6. On an issue whether the owner of a parcel of land was entitled to a way of necessity over adjoining lands, testimony whether or not there was a well-defined road along a creek adjoining the land for which the way was claimed is admissible.

7. In an action to establish a way of necessity, evidence as to the most convenient way to reach the highway from the lands for which the way is claimed is admissible.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by the San Joaquin Valley Bank against Emily Dodge and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

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[1] Rehearing denied July 11, 1899.

Loutitt & Middlecoff, for appellants. Minor & Ashley, for respondent.

COOPER, C. Action to have plaintiff adjudged owner of a right of way of necessity over lands of defendant Emily Dodge. Judgment for plaintiff. Motion for new trial, which was denied. Defendant appeals from the judgment and order. The facts, briefly stated, are as follows: On December 3, 1881, one Dodge was the owner of a tract of land which he mortgaged to one Hewlett. In the year 1885 Dodge recorded a declaration of homestead on a portion of the land so mortgaged, which homestead was afterwards duly set apart by the superior court to said Dodge in insolvency proceedings. The family of Dodge consisted of himself and wife, Emily Dodge, one of the defendants in this case. On July 21, 1886, Hewlett commenced an action to foreclose his said mortgage, making Dodge and his wife, Emily, defendants. On October 6, 1886, the court decreed that Hewlett recover judgment against said Dodge, the mortgagor, for $15,708.80, and that the said judgment was a lien upon five separate parcels of land, which are described and referred to in this action as lots 1, 2, 3, 4, and 5. Lot 5 was the homestead so selected. The decree directed the sale of the land in five separate parcels in the order of their numbering, and that, if sufficient money should be raised from the sale of the parcels numbered 1, 2, 3, and 4, parcel number 5, being the homestead, should not be sold. On November 4, 1886, the property described in said decree as lots 1, 2, 3, and 4 was sold to different purchasers, and sufficient money realized from the sale to pay the judgment, leaving the homestead unsold and free from the mortgage lien. At the said sale one Ladd became the purchaser of lot 4, and the plaintiff thereafter, by mesne conveyances, prior to the commencement of this action, became the owner of said lot 4. The land mortgaged as a whole was bounded on the east by a public highway known as the Waterloo road, and the homestead is bounded on the east by said public highway. Lot numbered 4 is bounded easterly and southerly by the Calaveras river, westerly by lands of strangers, and on the north by lot 3 and the homestead lot. The homestead lot lies east of lot 3, and thus forms the boundary of a portion of the northerly line of lot 4. When lot 4 was sold at said foreclosure sale, at all times since, and now, said highway known as the Waterloo road could not be reached except by crossing over the homestead, without crossing the lands of strangers, and plaintiff is unable to use and enjoy its said property without a way to it from said public highway. Dodge died in July, 1893, leaving the defendant, Emily Dodge, the sole owner of the homestead. The principal question in this case is whether or not, by the sale of lot 4 under the decree of court, the homestead was burdened with a way of necessity from said lot 4 to the highway. A way of necessity arises when one grants a parcel of land surrounded by his other land, or where the grantee has no access to it, except over the other land of the grantor, or, as an alternative, by passing over the land of a stranger. In such cases the grantor impliedly grants a right of way over his land as incident to the purchaser's occupation and enjoyment of the premises granted. The general rule is not questioned, and if Dodge, the mortgagor, instead of the sheriff, had sold lot 4, and if the homestead had not been filed, the rule would beyond question apply to him. It is claimed that the rule does not apply to the defendant, Emily Dodge, in this case for two reasons: First, because the premises were sold by the sheriff under order of the court; and, second, because of the homestead having been filed prior to the decree and sale.

One of the earliest cases, decided more than 100 years ago, is Howton v. Frearson, 8 Term R. 50. One S. Dalby, a widow, was seised for her life of certain lands in the liberty of Ockbrook, which estate was limited in remainder to her son, J. J. Dalby, in tail. The mother died, and her said son became entitled to the lands. By the will of the son, certain trustees were appointed for the sale of the lands, and after his death the said trustees sold to the plaintiff in said case three parcels of land, to wit, the "Allotment," "Draycott Field" and "Carr Close," and to defendant the "Upper Meadow." Soon after defendants purchased, the owners of other portions of lands purchased at the trustees' sale closed up the way over their lands leading to defendant's lands, the "Upper Meadow." The case was argued at length in Trinity term as to whether or not the rule applied to a grant made by trustees. Lord Kenyon entertained great doubt upon the question, and ordered that the case might be argued again at the next term. Upon the calling of court, and before the case was reargued, the learned chief justice said: "Upon further consideration I find it impossible to distinguish this from the general case where a man grants a close surrounded by his own land (in which case the grantee has a way to it of necessity over the land of the grantor) merely on the ground that the plaintiff conveyed to the defendant in the character of trustee, for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such a way of necessity upon the authority of all the cases, upon the principle that every deed must be taken most strongly against the grantor. * * * There are, I think, great difficulties in the question; but, in the other mode of considering the case, those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted even by the plaintiff." The rule thus laid down by Lord Kenyon has ever since been the rule in England and in this country. In Collins v. Prentice, 15 Conn. 38, it was held to apply by one purchaser against another at probate sale made by executors under order of court, both purchases being made on the same day and as parts of same estate. In Pernam v. Wead, 2 Mass. 202, it was held to apply in favor of a debtor as against a creditor who had taken part of the debtor's land under execution, leaving him no passage to the highway. In Taylor v. Townsend, 8 Mass. 410, it was held to apply in favor of a creditor, as against a debtor, when the creditor had certain lands set off to him under execution, but no way of reaching them, except on the lands of the debtor not so set apart. In the late case of Schmidt v. Quinn, 136 Mass. 575, the rule was again applied as against the judgment debtor in favor of the party holding under the execution. The court, in discussing the case, said: "We see no reason why the rule of law should not be the same where the grant is involuntary, as by the levy of an execution, even although a right of way might have been expressly included in the levy, but was not." It was applied to purchases made by tenants in common in Smyles v. Hastings, 22 N. Y. 217, and to mutual deeds arising on the settlement of an estate. Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966. It was applied in favor of a mortgagor purchasing at foreclosure sale as against the mortgagee and over lands not described in the mortgage in the well-considered case of Insurance Co. v. Patterson, 103 Ind. 582, 2 N. E. 188; and in Ellis v. Bassett, 128 Ind. 118, 27 N. E. 344, the same rule was held to apply against the purchaser from the widow of Bassett of a five-acre tract of land which had been set apart to her in partition proceedings in the estate of her husband, and in favor of the purchaser at administrator's sale of the other part of the real estate. This court in Blum v. Weston, 102 Cal. 362, 36 Pac. 778, applied the same rule in partition proceedings as to parties holding under the decree of the court. The court approved the rule as announced in Ellis v. Bassett, and held that the decree had the effect of vesting the title in the different parties, and that the rule would apply precisely as if they had conveyed to each other. Further authorities supporting the rule are: Russell v. Jackson, 2 Pick. 574; Jones, Easem. §§ 309–312; Washb. Easem. p. 261; Godd. Easem. p. 269. It is claimed with considerable plausibility that the sale freed the homestead from the lien of the mortgage, and that, under Civ. Code, §§ 1240–1242, the homestead cannot be invaded even for the purposes of a way of necessity.

We have carefully examined the authorities cited, and we think the rule applies to the homestead in this case. The land was all mortgaged by Dodge for his indebtedness. By the mortgage, and at the date of its execution, he authorized the mortgagee, in case the debt was not paid, to sell the land for the purpose of paying it. The filing of the homestead only protected the premises therein described from future liabilities, and gave the mortgagor or his wife the right in foreclosure proceedings to have the land not included in the homestead sold first, and, if the proceeds should be sufficient to pay the debt, to have the homestead reserved from sale. The homestead did not relieve the property therein described from the lien of the mortgage. If the mortgagor had sold the four lots, the defendant Emily joining in the deeds, the rule would apply to them. The premises were sold by Dodge through the decree of court under the authority given when the mortgage was made, at which time there was no homestead upon the premises. For the benefit of defendants in the foreclosure proceedings, the decree provided that the land should be sold in five different lots, and that, if the first four lots could be sold for enough, then lot 5 should be saved as a home. If the purchaser of lot 4 could not use the same, because of no way to reach it, and that fact had been announced at the sale, the homestead might have had to be sold under the decree. To apply the rule to the purchaser of lot 4, and against the very person who was benefited by its sale, seems to us to be just, and in accordance with the authorities. This disposes of the vital point in the case, and, the judgment of the court below being in accord with what has been said, we would not feel justified in disturbing it for errors in the trial or proceedings, unless material injury has been done. It is claimed that plaintiff's cause of action is barred by the statute of limitations; but it is sufficient to say that the statute is not pleaded, even if it applied to the facts of this case. Counsel seem to have been of the same opinion, as they asked leave to file an amended answer pleading the statute of limitations long after the case was tried and submitted, and they now claim it was error in the court to deny their application. Amendments to pleadings are left much to the discretion of the court below, and it is presumed that such discretion will always be exercised in furtherance of justice, and with the end in view of disposing of cases upon their merits. We cannot interfere, except in cases where such discretion is abused. In view of the fact that the application was made after the case had been submitted, and was made for the purpose of allowing defendants to plead the statute of limitations, we cannot say that the court abused its discretion. It is claimed that the complaint does not state facts sufficient to constitute a cause of action, because it states that defendant Emily Dodge is the owner seised in fee and entitled to the possession of lot 5, and, further, because there is no description of the right of way claimed in the complaint. The complaint sets forth the facts as to the ownership by different parties and the claim of plaintiff to the way. It would have been difficult to describe a way which had been denied to plaintiff, and the location of which the defendants had the right to dictate. No demurrer was filed in the court below, and no objection was made during the trial to the complaint. The case was tried upon the theory that it was sufficient. In view of these facts, and in view of the fact that the parties have stipulated as to the proper description of the way in case the law adjudges that one exists, we must now hold the complaint sufficient. It is said the evidence is insufficient to justify finding four as to the date of recording the declaration of homestead, and that it was recorded September 22, 1885, instead of December 17th, as found by the court. The date is wholly immaterial, as we view the case. Granting that the homestead was recorded September 22d, it would not change the views here expressed. Other findings are objected to, but we think there is evidence to support them. The questions asked of the witness Dodge to which objections were made do not appear to have been improper. As to whether or not there was a well-defined road along Calaveras creek, and as to which was the most convenient way to reach the highway, were facts tending to throw light upon the necessity for a way over the lands of defendant. We think the judgment and order should be affirmed, and so advise.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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125 Cal. 9

PEISER et al. v. GRIFFIN et al. (BRADBURY, Intervener). (S. F. 1,091.)

(Supreme Court of California. June 8, 1899.)

HUSBAND AND WIFE—TRUSTS—COMMUNITY—NEW CAUSE OF ACTION—AMENDMENT—LIMITATIONS—VESTED RIGHTS—FINDINGS.

1. A husband, for himself and as guardian of his minor son, sued his wife and another, alleging that certain lots were purchased with his money; that the deed was taken in the wife's name in trust for the husband and child and herself, but she conspired with the other defendant to defraud the husband and child of it; and seeking to enjoin the other defendant from conveying the property. *Held*, that the theory of the suit was that the legal title vested in the wife under a trust creating an equitable interest to one-third each of the land in the father and son, and an amendment based on the theory that the property was community property, and that the title had always been in the husband, and could not be conveyed by the wife, set up a new cause of action.

2. Where an amendment shows that it sets up a new cause of action which was barred, the court properly refuses to permit its being filed with leave to the adverse parties to plead the statute.

3. Act March 4, 1897, amending Civ. Code, § 164, repealing a former limitation law, and extending the limitation of a husband's right to recover as community property previously conveyed by the wife, did not apply to causes of action already barred.

4. Where plaintiff, under the findings actually made, could not possibly recover, he cannot complain of absence of findings on an issue raised by an intervener.

Department 2. Appeal from superior court, city and county of San Francisco.

Suit by Lemuel Peiser and another against Thomas H. Griffin and Minnie L. Peiser, W. B. Bradbury, intervener. From a decree for defendants and intervener, and an order denying a new trial, plaintiffs appeal. Affirmed.

W. A. Richardson, for appellants. Thos. J. Clunie, for respondents Griffin and others. T. V. O'Brien, for other respondents.

HENSHAW, J. Lemuel Peiser, for himself and as guardian ad litem of Edwin A. Peiser, his minor son, sued Thomas H. Griffin and Minnie L. Peiser, his wife. He alleged that on May 1, 1889, two certain lots of land in San Francisco were purchased with his money, and "that the deed of conveyance was had and made in the name of Minnie L. Peiser for the purpose of and in trust for plaintiff and said Minnie L. Peiser, and the child of parties, Edwin Adair Peiser"; that Thomas H. Griffin conspired with Minnie Peiser to defraud plaintiffs of their property, and, exercising undue influence upon her, induced her to convey and transfer the property to him. A judgment was sought restraining Griffin from alienating the property and setting aside Mrs. Peiser's deed to him. This complaint was filed on June 26, 1889. Griffin answered, denying the charge of undue influence. In October, 1890, W. B. Bradbury was allowed to intervene, and filed his complaint, in which he set up that without notice, and for a valuable consideration, he had upon June 24, 1889, purchased the property from Griffin. The answer to this complaint in intervention consisted of denials and an iteration of the matters pleaded in the original complaint. It was filed in March, 1895. Upon these pleadings trial was had. The court found that the land in question was paid for with the money of Lemuel Peiser, and that the deed was taken in the name of his wife; that his wife did not hold the title to the property under any trust; that the wife conveyed the property to Griffin without any valuable consideration, but that she had not been moved to the making of the deed by undue influence; that Bradbury purchased the property upon June 24, 1889, for a valuable consideration. The judgment denied plaintiffs any relief, and gave costs to defendant Griffin and intervener Bradbury. From this judgment, and from the order denying a new trial, plaintiffs appeal.

Upon the trial it was shown that Mrs. Peiser conveyed to Griffin one lot, and assigned to him a contract for the purchase of a second lot. Plaintiffs thereupon sought leave to file an amended complaint, setting up that the first lot was purchased with community funds, and was community property; that the same was true of the second lot; and that the later installments called for by the contract had all been paid by the plaintiff since the commencement of the action. The court refused permission to file this offered pleading. In so doing it held that the proposed complaint did not amend the old, but charged upon a new and distinct cause of action, and that the statute of limitations barred plaintiffs' right to prosecute upon this new cause. The soundness of the court's ruling on this matter is the most important question in this case. The original complaint is framed upon the theory that the trustee holding the legal title had made a conveyance in violation of the trust to one not an innocent purchaser for value, which conveyance was, therefore, voidable at the instance of the beneficiaries (Civ. Code, § 869); for, if the property was community property, the legal title remained in the husband notwithstanding that the deed was taken in the name of the wife, and the wife could not pass the title to it. An attempt of the wife to dispose of community property, real or personal, is a nullity. "If land, being community property, is conveyed to the wife during marriage, she takes no real title in it. The whole title, both real and equitable, at once vests in the husband by means of the deed to the wife. * * * Even the portion of community property standing in her own name, and acquired by her, the wife cannot convey nor transfer." Pom. Commun. Prop. 4 West Coast Rep. 390, 393; Tryon v. Sutton, 13 Cal. 490; Van Maren v. Johnson, 15 Cal. 308. If the original complaint had been framed upon the theory that the property was community property, it would certainly have contained some distinct allegation to this effect; but it does not. The averment that the property was purchased with the money of the husband might be open to the construction that community money was meant thereby were the action prosecuted against a mere stranger, but, as against his wife and her grantee, under this complaint it can only have reference to the husband's separate property; or, if it can be said that it refers to community property, then the further allegations demonstrate that its character as community property was destroyed by the express trust created in the wife as trustee for the benefit of the three. If the husband had meant to avoid the deed of his wife as being an attempt by her alone to pass title to the community property, he would not have pleaded a trust; he would not have sued as guardian ad litem of his minor son, who could have no actionable interest in the community property; he would not have sought an injunction to restrain Griffin from cheating and defrauding him by conveying the property away, when, if it were community property, Griffin would have nothing to convey. The manifest theory of the original complaint is that the legal title vested in Mrs. Peiser, as it could not vest if the property were community property; that it vested in her under a trust, which created an equitable interest or title to one-third each of the land in the father and minor son. By the proposed amended complaint all of these issues are withdrawn, and another and distinct cause of action is pleaded, namely, an action to establish that the property which had stood in the name of Mrs. Peiser was community property, and, consequently, that the title had always been in the husband, and could not have been conveyed by the wife's deed. At the time when this suit was commenced, such an action was open and available to the plaintiff, but upon March 3, 1893, section 164 of the Civil Code was amended. With other important changes which were wrought by the amendment, it was provided that in cases where married women have conveyed real property which they acquired prior to May 19, 1889, the husbands shall be barred from commencing any action to show that said real property was community property, or to recover such real property from and after July 1, 1894. This is a perfectly valid statute of limitations fixing the time within which an action to avoid such a past conveyance of the wife must be brought. It applied to this plaintiff's right of action, for Mrs. Peiser acquired the property prior to May 19, 1889, and her deed to Griffin was executed in June, 1889. The application to file the amended complaint was made in May, 1896. At that time plaintiff could not have commenced and maintained such an action as an original proceeding, and the court, under intervener's objection, properly refused to permit him in the guise of an amendment indirectly to do the same thing. Nor was it incumbent on the court to permit the amendment with leave to the adverse parties to plead the statute. Their objection to permitting the amended answer to be filed was that it was not an amendment to the old, but the statement of a new, cause of action, and one that was barred by the provisions of section 164 of the Civil Code. These grounds of objection being well taken, the proposed pleading was properly excluded from the files. On March 4, 1897, section 164 of the Civil Code was again amended. It now contains this provision: "In cases where married women have conveyed or shall hereafter convey real property which they acquired prior to May 19, 1889, the husbands or their heirs or assigns of such married women shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act, and, as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances respectively." Appellants contend that this amendment operates to enlarge the time for the commencement of the action, and that, even if the trial court was justified in refusing to allow them to file an amended complaint, owing to the condition of the law at the time when the amended pleading was offered, still, the code amendment of 1897 being within the judicial knowledge of this court, we should now accord appellants the permission contemplated by the present section. But at the time when plaintiff proposed his amendment the statute of limitations barring his right to commence such a cause of action had already run. By its running the title to the property irrespective of the original right is regarded as vested in the possessor, and the subsequent repeal of the limitation law cannot be given a retroactive effect so as to disturb the title. Cooley, Const. Lim. (6th Ed.) p. 448.

The foregoing renders unnecessary any extended consideration of appellants' remaining points. The findings are responsive to the issues tendered by plaintiffs' complaint. For the most part they negative the averments therein contained. The finding in the language of the complaint that the land was purchased with the money of Lemuel Peiser is not a finding that the property in question was community property, and therefore did not warrant, as appellants contend, a judgment in their favor. Under the findings, the judgment properly followed that plaintiffs should take nothing by their action. Appellants complain that the findings under the complaint in intervention do not determine the title, but, as under the findings actually made they could not, under any possibility, recover, additional findings could not have benefited them, and the absence of them cannot work injury. We perceive no rulings in the admission or rejection of evidence which call for especial consideration. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

125 Cal. 85

YNDART v. DEN et al. (L. A. 488.)

(Supreme Court of California. June 16, 1899.)

MODIFICATION OF JUDGMENT — RESTITUTION OF PROPERTY—APPEAL—RIGHT TO RENTS.

1. Under Code Civ. Proc. § 957, which provides that when the judgment is reversed or modified the court may make complete restitu-

tion of all property and rights lost by the erroneous judgment, it is not error to refuse to set aside a foreclosure sale made pursuant to a judgment which, on appeal, subsequent to the sale, was modified by the reduction of the amount thereof, for interest improperly included therein, and which was in other respects affirmed, where complete justice will be done by the payment to plaintiff of the excess.

2. The right to appeal from an order denying a motion to set aside a foreclosure sale, made after the satisfaction of a judgment by the sale, where such motion is based on a decision of the supreme court in a former appeal taken without a stay bond, wherein the judgment under which the sale was made was modified, is not abridged by Code Civ. Proc. § 1049, which provides that an action is deemed to be pending until the time for appeal has passed, unless the judgment is sooner satisfied.

3. Where a purchaser at a mortgage foreclosure sale enters into possession, under an agreement with the mortgagor, before the time of redemption expires, whereby he undertakes to improve the premises, and the mortgagor agrees to repay the purchaser for all sums expended in that behalf in case of redemption, the purchaser is entitled to set off the rents and profits received by the mortgagor from the premises during the period for redemption against an excess of interest included in the judgment under which the sale was made, when the agreement is silent as to whom the rents and profits shall be payable, under Code Civ. Proc. § 707, which provides that a purchaser of real property at a sheriff's sale is entitled to receive the rents of the property sold, from the time of the purchase to the time of redemption.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county.

Bill by U. Yndart against N. C. Den and others. From an order refusing to set aside a foreclosure sale, defendants appeal. Affirmed.

Bishop & Wheeler and J. W. Taggart, for appellants. Richards & Carrier, for respondent.

CHIPMAN, C. Appeal from an order modifying the judgment herein, but refusing to set aside a sale made under the original judgment and restore the property so sold. The action was for foreclosure of a mortgage, in which judgment was entered May 14, 1895. On June 8, 1895, the mortgaged premises were sold, and on the same day the sheriff made return of full satisfaction of the judgment, and on December 10, 1895, his deed was made to the plaintiff as purchaser. On December 7, 1895, the day before the time for redemption had expired, defendants appealed from the judgment of foreclosure to this court. Its decision was rendered April 23, 1897, and is reported in 116 Cal. 533, 48 Pac. 618. The judgment here was that the original decree included interest in excess of that which should be allowed, and the cause was remanded, with directions to modify the decree in this particular "as of the date when the judgment appealed from was entered; and, when thus modified and entered, the decree will stand affirmed." Remittitur was filed in the lower court May 26, 1897. Thereupon defendants served notice that they would on June 4, 1897, move the court to modify said decree, as originally made and entered, "in accordance with the decision of the supreme court in said matter," and, "by virtue of said modification and decision, * * * to set aside the sale of the property made by the sheriff, * * * as shown by the return of the sheriff filed in said cause, and to make restitution to said defendants of all property and rights lost by the said erroneous judgment and decree of said superior court," etc. The motion was to be heard upon the papers on file in said cause, and on the affidavit of defendant N. C. Den. In his affidavit, defendant Den avers that he is the husband of defendant Isabel Den, to whom the mortgaged premises belonged, and as her agent has attended to all business connected with said action, and is more familiar with the same than the said Isabel; that the property sold for $17,711.01, and plaintiff became the purchaser, to whom certificate of purchase was issued; and to whom on December 10, 1895, the sheriff delivered his deed to said property, and that plaintiff thereupon went into possession, and has ever since remained in possession thereof under said deed; that at that time and now said property was of the market value of $25,000, and that the rents and incomes amounted to $2,500, which plaintiff received, and that the property would now sell for a sum in excess of the judgment as modified by the said supreme court; that the incomes have been in excess of the amount of interest which would have accrued from the date the judgment was authorized to be entered under the order modifying the same. Plaintiff filed objections, and claimed that defendants' application did not state sufficient grounds for the modification as asked, nor for the restitution of the property, and that the court has no jurisdiction to make such modifications, "there being no judgment in force or existing, the same having been fully satisfied before appeal taken"; and "the court has no power to grant restitution for said property as applied for." With the objections, and in support thereof, plaintiff made affidavit in which he denies that the property was worth any sum over $15,000. Denies that the incomes were $2,500, or any sum greater than the expenses, or that he has received any sum greater than the expenses per annum. Avers that it is impossible to state whether or not the property, on resale, would bring more than the full amount of the modified judgment. Avers that no appeal was taken until the day before redemption from the sheriff's sale expired; that, immediately after the sale, defendants stated to plaintiff that they could not obtain water for the preservation of the premises and the orchards thereon, and that it was impossible for the said Isabel, the owner of the property, "to carry on or preserve or cultivate said property, as she had not, and could not obtain, the means for the purpose, and she then proposed that affiant (plaintiff) should go into the possession of the property, take charge of and care for the same, and procure water for the use thereof, and advance the necessary funds for the care, management, and cultivation of the same, upon the understanding and agreement that affiant should hold possession and perform such acts until the said property was redeemed, or the time for redemption had expired, and that, in case she redeemed the property, she would pay affiant all costs and expenses incurred by affiant during the time affiant had possession, and, in case she failed to redeem the same, affiant was to make no charge against her." Avers that he went into possession under this agreement, which defendants afterwards ratified, and remained in possession under said agreement until the expiration of the time of redemption and issuance of the sheriff's deed; that, upon issuance of the deed by the sheriff, he was put into formal possession by writ of assistance issued out of the court in which the action was commenced in 1896, and has remained in possession ever since; that during the period of redemption he expended the sum of $1,300 in necessary labor, in the purchase of water and care of the premises, and to preserve the property from being impaired and destroyed, and that without such expenditure and care the property would have been impaired in value at least 30 per cent. of the price paid by plaintiff at the sheriff's sale; that plaintiff was the only bidder at the sale; that no other bidder could have been found at that time who would have paid over $15,000 for the property, and that the property was not then worth the amount of said judgment as modified by said supreme court; that plaintiff "received none of the rents and profits of said property, but defendants received and appropriated to their own use all thereof, and the same were in value more than the amount in which said judgment was modified by the supreme court, and were of value more than $1,500, and defendants have not paid or accounted to affiant for the same." This affidavit of plaintiff is not controverted. The motion was heard upon the foregoing affidavits, and upon the judgment roll as contained in the transcript in the case on appeal here, and the decision of this court of April 23, 1897. The court below modified the decree as directed by this court; i. e. reduced the judgment from $16,926.70 to $16,456.51, as of the date when the judgment was entered. In all other matters the motion was denied. Defendants appeal from this order on bill of exceptions, in which the foregoing proceedings appear. The first appeal was upon the judgment roll alone, and no stay bond was filed. The only error corrected by the appeal was in the computation of interest. The judgment of the trial court was not reversed. It was modified in this one particular of interest, which the court below found to amount to $470.19, and the judgment was to retain its date as when first entered, and, when modified, to stand affirmed.

Section 957, Code Civ. Proc., provides as follows: "When the judgment or order is reversed or modified the court may make complete restitution of all property and rights lost by the erroneous judgment or order," etc. Section 1049, Id., provides as follows: "An action is deemed to be pending * * * until the time for appeal has passed, unless the judgment is sooner satisfied." The judgment was satisfied against the will of appellants, and section 1049, in such case, cannot be invoked to abridge the right of appeal. Kenney v. Parks, 120 Cal. 22, 52 Pac. 40. Section 957 is not mandatory upon the court, but the power to make restitution rests in the discretion of the court. Waterworks v. Drinkhouse, 95 Cal. 220, 30 Pac. 218. Leaving out of view, for the moment, the undenied agreement set up in plaintiff's affidavit, defendants lost no rights or property by the execution of the judgment before the right of appeal had expired, except in the single item of the excess of interest included in the judgment. Complete justice will be done defendants by repayment of this excess, to wit, $470.19, and the statute does not contemplate any greater relief than the "restitution of all property and rights lost by the erroneous judgment or order." Where the judgment is not reversed, a different situation exists from that where there is a modification which does not disturb the foundation of the sale. This distinction is pointed out in Hewitt v. Dean, 91 Cal. 617, 28 Pac. 93.

Do the matters set up in plaintiff's affidavit work a set-off to defendants' right to have restored to them the excess of interest included in the judgment? It will be noticed that there was no agreement as to which of the parties was to have the rents and profits of the property. Plaintiff was entitled by law to the rents during the period of redemption. Code Civ. Proc. § 707; Walker v. McCusker, 71 Cal. 594, 12 Pac. 723. In support of the order, it must be assumed that the facts stated in plaintiff's affidavit are true. It is there stated that defendants received, of rents and profits, a sum greater than the excess of interest included in the judgment. In dealing with the question of defendants' right to restitution, we think the court could take into consideration the rents received by defendants. We are unable to discover, from the facts as they appear, that the court erred in its conclusion, and it is advised that the order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

127 Cal. 312

DAVIS v. PACIFIC TELEPHONE & TELEGRAPH CO. (S. F. 1,097.)

(Supreme Court of California. June 12, 1899.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—FALSE IMPRISONMENT—ARREST BY OFFICER—PRESUMPTION.

1. Pen. Code, § 591, provides that any person who maliciously removes or obstructs any line of telegraph, or severs any wire thereof, is guilty of a misdemeanor. In an action for malicious prosecution the evidence disclosed that plaintiff was a house mover; that, to test a law requiring him to pay the expense of moving telegraph wires when necessary in moving buildings, he employed an attorney, who advised plaintiff to cut defendant's wires, after giving the latter notice to remove them, at the same time advising him that he would probably be arrested; that thereafter plaintiff cut defendant's wires, and was arrested, and charged with cutting telegraph wires, contrary to the provisions of section 591; and that he was acquitted in the police court on the charge. *Held*, that the evidence does not show such want of probable cause as to require its submission to the jury.

2. In an action to recover for malicious prosecution, the plaintiff is not, under the allegations of a complaint alleging that he was arrested without probable cause, and maliciously prosecuted by defendant, and that he was acquitted of the charge, entitled to recover as for false imprisonment, though the proof thereof would be sufficient under proper allegations, as the two causes of action are inconsistent.

3. Where a police officer is authorized to make an arrest only where he has a warrant for the offender, or the offense was committed in his presence, under an allegation that plaintiff was arrested by a police officer it will be presumed that he had a warrant, or that the offense was committed in his presence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by George Davis against the Pacific Telephone & Telegraph Company. From a judgment in favor of defendant, plaintiff appealed. Affirmed.

Crandall & Bull, for appellant. Pillsbury & Madison, for respondent.

COOPER, C. This is an action to recover damages for malicious prosecution. The complaint alleges that on the 17th day of October, 1891, the defendant caused a complaint to be verified and filed against the plaintiff, charging him with a criminal offense, to wit, "with willfully, unlawfully, and maliciously taking down, removing, injuring, and obstructing a line of telegraph in the city and county of San Francisco," and that on said complaint the defendant caused plaintiff to be arrested, and prosecuted in the police court of said city; that in so doing "the defendant acted maliciously, and without probable cause"; and that plaintiff was afterwards acquitted of the said offense. The plaintiff was charged in said police court with the violation of section 591 of the Penal Code, which is as follows: "Every person who maliciously takes down, removes, injures or obstructs any line of telegraph, or any part thereof, or appurtenance or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor." The undisputed facts, as established at the trial, were substantially as follows: A number of persons engaged in the business of moving houses in the city and county of San Francisco thought that the telegraph and telephone companies had no right to make the parties so engaged in moving houses pay the expense of moving or changing the telegraph wires when such removal or change became necessary by the removal of a house. Controversies had before arisen as to the right of the companies to exact payment of the house movers. Accordingly the house movers organized for the purpose of testing the law, and employed an attorney. The attorney advised the plaintiff, who appears to have been the treasurer and manager of the association, to serve a written notice upon defendant to the effect that he was moving a house on Union street, in said city, and that the wires used by defendant were an obstruction to him, and demanding that the wires be removed by 1 o'clock of the morning of October 17, 1891. The notice was accordingly prepared by the attorney for the association, and served by plaintiff upon defendant. Plaintiff, upon serving the notice, said nothing in explanation, but walked away. He had been advised by the attorney so retained that the way to test the law was to cut the wires after serving notice, and that he would then probably be arrested. The attorney prepared a bail bond for him, and agreed to attend to the case, and to all the "wire cases" that should come up. At 1 o'clock on the morning of the 17th of October the president and superintendent of defendant and several police officers appeared at the place designated in the notice. Plaintiff did not then cut the wires, but the next day, during the busy part of the day, and while no police officers were around, he cut about a dozen of defendant's wires in the presence of an employé of defendant. The employé immediately telephoned for the police officers, and in 15 or 20 minutes two came up, and upon their arrival the employé arrested the plaintiff, and turned him over to the police. The whole party then boarded a Union Street car, and proceeded to the old city hall, where plaintiff was charged with cutting telegraph wires, contrary to the provisions of law and section 591 of the Penal Code. Bail was fixed at $60, which plaintiff deposited, instead of giving the bond prepared by his attorney, and was then released. He was discharged in the police court. After testimony was given, establishing the facts as herein stated, in the court below defendant made a motion for a nonsuit upon several grounds; among others upon the ground that the evidence offered on the part of plaintiff failed to show either malice or want of probable cause. The court granted the motion, and judgment of nonsuit was entered. Motion for a new trial was made and denied, and plaintiff appeals from the judgment and order.

It is contended by plaintiff that there was evidence of malice and want of probable cause sufficient to entitle the case to go to the jury. It is incumbent upon the plaintiff, and the burden of proof is upon him, in an action of this kind to prove both malice and want of probable cause. 2 Greenl. Ev. § 454; Potter v. Seale, 8 Cal. 221; Grant v. Moore, 29 Cal. 656; Anderson v. Coleman, 53 Cal. 188. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. 2 Greenl. Ev. §§ 453, 457; Potter v. Seale, supra; Smith v. Insurance Co., 107 Cal. 433, 40 Pac. 540. Where there is no conflicting testimony, the question whether or not the evidence introduced by plaintiff shows want of probable cause is always for the court to decide, and it is error in such case, where there is no proof of want of probable cause, to submit any question to the jury. Dwain v. Descalso, 66 Cal. 415, 5 Pac. 903; Smith v. Insurance Co., 107 Cal. 436, 40 Pac. 540. It was therefore incumbent on the plaintiff in this case, in order to entitle him to recover, to prove the allegations of his complaint. He alleged that the prosecution was malicious, and without probable cause. The primary question was the want of probable cause for the prosecution complained of, and this must have been established by the plaintiff before he could claim the right to have the case go to the jury. It was therefore essential for plaintiff to prove that his arrest and prosecution were not under such circumstances as would justify a suspicion in a reasonable man that the charge was true. Let us examine the facts, and determine whether or not they warranted such suspicion. The section of the Penal Code hereinbefore cited makes it a misdemeanor for any one to maliciously tear down, remove, or injure any line of telegraph. The plaintiff deliberately, with the advice of counsel, for the purpose of testing the law, with the expectation of being arrested, and during the busy hours of the day, cut about a dozen wires of defendant's telegraph line. The circumstances were such that appellant and his attorney (and we suppose they were reasonable men) expected an arrest to follow. The wires were cut in the presence of an employé of defendant. An act is, in contemplation of law, done maliciously where it is wrongful, and is done intentionally. Pen. Code, § 7, subd. 4; People v. Taylor, 36 Cal. 257; People v. Ah Toon, 68 Cal. 362, 9 Pac. 311. The act of plaintiff in cutting the wires was unlawful, and he knew it to be. He had been so advised by his attorney. In the complaint in this case, which was verified, he alleges that the complaint in the police court charged him with a criminal offense in the willful cutting of telegraph wires. It is not questioned that the wires of defendant had been erected and were being maintained under a franchise from the board of supervisors. It is not claimed that they in any way interfered with the regular use of the highway by the public, nor that they were upon private property. There is no attempt made to show that appellant had any legal authority to cut them. It seems to us that the circumstances were amply sufficient to warrant a reasonable person in the belief that the plaintiff had committed a crime. The fact that he was discharged in the police court is but a circumstance, and in no way convinces us that the charge was without probable cause. This court, in Janin v. Bank, 92 Cal. 27, 27 Pac. 1102, said: "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and, when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to a jury." Applying the rule to this case, we do not think there was evidence sufficient to convince a rational, well-constructed mind that there was no probable cause for plaintiff's arrest in the police court. Counsel for plaintiff seem to have apprehended that they had not proved the case as alleged in the complaint, because they devote the first half of their brief to arguing that the complaint is sufficient to sustain an action for false imprisonment, and that the evidence should have been submitted to the jury with proper instructions on that issue. We do not think the contention can be maintained. We will take the definition of false imprisonment as given by plaintiff's counsel: "False imprisonment is a trespass committed by one man against the person of another by unlawfully arresting him, and detaining him without any legal authority." In order for the complaint to state a cause of action under the above definition, it would have to show that the defendant unlawfully arrested the plaintiff without legal authority. The complaint not only fails to state that the arrest was unlawful, and without legal authority, but states that it was lawful, and upon a complaint charging plaintiff with a criminal offense, and by a police officer of the city and county. The plaintiff, in order to make out a case of malicious prosecution in his complaint, had to allege that he was arrested by legal process. On the other hand, in an action for false imprisonment he would have to allege that he was arrested without legal authority.

The rule has often been stated by this court that the plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other, which may be developed by the proofs. Mondran v. Goux, 51 Cal. 151; Evans v. Bailey, 66 Cal. 113, 4 Pac. 1089; Milling Co. v. Morgan, 106 Cal. 409, 39 Pac. 802. In Johnstone v. Sutton, 1 Term R. 544, decided in 1786, Lord Loughborough, in discussing an action for malicious prosecution, said: "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." This rule has always been adhered to, not only in England, but in this country. Colter v. Lower, 35 Ind. 285; Turpin v. Remy, 3 Blackf. 210; Seeger v. Pfeifer, 35 Ind. 13; Murphy v. Martin, 58 Wis. 276, 16 N. W. 603; Elsee v. Smith, 2 Chit. 304; Gelzenleuchter v. Niemeyer, 64 Wis. 321, 25 N. W. 442. And in the case of Nebenzahl v. Townsend, 10 Daly, 235, the court used this language: "The complaint was for false imprisonment and malicious prosecution, which was uniting two causes of action that were inconsistent with each other, for, if the arrest was without lawful authority, it was not a case of malicious prosecution (Bourden v. Alloway, 11 Mod. 180); and, if under lawful process, there was no false imprisonment, the imprisonment being by lawful authority. Each cause of action is distinct from the other. Thus, formerly, for false imprisonment the remedy was trespass, and for malicious prosecution it was case. Elsee v. Smith, 2 Chit. 304. Both cannot exist upon the same state of facts; or, to put it more clearly, if the one lies upon the facts, the other does not." In this case plaintiff did not attempt in his complaint to state a cause of action for false imprisonment, and we do not think, under his pleading, that he can make the claim for the first time in this court. We have carefully examined the cases cited by appellant's counsel, and find nothing in them in conflict with what has been said. In Ah Fong v. Sternes, 79 Cal. 32, 21 Pac. 381, the court said: "We think the complaint states a good cause of action for false imprisonment. The allegation that the plaintiff was confined and restrained of his liberty by the defendant is an allegation of physical and bodily restraint, which would serve as a foundation for the old action of trespass vi et armis. In such an action it is not necessary to aver—as would be necessary to aver in an action for malicious prosecution—that the imprisonment was malicious, or without probable cause." The court evidently recognized the distinction between the two classes of cases. Even if the complaint in this action were sufficient as pleading a cause of action for false imprisonment, the evidence would not sustain it. The arrest was made by Corcoran, an employé of defendant, in whose presence the offense was committed. A private person may arrest another for a public offense committed or attempted in his presence. Pen. Code, § 837. If the evidence were sufficient to show a false imprisonment, we are again met by the objection that the complaint does not allege any restraint of any kind by defendant, but alleges that the defendant procured a police officer to arrest plaintiff. There is no statement as to whether the arrest was with or without a warrant, and the presumption of law is that a public officer performed his duty, and in this case the presumption would be that the officer either had a warrant, or that the "criminal offense" was committed in the presence of the officer. The allegation of the complaint is "that he was charged with a criminal offense," and in such case plaintiff cannot now claim "that he was not charged with any criminal offense." Being charged with a criminal offense, and arrested by a police officer, and nothing being averred to the contrary, it is presumed the officer had the proper warrant. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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125 Cal. 101

ALAMEDA COUNTY v. CROCKER et al.

(S. F. 1,179.)

(Supreme Court of California. June 17, 1899.)

EMINENT DOMAIN—FINDINGS—CONSTRUCTION—JUDGMENT—FICTITIOUS NAMES—ERRORS AFFECTING CO-PARTIES—COSTS.

1. A finding in condemnation proceedings "that all the facts alleged in the complaint are true, except as to those hereinafter otherwise specified, and as to those allegations the court finds as follows," the court then finding specifically as to certain facts, does not mean that all the facts so excepted are necessarily untrue, but that they are as found specially.

2. In condemnation proceedings, a finding specifically as to the ownership of all the lands sought to be condemned, and as to all lands about which there is any issue presented, necessarily excludes the idea of any ownership in a defendant not specifically mentioned, and is, in effect, a finding against him.

3. A judgment in condemnation proceedings against defendants, served by fictitious names, who appeared, and answered by their real names, cannot be supported without amending the complaint.

4. In condemnation proceedings, the action of the court in vacating former orders for condemnation of lands of a defaulting defendant, prematurely entered, and inoperative, and entering a final decree, such former orders not purporting to adjudge the rights of any of the other defendants or condemn any of the other lands, is not prejudicial as to such other defendants.

5. Where an appeal by defendant in condemnation proceedings is from the judgment, and upon the judgment roll alone, and there is nothing to show whether defendant presented a cost bill, or incurred any costs, or that, if a cost bill was presented, it contained only proper items of cost, it will be presumed in support of the judgment that defendant failed to present a bill of costs showing items properly chargeable to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Action by Alameda county against Mary Ives Crocker, Isabella E. Jordan, and others, to condemn lands for a public highway. There was a judgment for plaintiff, and defendant Isabella E. Jordan appeals. Affirmed.

R. E. Hewett, for appellant. Mastick, Belcher & Mastick and A. L. Rhodes, for defendants and respondent. T. C. Huxley and Charles E. Snook, for respondent.

CHIPMAN, C. Action to condemn lands for a public highway in the county of Alameda. There were twelve defendants named in the complaint, four of whom were sued by the fictitious names of John Doe, Richard Roe, John White, and James Black. Mary V. Baldwin, George W. Patterson, R. W. Allen, and Catharine M. Allen, whose names do not appear in the complaint, appeared as defendants. George W. Patterson answered under the name of Richard Roe, claiming to own the land alleged to belong to A. Patterson. R. W. Allen was served under the name of Richard Roe. Catharine M. Allen appeared by demurrer under a fictitious name, not stated. The Allens (R. W. and Catharine) answered "as sued and served under fictitious names" (the fictitious names not stated), claiming to own the land alleged to belong to Mrs. F. J. Hall, alias Phebe J. Hall, defendant named in the complaint; and Mary V. Baldwin appeared by demurrer under the name of John Doe. No amendment of the complaint was made inserting the true names of these four who appeared after the complaint was filed. Defendant Pope defaulting, a preliminary decree was entered against him August 24, 1894, and a final decree October 29, 1894, condemning his lands, and on March 13, 1895, the final decree against Pope was amended as to description of his lands. Defaults as to all the other defendants were taken, except as to defendants Crocker, Dillon, the Allens, and appellant, Jordan, and upon the issues raised by their answers the case was tried August 25, 1896. The court filed findings, and ordered judgment for plaintiff as prayed for. Thereafter an interlocutory decree, and subsequently a final decree, were entered, which final decree included all the defendants in the case. From these last two mentioned decrees the appeal is taken by Isabella E. Jordan.

1. The court made the following finding: "That all the facts alleged in the complaint * * * are true, except as to those hereinafter otherwise specified, and as to those allegations the court finds as follows." The court then takes up the parties, and the several pieces of property sought to be condemned, and finds specifically as to the ownership, acreage, value, and damages and benefits to the tracts belonging to defendants Crocker and Dillon, appellant, Jordan, Phebe Hall (found to belong to R. W. and Catharine Allen); and as conclusions of law the court finds that Crocker and Dillon, Jordan, and the Allens are entitled to damages. Appellant contends that the above finding is insufficient, because uncertain and obscure. It is said: "It may mean that it was the intention of the court to indicate subsequently in its findings those allegations which it found to be untrue, or it may mean that all the allegations of the complaint were true except so far as inconsistent with the facts subsequently found." It is claimed that, if the former of these intentions is to be taken as the purpose of the court, it failed to point out the allegations it intended to declare to be untrue; and, if the second construction suggested be the true one, then the general finding in question would not comply with the Code,—citing Johnson v. Squires, 53 Cal. 37; Harlan v. Ely, 55 Cal. 340; Bank v. Treadwell, Id. 379. We think the natural reading of the finding is, in effect, that all the facts alleged in the complaint are true except as to those facts therein alleged and in the findings otherwise specified, as to which the facts are not necessarily untrue, but are as found specifically by the court. In the cases cited the finding left something undetermined, so that the court could not ascertain precisely what facts had been found. Here the finding is that the facts set forth in the complaint are true except as to certain particulars, and as to these the facts are as specifically found. For example: The complaint alleged that the value of the land belonging to defendants Crocker and Dillon does not exceed $1. The finding is that its value is $50. And so as to appellant's land, sought to be condemned, which was alleged to be of the value of $1, the finding is that it is of the value of $60. Certain land is alleged to belong to Phebe Hall, and the court found that the Allens were the owners. But it is said that, if the finding be sufficient, then it adopts as true the allegation of the complaint that the four fictitious defendants have or claim to have some interest in the property sought to be condemned, and that this finding is capable of the construction that the fictitious defendant sued as James Black is not merely an incumbrancer but the owner of the whole, or a portion of, or an undivided interest in, the lands specially found to belong to defendants Crocker, Dillon, Allen, or Jordan, and, if this be so, the two findings destroy each other. This might be true if there had been an unqualified finding that Black is the owner of an interest in any of the lands found to be entirely owned by some one or more other defendants and if Black had been a real party, and there was any issue made as to his interest. But the court found specifically as to the ownership of all the lands sought to be condemned, and as to all lands about which there was any issue presented. This finding necessarily excluded the idea of any ownership in Black, and was, in effect, a finding against him.

2. It is contended that the judgment is erroneous as to the Allens, Patterson, and Baldwin, as to whom the complaint was not amended, citing McKinlay v. Tuttle, 42 Cal. 572, and Baldwin v. Bornheimer, 48 Cal. 434. In McKinlay v. Tuttle certain defendants—the Castros—were served by fictitious

names, and appeared and answered, but the complaint was not amended by inserting therein their true names, and it was held, under section 69 of the practice act, that, when the true name is discovered, the pleading must be amended, if it is intended to bind such person by the judgment. And this has been held to be the law under section 474 of the Code of Civil Procedure. Bachman v. Cathry, 113 Cal. 498, 45 Pac. 814. In the case cited in 48 Cal., supra, the rule in McKinlay v. Tuttle, supra, was approved, and the court affirmed the order denying a new trial, but ordered the lower court "to amend the complaint, or cause the same to be amended, as of date prior to the judgment in said court, by the insertion therein of the name of Engel Bornheimer as a party defendant." I think it essential that there should be a valid judgment against all defendants whose lands are sought to be condemned (Butte Co. v. Boydstun, 68 Cal. 189, 8 Pac. 835), and that the judgment, without amending the complaint, cannot be supported (Bachman v. Cathry, supra); but I think the course pointed out in Baldwin v. Bornheimer, supra, should be followed. There is no necessity or reason for subjecting the parties to a new trial on account of the failure to amend the complaint in the particular complained of.

The point that the judgment is erroneous because it fails to ascertain and determine the specific rights, in the land condemned, of the defendants sued by fictitious names, is disposed of by what has already been said. There are no such lands, the specific rights in which have not been determined.

3. It is claimed that when the court rendered judgment against Pope it exercised its powers, and exhausted them for the purposes of the action, and the subsequent judgment must be void. It appears that on August 24, 1894, the court ordered that plaintiff pay to Pope the sum of $1 within 30 days, and "that upon such payment being made within said time the final order condemning and taking said strip of land be made and entered." This order was entered before appellant and some other defendants had answered. After the answers of some, but not all, of the defendants appearing were filed, the court, on October 29, 1894, "ordered, adjudged, and decreed" that "all the estate * * * of the defendant R. T. Pope, * * * and the same are hereby condemned for the purpose of a highway." On the same day the court made and entered an amended order as to Pope, referring to what it terms the "preliminary order of condemnation made and filed in this court on the 24th day of August, 1895 (should be 1894)." Appended to this order is an order dated March 13, 1895, reciting that an error was made in the description of the land contained in the order first made on October 29, 1894, and declaring that the true description is as in the last order of that date. Some of the defendants appeared by answer or demurrer after this order was entered; and finally, on April 25, 1896, the cause was tried, and the court made its findings, and entered its decree adjudging the rights of all the parties, including Pope; and on July 25, 1896, the court entered its final decree of condemnation as to all the land sought to be condemned, and as to all the defendants, including Pope. The court apparently treated the earlier orders or decrees made by it as prematurely entered and inoperative, and in support of the judgment it may be presumed that the court made an order vacating the first orders as to Pope. Those orders did not purport to adjudge the rights of any of the other defendants, or condemn any of the other lands; nor could the court have done so at that stage of the proceedings, for some of the defendants had not yet answered. The record was not yet in condition for a final decree. No possible harm came to appellant, and Pope is not appealing. See the subject discussed in 1 Freem. Judgm. § 16 et seq.; Fox v. Mining Co., 112 Cal. 568. 44 Pac. 1022. As to the necessity for a final judgment of condemnation as to all defendants, see Butte Co. v. Boydstun, supra.

4. It is contended that the court erred in not awarding the defendants, whose lands were condemned, their costs of the action, citing City of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56. That case holds that the power to allow or not to allow costs in condemnation proceedings under section 1255, Code Civ. Proc., is limited by section 14, art. 1, of the constitution. See, also, Town Co. v. Neal, 88 Cal. 50, 25 Pac. 977. But it is held that the court had discretion to determine what are improper items of cost in proceedings of this kind, and to disallow such as are improper, as in other cases. This appeal is from the judgment and upon the judgment roll alone. There is nothing here to show whether appellant presented a cost bill or incurred any costs, or that, if she did so present a cost bill, it contained only proper items of cost. It must be presumed, in support of the judgment, that appellant failed to present a bill of costs showing items properly chargeable to plaintiff. We think the judgments appealed from should be affirmed, with directions to the court below to amend the complaint, or cause the same to be amended as of a date prior to the judgment of condemnation entered April 25, 1896, in said court, by the insertion therein of the names, Mary V. Baldwin, George W. Patterson, R. W. Allen, and Catharine M. Allen, as parties defendant.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgments appealed from are affirmed, with directions to the court below to amend the complaint, or cause the same to be amended, as of a date prior to the judgment of condemnation entered April 25, 1896, in said court, by the insertion therein of the names, Mary V. Baldwin, George W. Patterson, R. W. Allen, and Catharine M. Allen as parties defendant.

125 Cal. 90

MOORE v. HOFFMAN et al. (S. F. 1,119.)

(Supreme Court of California. June 16, 1899.)

HOMESTEAD—CONVEYANCE OF UNDIVIDED INTEREST—RIGHTS OF GRANTEE.

A conveyance of the interest of a child in the homestead of a deceased parent will not constitute the grantee a tenant in common with the surviving parent, and entitle him, as such, to share the possession of the homestead with such parent.

Department 2. Appeal from superior court, Santa Cruz county.

Action by Helen M. Moore against Alice Hoffman and another for the possession of certain real estate. There was a judgment for defendants, and plaintiff appeals. Reversed.

Chas. B. Younger, for appellant. Frank M. Stone, for respondents.

McFARLAND, J. Plaintiff avers in her complaint that she is the owner of the undivided one-half of certain described land, and is entitled to the possession thereof, and that defendants are unlawfully in possession of said land; and she prays for the recovery of the possession of the land from defendants, with damages, etc. The defendants, in their answer, admit that plaintiff is the owner and entitled to possession of the undivided one-third of the premises, and afterwards, at the trial, admitted that she was entitled to one-half; but they say that the defendant Alice is the owner of an undivided interest in the land as tenant in common with plaintiff, and they claim only the right to hold possession jointly with plaintiff as tenant in common. The jury found for the defendants, for whom judgment was rendered; and plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

Appellant makes many points for a reversal, which, under our view of the case, need not be discussed; for, waiving all contentions of appellant as to minor matters, the court erred as to the leading question in the case, which goes to the real merits of the controversy.

William H. Moore died intestate, seised of the land in question, leaving a widow, the appellant herein, and three minor children, Charles Moore, Stella Moore, and William M. Moore. Afterwards, and during the administration of his estate, to wit, on April 26, 1881, the court in which the administration was pending duly set apart the land in question here as a probate homestead to the appellant, as widow, and the minor children; the order setting it apart declaring that one half should go to the widow, and the other half to the children, or one-sixth to each of them. On September 11, 1889, Charles Moore, one of the children, who had then attained his majority, conveyed by deed to Alice Hoffman, one of the respondents, an undivided two-fifteenths of an undivided one-sixth of the land; and under this deed the said Alice and the other respondent, her husband, William C. Hoffman, who was also made a party defendant, claim the right to possession as tenants in common with appellant. It does not expressly appear whether or not the other two children had attained majority at the time this suit was commenced, although, according to certain dates which the record shows, they probably had; and, for the purposes of the case, we will assume that all the children were of legal age at the time of the commencement of this action, as that view is the most favorable to respondents. The question in the case presented by the foregoing facts is, can the grantee of one of the children, in a case like this, legally go into possession of the homestead as the tenant in common with the widow? The question arose in various ways, and principally upon the instructions of the court to the jury. The court instructed that, if Charles Moore deeded an interest to Alice Hoffman, as above stated, then "that, unless it had been shown by evidence that Alice Hoffman has since disposed of her interest in said land, that she is, and has been since said date, a tenant in common with plaintiff, and you must find for the defendants," and that her husband had a right to be in possession with her, and refused to instruct that neither of the children "could give any right to any person to the possession of said homestead against said plaintiff"

The purpose of a homestead is to secure a home to those clothed with the homestead right,—to each and all of them; and the power of a stranger to enter into the posession of the land, and, as a tenant in common, to interfere with its occupancy and control by the homestead claimants, and to have it partitioned, or sold if division be impracticable, would be inconsistent with the very nature of a homestead, and violative of the very purpose for which homesteads are created. Probate homesteads are, of course, for the benefit of minor children, when there are such, as well as for the surviving wife or husband; and our attention has not been called to any adjudication in this state where in such a case the grantee of a child has undertaken to disturb the possession of the other homestead claimants, but the principle which is clearly applicable to the case at bar was declared and applied, where the party asserting the right of possession was the grantee of the widow, in Hoppe v. Hoppe, 104 Cal. 94, 37 Pac. 894. In that case, where a probate homestead had been set apart to the widow and minor children, the widow had mortgaged all her interest in the homestead premises; and it was held that a purchaser at the foreclosure of the mortgage had no right to possession, as against the minor children, until their homestead rights had ceased, which would occur at their majority. The court announced the principle above stated as follows: "The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it." Counsel for respondents seems to think that the Hoppe Case decides that the rights of all the homestead claimants ceased when the children arrived at majority, because the court said that the premises were to "remain as a homestead, without any power in either of the parties interested to destroy its quality as a homestead until after all of the children shall have arrived at majority," and "it must remain intact until the youngest child has reached its majority." But this language was used in a case where the rights of the minor children were being asserted as against the act of the widow, not where the rights of the widow were being asserted as against the acts of the children. When the children arrive at majority, their interest in the homestead, as a homestead, ceases, for they no longer constitute a part of the family, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of those of remainder-men or reversioners. After their majority, the widow, being the only homestead claimant left, could, of course, dispose of her interests in the land, because there would then be no other homestead claimant to contest her right to do so; and it was in view of this situation that the court said in the Hoppe Case that she could not destroy the homestead while any of the children were minors. But exactly the same principle applies in favor of the widow as against the grantee of a child. Such grantee cannot disturb her possession until her homestead right has been extinguished either by her own act or by operation of law, and it cannot be extinguished by any act of one or all of the children, either before or after their majority. The rights of a homestead claimant cannot be affected by an instrument in writing to which such claimant is not a party. See Phelan v. Smith, 100 Cal. 166, 34 Pac. 667. The governing principle is that the homestead right continues in favor of any one of the family for whom it was created as long as he or she asserts it and remains in a position to assert it. This rule has been declared in other states, for, while not many of their statutory provisions about homesteads are exactly like ours, still they are sufficiently similar to make the principle applicable. See cases cited in opinion of Harrison, J., in Hoppe v. Hoppe, on page 101, 104 Cal., and page 895, 37 Pac. In Keyes v. Hill, 30 Vt. 768, the supreme court of Vermont declares the law as follows: "We think the clear design of the law is to continue the homestead entire, as the home of the widow, or of the widow and children constituting the family at the decease of the husband, housekeeper, or head of the family, and that no rights of the children become operative to sever or divert such homestead from full occupancy and enjoyment as a family home, as long as the widow, or widow and children, see fit to continue it as such family home." The judgment and order appealed from are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

125 Cal. 44

PEOPLE v. MILLER. (Cr. 528.)

(Supreme Court of California. June 10, 1899.)

HOMICIDE—JUROR—COMPETENCY.

1. On his voir dire, in a murder trial, a juror stated he had read accounts of the killing, and had heard it discussed by persons making statements they said were true. From what he had heard and read he had formed an opinion rather unfavorable to accused, if what he heard and read was true. He did not know deceased or witnesses, and it would take some evidence to remove his opinion. *Held* that, since it did not appear but what the juror had formed his opinion from talks with an eyewitness, or a witness on the trial, the statutory exception to the common-law rule disqualifying juror with an opinion of guilt (Pen. Code, § 1076) that, where the juror's opinion is founded on "public rumor, statements in public journals, or common notoriety," the court could exercise discretion in accepting him, did not apply, and it was error to accept him.

2. An instruction on a trial for murder that no man by his lawless acts can create a necessity for acting in self-defense, and that the plea, of necessity, is a shield only to those who are without fault in occasioning it, but that defendant can show in justification that, though he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind, and endeavored to escape from it, but could not without striking a mortal blow, though not approved, does not constitute error.

Department 1. Appeal from superior court, Lassen county.

Frank Miller was convicted of murder, and he appeals. Reversed.

E. V. Spencer and H. D. Burroughs, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of murder, and sentenced to imprisonment for life. He now claims that a challenge interposed to the juror De Forest, upon the ground of actual bias, should have been allowed. The attorney general, in his brief, sums up the evidence of the juror upon his voir dire examination in the following form (this summation being a fair one, and fully as favorable to the people as the circumstances justify): Upon examination the juror said: "That he had read newspaper accounts of the killing, had heard the matter discussed by persons, but did not know whether such persons assumed to know the facts or not, but they made certain statements which they said were true. He did not know whether such statements were true or not. From what he had heard and read he had formed an opinion rather unfavorable to defendant; that is, if what he had heard and read was true. He did not know deceased, nor who the witnesses were. It would take a little evidence to remove the opinion he had. He had no reason to disbelieve the statements he had heard. The only impression he had about the case was a sort of impressionable opinion formed from the statements he had heard from others. If sworn as a juror he would try to lay aside his opinion entirely and act solely and entirely upon the evidence. He could not entirely dismiss the opinion from his mind. He was not a man that made up his mind from newspaper reports and rumors. His opinion would not have great weight with him in trying the case. He would commence the trial of the case with an impressional opinion, subject to be changed upon the introduction and production of almost any evidence that would disprove it. He would regard the statement he had heard as entitled to but little weight. The statements were made by parties he had known for years, and whom he believed were telling the truth, and he believed them. He had some idea that they might be mistaken. He would take the instructions of the court as to the law."

Upon the foregoing state of facts the challenge to the juror, upon the ground of actual bias, should have been allowed. The juror went into the box with an opinion that the defendant was guilty. Such condition of the juror's mind was an absolute disqualification at common law. Under the Penal Code of this state, a single exception is found to the common-law rule, and that exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section. The exception found in the law covers the single case where the opinion of the juror is "founded upon public rumor, statements in public journals, or common notoriety," and it further appears to the court, from the declarations of the party under oath, that he can and will, notwithstanding his opinion, act impartially and fairly upon the matters submitted to him. The court is not allowed to hold that a juror is qualified when he is impressed with an opinion as to the guilt or innocence of a defendant, unless that opinion is based alone upon one or more of the cases enumerated in the aforesaid section of the Code. When the opinion is based upon one or more of these causes, then the court has a wide margin allowed it in weighing, measuring, and testing the party's declarations for the purpose of ascertaining his fairness and impartiality in passing upon the defendant's guilt or innocence. And here, if it appeared from the evidence that the opinion of the juror had been formed from public rumors, newspaper articles, or common notoriety, the finding of the court as to his competency probably would not be disturbed; but we have no such showing. As far as this record discloses, any one of the parties with whom the juror conversed as to the circumstances of the killing may have been an eyewitness to the tragedy and an important witness at the trial. The record must show affirmatively a contrary state of facts to this, or the exception in section 1076 to the common-law rule cannot be invoked. There is nothing in the evidence which would justify the conclusion that the opinion of the juror was founded alone upon public rumors, statements in public journals, or common notoriety. This case, in principle, is directly in line with People v. Wells, 100 Cal. 227, 34 Pac. 718. It is there said: "But in order that a juror, disqualified at common law by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within this provision of the statute, it must appear affirmatively to the court, from the evidence before it, that such opinion is formed from public rumors or statements of public journals, or common notoriety." Some other jurors were placed in the box whose competency came close to the border line; but it becomes unnecessary to consider the questions involved as to them.

The trial court gave an instruction to the jury upon the law of self-defense. This instruction was taken bodily from the cases of People v. Kennett, 114 Cal. 18, 45 Pac. 994, and People v. Roemer, 114 Cal. 51, 45 Pac. 1003, where it was approved by a divided court. At the same time it was substantially said in the Roemer Case that "trial judges are not advised to make further use of it." This instruction, aside from the qualification, is unsound. See People v. Button, 106 Cal. 628, 39 Pac. 1073; People v. Conkling, 111 Cal. 616, 44 Pac. 314; People v. Farley (Cr. 494; filed June 2, 1899) 57 Pac. 571. In the Roemer and Kennett Cases it was held that this mass of bad law was so neutralized, and enriched for the better, by a qualification found at the end of the instruction as not to be absolutely vicious. To work such a result, the qualification must have been held by the court to have had the effect of a very powerful antidote. But, in view of the holding made in those cases, the giving of the instruction here does not constitute error. Yet no good purpose can ever be subserved by giving it, and it should never be done. There is nothing further disclosed by the record demanding the consideration of the court. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN DYKE, J.; HARRISON, J.

125 Cal. 146

KENNEY v. PARKS et al. (L. A. 405.)

(Supreme Court of California. June 19, 1899.)

DEEDS—EXECUTION—DELIVERY—SUFFICIENCY.

A grantor's deposit of a deed with a bank cashier, to be filed for record if the grantor died during the life of the grantee, and otherwise to be returned, is not a sufficient delivery to vest title in the grantee.

In bank.

On rehearing. Reversed.

For opinion in department, see 54 Pac. 251.

GAROUTTE, J. This is an action in equity to reform a deed, quiet title, and for general relief. The plaintiff is the widow of Joseph A. Kenney, deceased, and the defendants are the executors of his last will and testament, joined with certain of his heirs at law. Judgment went for plaintiff, and this appeal is prosecuted therefrom. The leading question involved arises upon the sufficiency of the findings of fact to support the judgment, and by reason of the views we entertain upon that proposition it becomes unnecessary to review the minor matters discussed which bear upon the legal sufficiency of the complaint, and which are presented by special demurrer.

The evidence presents no important conflict, and by the evidence and the findings it appears that plaintiff and the deceased, Joseph A. Kenney, were husband and wife, and each owned considerable property, both real and personal. Having no children, they entered into an agreement in writing wherein they mutually agreed to execute deeds each to the other, conveying absolutely, in fee simple, all of their respective estates, both real and personal, situate in Santa Barbara county; and agreed that said deeds should be placed as escrows in the hands of the cashier of the First National Bank in Santa Barbara, with directions to said cashier that, if the plaintiff should die during the lifetime of said Joseph A. Kenney, he, the said cashier, should, on request of said Joseph A. Kenny or his agents, file the deed by the plaintiff to said Joseph A. of record in the county recorder's office in said county, and, if said Joseph A. should die during the lifetime of the plaintiff, said cashier, at the request of the plaintiff or her agent, should file said deed of Joseph A. to her in said recorder's office. This agreement was executed, and the deeds delivered to the cashier, as therein provided. These deeds were inclosed in separate envelopes, and these envelopes were similarly indorsed by the respective parties, the indorsement of the husband being as follows: "The inclosed deed, dated the 1st day of June, 1892, is herewith deposited in escrow with the cashier of the First National Bank of Santa Barbara, and the said cashier, who may be such cashier at my decease, if I should die during the lifetime of my wife, is hereby instructed and commanded, at my decease, on request of my said wife or her agent, to open this envelope at once, and to file the inclosed deed for record with the recorder of Santa Barbara county." Joseph A. Kenney died; whereupon his wife, the plaintiff, demanded of the cashier that his deed to her be recorded or delivered to her. This demand was refused, whereupon she inaugurated the present litigation, claiming title to the husband's property under his aforesaid deed delivered to the cashier of the bank.

The question presented is, has the title to the property described in the husband's deed passed to the wife? And the solution of this question depends upon the fact as to the sufficiency of the delivery of the deed by the grantor, the husband. The agreement entered into between the husband and the wife declares the two deeds are to be placed in the hands of the cashier as escrows. But so christening them did not have the effect of making them escrows. When placed in the hands of the cashier, they were in no sense escrows. Where an instrument is deposited with a third party to await the performance of some condition by the grantee, such instrument becomes an escrow. Civ. Code, § 1057. The evidence here presents no such case. Upon the contrary, we have a direct grant or no deed whatever.

Was the delivery of the husband's deed to the cashier sufficient to pass the title to the wife? Upon mature consideration, we have arrived at the conclusion that no title whatever passed. While it is not so expressed in the agreement, yet the intention of both parties is plain that the party surviving should have his or her deed returned in case the other party should die, and that no title to the property described in the deed of the party living should vest. In other words, the plaintiff having survived her husband, her deed is to be returned to her, and title to her property remain vested in her. Under the laws of this state, the title to the property vested presently when the deeds were delivered, or it did not vest at all. Yet, as to the plaintiff's property, it is apparent that no title ever vested in the husband under her deed. Such being the case as to her property, it is most difficult to see how title to his property, by his deed, ever vested in her.

The general principles of law involved in this case are quite fully discussed in Bury v. Young, 98 Cal. 446, 33 Pac. 338. In the decision of that case many authorities are cited supporting the conclusion declared, and with that conclusion we are entirely satisfied. It is there said: "The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that, when it is placed in the hands of a third party, it has passed beyond the control of the grantor for all time." In the present case, by the agreement of the grantor and grantee, it was understood that the grantor's deed was to be returned to him upon the happening of a certain event, to wit, the death of the other party. And at this time it may be assumed that the plaintiff's deed has been returned to her, or at least has been treated as of no force and effect. In the Bury Case it is also said: "In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that upon the happening of some event, or contingency, or condition, he had the right, if so disposed, to reach out and take it from the possession of the depositary." The present case comes squarely within that description. Here the grantor reserved the right to recall his deed upon the happening of a certain event. When that event happened, he had the right to reach out and take back the deed, and such reservation is fatal to a valid delivery.

The all-controlling fact in this case, which defeats plaintiff's claim, is that, when the deeds were made and delivered to the cashier of the bank, the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title should vest under it. The decision in Bury v. Young, supra, was rested upon a directly contrary state of facts, namely, that the grantor has parted with the control and possession of his deed for all time. It is declared in that case that the doctrine there laid down would not be enlarged. The validity of the deed here involved, and upon which plaintiff rests her claims, cannot be supported without greatly extending that doctrine. For the foregoing reasons, and under the authority of Bury v. Young, supra, Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300, and Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867, the judgment is reversed, and the cause remanded.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

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125 Cal. 117

REID v. F. W. KRELING'S SONS' CO.

(S. F. 1,151.)

(Supreme Court of California. June 17, 1899.)

PARTNERSHIP — INCORPORATION — LIABILITY FOR FIRM DEBTS.

1. Where a partnership incorporates, and the company continues to use the firm books, and continues the various running accounts without break, it is estopped to set up the incorporation as a defense against one who, without notice of the change, sells it goods, and charges them to the firm.

2. That a portion of goods sold to a firm was used by the partners individually does not relieve a corporation which succeeds the firm from liability for the goods.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. S. Reid against F. W. Kreling's Sons' Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Thos. A. McGowan, for appellant. Chas. Wesley Reed, for respondent.

McFARLAND, J. Action to recover $1,064.44 for goods sold defendant by the S. F. Novelty Plating Works, a corporation, which assigned its claim therefor to plaintiff. The court below gave judgment to plaintiff for the amount sued for, and defendant appeals from the judgment and from an order denying a motion for a new trial.

We see no reason for disturbing the judgment, which is clearly a just one. There is no question about the amount of the goods furnished, or the actual balance due thereon. The whole defense is upon the ground that the members of a co-partnership, which had been dealing with the respondent's assignor, changed the co-partnership into a corporation, and continued to deal with said assignor as before, without his knowledge that such change had been made. For many years prior to the year 1894 F. W. Kreling & Sons had been carrying on a certain business as co-partners, and prior to and during the year 1894 they had a running account with plaintiff's assignor. Some time in 1894 they concluded to continue their business under the form of a corporation instead of a partnership, and for that purpose formed a corporation called F. W. Kreling's Sons' Company. It seems that they considered themselves a corporation in April, 1894, at which time they signed certain papers relating to the proposed change, and commenced at that time to conduct their business in the corporate name; but articles of incorporation were not filed until September 1st, and a certificate of the incorporation was not issued by the secretary of state until October 5th. But no matter at what time they assumed to change, or did legally change, from a partnership to a corporation, plaintiff's assignor had no notice of the change until a short time before the commencement of this action, and continued as usual to send them goods, and sent bills in which F. W. Kreling & Sons were named as purchasers and debtors; and these goods and bills were received by appellant, and their amounts entered on its own books, and payments were made from time to time to plaintiff's assignor without any objection whatever, and without any notification to him that what was formerly a partnership had become a corporation with substantially the same name. The corporation took the assets of the co-partnership, and, as the evidence shows, continued to pay the debts of the latter, and to conduct the business just as before. Indeed, the corporation used the very books which had been used by the co-partnership, and continued and extended therein the various running accounts without break. Under these circumstances, the appellant is estopped from setting up a defense founded upon the change from a co-partnership to a corporation, as against the cause of action here sued on. The fact that a small part of the goods was used by some of the Krelings individually in improving certain real property makes no difference. They were ordered and sold in the same manner as the other goods, and in like manner were credited and entered in the books of both parties; and, under the above views, payments made by appellant after September 1st were properly applied to indebtedness on the running account that had accrued before that time. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

125 Cal. 141

DOOLIN et ux. v. OMNIBUS CABLE CO.

(S. F. 822.)

(Supreme Court of California. June 19, 1899.)

APPEAL AND ERROR—QUESTIONS OF FACT—REMITTITUR OF EXCESSIVE DAMAGES.

Where the evidence in a personal injury case is conflicting, the action of the trial court in granting a new trial on plaintiff's refusal to enter a remittitur will not be reviewed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Michael Joseph Doolin and wife against the Omnibus Cable Company. Judgment was for plaintiffs, and from an order granting a new trial on refusal to enter a remittitur the plaintiffs appeal. Affirmed.

W. H. L. Barnes, for appellants. Sullivan & Sullivan, for respondent.

BRITT, C. Defendant, a street-railway corporation, was engaged in the business of transporting passengers for hire on certain streets of the city of San Francisco. On November 17, 1891, the plaintiff Mary J. Doolin, wife of Michael J. Doolin, who joins with her in this action, was a passenger on one of defendant's cars. The driver in charge thereof lost control of the horses by which the car was drawn, and they pulled it from the track and down an embankment. Plaintiffs allege in their complaint that this was in consequence of the negligence of the defendant and its servant, the driver, and that thereby said Mary was violently thrown against the seat and floor of the car and sustained severe personal injuries, for which they pray damages. The trial of the action was commenced on September 25, 1893, and was concluded October 9, 1893. The evidence for plaintiffs tended to show that, as the result of said accident, Mrs. Doolin fell on the floor of the car, and sustained, besides some minor hurts, a concussion of the spine, which drew after it a train of evil consequences, such as great nervous debility, incompetence to walk without assistance, retention of urine, incoherence of speech, impaired vision, impaired memory, sleeplessness, hysterical and other effects, all of which, her counsel claim, "rendered her a physical wreck, and seriously impaired her mind and memory." She appeared at the trial as a witness on her own behalf. There was evidence for both sides that on May 8, 1893, an examination of Mrs. Doolin, with a view to ascertaining her physical and mental condition, was made by some medical gentlemen; three of them acting at the instance of the defendant, and three or four others on behalf of the plaintiffs. Several of them testified at the trial (both those for plaintiffs and those for defendant) that upon such examination they discovered that the patient had either a uterine or ovarian tumor (they differing as to its precise locality), which was then about the size of a cocoanut; and plaintiffs' family physician, who participated in such examination, testified that at time of the trial such tumor had become about four times as large as it appeared to be when first discovered. Most of the medical witnesses expressed the opinion that concussion of the spine would not produce the tumor, though one of those called for plaintiffs stated that "it could have been produced by a shock to the patient in this way; that, from the fact of a hemorrhage having followed from the blow, a certain amount of fluid may have been thrown out into the interstices of the womb, and that may have become a nidus for a tumor." For the defendant there was further evidence tending to show that the embankment down which the car was drawn was but slight, and that the car was not overturned; that Mrs. Doolin was not thrown down; that she then exhibited no signs of injury; that she stated to several persons then and on the following day that she was not hurt, but had been frightened and made a little nervous; and that the symptoms she subsequently manifested were those of hysteria, or other causes not dependent upon concussion of the spine, important among which causes was the tumor above mentioned. There was a verdict for plaintiffs in the sum of $20,000. Defendant moved for a new trial upon the grounds, among others, that the damages are excessive, and appear to have been given under the influence of passion or prejudice; that the evidence is insufficient to justify the verdict; and newly-discovered evidence, material for defendant, which it could not with reasonable diligence have discovered and produced at the trial. At the hearing of the motion it was a fact admitted on both sides that 10 days after the trial, viz. on October 19, 1893, Mrs. Doolin gave birth to a child at full term, which, however, was stillborn, and that she had not been affected with a tumor at all. In an affidavit of Mrs. Doolin, she stated that she did not know of her pregnancy until a day or two before the birth of the child; that until then she was advised by reputable physicians, and believed, that her symptoms in that particular were due to the presence of a tumor. The court made an order that, unless plaintiffs remit the sum of $15,000 from the judgment, a new trial would be granted; the order concluding with the statement that it was made "on the sole ground that the verdict herein is excessive." Plaintiffs not complying with such condition, the court ordered finally that the motion for new trial be granted "on the sole ground that said verdict is excessive." This appeal is from both of said orders.

Plaintiffs contend that it is only when excessive damages appear "to have been given," in the language of the statute, "under the influence of passion or prejudice" (Code Civ. Proc. § 657, subd. 5), that the court can make such excess the ground for a new trial, and that in the present instance the evidence so clearly shows the verdict to have been intrinsically reasonable that the action of the court in requiring the plaintiffs to remit $15-000 therefrom as the condition of denying a new trial was an abuse of discretion. To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial. Harrison v. Railway Co., 116 Cal. 156, 47 Pac. 1019. Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that, when there is material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict. The record of the case just cited from 116 Cal. and 47 Pac. shows that precisely the same practice was pursued there as in the present case. The court ordered that defendant's motion for new trial be denied, provided the plaintiff would consent to a reduction of his verdict from $8,000 to $4,000. Plaintiff refused, and the rule was made absolute on the sole ground that the verdict was excessive. On appeal the plaintiff urged the same objections that plaintiffs make here,—that the record did not indicate passion or prejudice in the verdict of the jury, and that the trial judge had no proper control over it. But this court pointed out that there was evidence regarding the amount of damage, upon which the views of men might differ, and said, "Every intendment is to be indulged here in support of the action of the court below, and it will not be disturbed if the question of its propriety be open to debate." Accordingly the order was affirmed. See, further, Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Lee v. Railroad Co., 101 Cal. 118, 35 Pac. 572; Mills v. Navigation Co., 102 Cal. 357, 36 Pac. 772. Since in the case before us the court below saw the person injured and heard her testimony, since the evidence was conflicting concerning the extent of the injuries she sustained at the time of the accident, and whether the distressing symptoms which she afterwards manifested were attributable to those injuries was in considerable measure a question of opinion, upon which experts differed, it is plain that the case is not such that we can say the court was without data upon which to revise the verdict.

Plaintiffs say, however, that the opinions which assigned the cause of Mrs. Doolin's illness in any degree to the presence of a tumor in her genital organs are shown to have been mistaken. This is a fact, and, as both sides rely on it to maintain their respective views touching the action of the court in requiring a reduction of the amount of the verdict, we are justified in considering it pertinent to that question, although it was developed by affidavit to support the branch of defendant's motion assigned on newly-discovered evidence. It must be remembered in this connection that some testimony of the same character for plaintiffs tended to attribute the supposed tumor itself to the shock of the accident. Since the time of Mr. Pope, it has been often inquired, "Who shall decide when doctors disagree?" The case shows that serious error may lurk in their conclusions, even when they have agreed, by which we mean no reflection upon the learned and very important profession of which the expert witnesses at the trial seem to have been respectable members; for all opinion evidence is, from its nature, fallible to a degree beyond that of most other kinds of evidence which the law deems competent. The evidence here for both parties having been so largely of that character, there seems to be on that account less reason for impugning the discretion which allowed a new trial. We cannot see that the orders appealed from were an abuse of such discretion. They should therefore be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

(125 Cal. 171)

BLACKBURN et al. v. BELL. (L. A. 475.)

(Supreme Court of California. June 21, 1899.)

THRESHER'S LIEN—ENFORCEMENT.

The lien given by St. 1885, p. 109, for services for work on a threshing machine to extend for 10 days after the person shall cease such work, expires, unless suit on the claim is brought, within 10 days after the party ceases work.

Department 1. Appeal from superior court, San Luis Obispo county.

Action by J. W. Blackburn and others against M. Bell. From a judgment denying plaintiffs a thresher's lien and their claim for attorney's fees, and an order denying their motion for a new trial, they appeal. Affirmed.

P. O. Chilstrom and G. F. Witter, Jr., for appellants. Chas. A. Palmer (G. Ward Kemp, of counsel), for respondent.

VAN DYKE, J. The plaintiffs were engaged in San Luis Obispo county as threshers, and the action is for their wages as such, and to enforce a thresher's lien, under the act of 1885 (St. 1885, p. 109). The act reads as follows:

"Section 1. Every person performing work or labor of any kind in, with, about or upon any threshing machine, the engine, horsepower, wagons or appurtenances thereof, while engaged in threshing, shall have a lien upon the same to the extent of the value of his services.

"Sec. 2. The lien herein given shall extend for ten days after the person has ceased such work or labor.

"Sec. 3. If judgment shall be recovered in any action to recover for said services for work or labor performed, and said property shall be sold, the proceeds of such sale shall be distributed pro rata to all judgment creditors who have, within ten days, begun suits to recover judgments for the amount due them for such work.

"Sec. 4. The lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work."

The findings of the court bearing on the question involved in the appeal are as follows: "First, that each and every one of the plaintiffs mentioned in said complaint was employed by the defendant to do and did perform work and labor in, with, and upon the threshing machine and appurtenances mentioned and described in said complaint while the same was engaged in threshing during the threshing season of 1896; second, that each and every one of said plaintiffs ceased such work and labor on September 16, 1896, between 11 and 12 o'clock a. m., and at no time since then has been engaged in such work and labor for defendant or any one on said machine; third, that no threshing has been done at any time with said machine since September 16, 1896; fourth, that such work and labor had ceased for more than 10 days before plaintiff commenced this action." The action was commenced September 28, 1896, and, as a conclusion of law, the court found in favor of the plaintiffs for their money demand in the aggregate sum of $416.65, but that plaintiffs had no liens upon, and cannot enforce the lien against, the threshing machine and appurtenances mentioned and described in said complaint, or at all. The plaintiffs appeal from so much of the judgment as declared that the said plaintiffs had no lien and were not entitled to an attorney's fee, and from the order denying said plaintiffs' motion for a new trial.

The evidence abundantly supports the findings of fact, and is all one way as to the time when work in the threshing ceased. Plaintiff Frank Kite, testifying in his own behalf, says: "We did no threshing for anybody after about noon of the 16th day of September, 1896. I did not know of anything further to do; supposed it was the last job." Plaintiff Ed. Copsey, in his own behalf, says: "The last day the machine was engaged in threshing was the 16th day of September, 1896. We quit about noon." Plaintiff Tom Fiers, in his own behalf, says: "The machine quit on the 16th of September, 1896, about noon. Did no work after the 16th that I know of." Defendant, Bell, says: "The machine has not done any threshing in this county for anybody since about noon, September 16, 1896." Witnesses W. D. Ashe and W. H. Brown, for defendant, testified to the same effect. Plaintiff Joe Copsey, in rebuttal, after stating that Bell had agreed to give them two days extra, says: "I knew the work was finished on the 16th day of September, 1896." William Mitchell, for plaintiffs, says: "We quit threshing about noon on the 16th day of September, 1896." This is all the testimony in reference to the time when the threshing ceased. The statute gives a lien for services mentioned therein "while engaged in threshing," and "the lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work." The lien in question is purely statutory, and the right to the same cannot be extended beyond the limits prescribed by the plain language of the law. The work while engaged in threshing having ceased on the 16th of September, the lien expired before the action was commenced, to wit, September 28th. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

(125 Cal. 139)

CITY IMP. CO. v. BRODERICK, City and County Auditor. (S. F. 1,138.)

(Supreme Court of California. June 19, 1899.)

MUNICIPAL CORPORATIONS—CONTRACTS—COMPETITIVE BIDDING.

One cannot recover of the city and county of San Francisco for street work done for it in front of lands owned by it under a private contract awarded without competitive bidding, in violation of St. 1871–72, p. 804, requiring such contracts to be let to the lowest bidder, or of the Vrooman act, making a similar provision, if it should be regarded as having repealed said statute.

Department 2. Appeal from superior court, city and county of San Francisco.

Petition for mandate by the City Improvement Company against William Broderick, auditor of the city and county of San Francisco. Judgment for defendant, and petitioner appeals. Affirmed.

J. C. Bates, for appellant. G. W. McEnerney, for respondent.

HENSHAW, J. Petitioner brought mandate against the respondent. A general demurrer was sustained to his petition, and he appeals from the judgment thereafter entered. Petitioner did certain street work upon a street of the city and county of San Francisco, in front of Alamo Square, the property of the city. The cost of this particular piece of work is chargeable against, and payable out of the funds of, the city. The contract, however, was awarded without competitive bidding. Upon this ground the auditor refused to allow the demand, and it was upon this ground that the trial court sustained his general demurrer to the petition. The question involved is that of the power of the city and county of San Francisco to make a private contract, without competitive bidding, for street work in front of the lands owned by it.

The consolidation act of the city and county of San Francisco (St. 1856, p. 145) provided for the improvement of the public streets and highways of San Francisco. It made provision for the doing of street work by the municipality in front of the property owned by it, but it declared that such contracts should be let to the lowest bidder. Id. p. 156, § 38. This provision was repealed by a later act. St. 1871–72, p. 804. This statute also contained the same provision requiring the contract of the municipality for the doing of this work to be let to the lowest bidder. In Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615, it was held that the general street law (the Vrooman act) superseded the scheme provided for the city of San Francisco by the act of 1872. Under the decision in Thomason v. Ashworth, either the whole of the act of 1872 was "struck dead," or only such portion of it as was in conflict with the provisions of the Vrooman act. If the latter view be accepted, then the provisions of the act of 1872 requiring the city and county of San Francisco to let such contracts under competitive bidding is still in force, and the judgment of the trial court was therefore properly given. If, upon the other hand, the former view is to prevail, then one must look to the Vrooman act for the power of the municipality to let a contract of this kind, and herein it has been decided that no work can be done by the municipality under this law, except under competitive bidding. Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

BERKA v. WOODWARD, City Treasurer.

(S. F. 1,012.)

(Supreme Court of California. June 17, 1899.)

MUNICIPAL CORPORATIONS — IMPLIED CONTRACTS WITH COUNCILMEN—VALIDITY.

1. The city of Santa Rosa is not liable to an officer and councilman thereof on an implied contract to pay for merchandise received from him, in view of Pol. Code, § 920, and charter of Santa Rosa (St. 1875–76, p. 255), prohibiting councilmen from being interested in "any contract" made by them, and page 257 of the charter, authorizing the council to allow claims, and Pen. Code, § 71, making it a crime for a councilman to be interested in a contract with the city.

2. Councilmen cannot validate a claim against the city under a void contract.

Department 2. Appeal from superior court, Sonoma county.

Petition by mandate by F. Berka against J. G. Woodward, treasurer of the city of Santa Rosa. Judgment for plaintiff, and defendant appeals. Reversed.

O. O. Webber and J. R. Leppo, for appellant. D. R. Gale and Campbell & Campbell, for respondent.

HENSHAW, J. This is an appeal from a judgment in mandate ordering the treasurer of the city of Santa Rosa to honor and to pay two warrants issued in favor of plaintiff by the common council of the city. The warrants were in payment of lumber and materials "had and received by the city from Berka." At the times when the material was supplied, at the times when Berka presented his bills and demands for payment, and at the time when the city council allowed and approved his claims, Berka was an officer of the city and a member of its common council. These facts appear by the petition. The defendant interposed a demurrer, both general and special. This demurrer was "overruled without leave to answer," and a peremptory writ of mandate was ordered to be issued.

The question of first importance presented upon this appeal is that of the right of an officer of the city to recover upon an implied contract with the municipality. The following provisions of the law, and of the charter of the city of Santa Rosa, have direct bearing upon this consideration: "No councilman to be directly or indirectly interested in any contract made by them, or in any pay for work done under their direction or supervision." Charter Santa Rosa (St. 1875–76, p. 255). "All bills, claims and demands against the city shall be * * * filed by the city clerk, who shall present it to the council, and they shall allow or reject the same in whole or in part." Charter Santa Rosa (St. 1875–76, p. 257). "Members of the legislature, state, county, city and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." Pol. Code, § 920. "State, county, township and city officers must not be purchasers at any sale, nor vendors at any purchase made by them in their official capacity." Pol. Code, § 921. "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein." Pol. Code, § 922. "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidence of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison not more than five years, and is forever disqualified from any office in this state." Pen. Code, § 71. "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals." Civ. Code, § 1667. "The consideration of a contract must be lawful within the meaning of section 1667." Civ. Code, § 1607. "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Civ. Code, § 1608.

It would seem that the need of discussion is foreclosed by the mere quotation of our express laws, but respondent contends, and in his contention prevailed in the trial court, that these provisions have no application to an implied contract such as this admittedly is, and that in the case of implied contracts which are not malum in se, even though they may be against public policy, the rule is that, if the consideration has passed,—if the contract upon the one hand has been wholly executed,—the party who has so performed will be allowed a recovery upon quantum meruit or quantum valebat, as the case may be. The importance of this question, the right of an officer of the city to recover upon an implied contract with his municipality, its gravity and far-reaching consequence, demand something more than a passing consideration.

By subdivision 1 of section 1667 of the Civil Code, reference is had to contracts expressly prohibited. These will be discussed hereafter. Within subdivisions 2 and 3 of the same section are embraced the multitude of contracts which, though not expressly prohibited, are refused recognition upon grounds of public policy. These contracts, in contemplation of their subject-matter, may be divided into two distinct classes: The first, where the consideration is base and against good morals,—malum in se; the second, where the consideration is in itself lawful, but where the mode is unauthorized, or where, because of some fiduciary relation between the parties, the law will not permit the contract to be made, nor countenance it when made. As to the first, it is said in Blachford v. Preston, 8 Term R. 95: "A plaintiff cannot recover in a court of justice whose cause of action arises out of a contract between him and the defendant in fraud or to the prejudice of third persons." Of the second Lord Mansfield and the court of king's bench, in Jones v. Randall, Cowp. 39, declared: "Many contracts which are not against morality are still void, as being against the maxims of sound policy." The first class of contracts embraces the infinite number of those made to further crime, or to interfere with the administration of the law, or to obstruct the course of justice,—all contracts affecting the rights and prerogatives of the government, as well as the personal rights of the citizen. In the second class no baseness is inherent in the essence of the contract, but there is either some defect in the mode of creation or the manner of performance, or some incapacity in one or the other of the parties because of nonage, mental disability, or the fiduciary relation which they sustain to each other. Within this second class, as has been said, are the contracts of one who stands in a fiduciary relation to another with that other. Because of the tendency to abuse, the temptation to take undue advantage, these contracts, even when not expressly prohibited by law, are still looked upon with disfavor, and they may be avoided at the instance of the other party in interest; but, where the trustee or other fiduciary agent has fully carried out the terms of the contract, the contract itself being fair, public policy, which is not punitive, is satisfied to leave the right of rescission to the other party. If he shall elect to rescind, he does so upon the equitable condition of restoring what he has received. If, however, he chooses to retain the consideration, he is not bound by the terms and conditions of the contract, but the courts permit an action to establish and to recover the reasonable value of the thing sold or the service rendered. Such, it may be said, is the general rule, but in this state the line has been more closely drawn. Such contracts are against public policy. Being against public policy, the making of them is not to be encouraged. But to permit a profit is thus to encourage them. Therefore, in this state, when a recovery is permitted, it is not for the reasonable or market value, which naturally includes within it the contemplation of a profit, but, where possible, the recovery is limited to the actual cost. Fox v. Mining Co., 108 Cal. 369, 41 Pac, 308.

Where contracts of public officials with their counties or municipalities have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a quantum meruit or quantum valebat. Spearman v. Texarkana, 58

Ark. 348, 24 S. W. 883; Pickett v. School Dist., 25 Wis. 551; City of Concordia v. Hagaman (Kan. App.) 41 Pac. 133; Gardner v. Butler, 30 N. J. Eq. 702; Call Pub. Co. v. City of Lincoln, 29 Neb. 149, 45 N. W. 245; Mayor, etc., v. Huff, 60 Ga. 221; Currie v. School Dist., 35 Minn. 163, 27 N. W. 922; Mayor, etc., v. Muzzy, 33 Mich. 61. But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration is base, or the contract is against the express prohibition of the law. Thus, in Call Pub. Co. v. City of Lincoln, supra, the publishing company had sued the city to recover for printing. Bushnell was a stockholder in the plaintiff company, and was chairman of the city council's committee on printing during the time of the publications in question. The court held that the statute of Nebraska prohibiting officers from being interested in any contract with their municipalities referred to express contracts; that the contract under consideration was an implied contract. It therefore concluded that the contract was not one expressly prohibited by law, and proceeded to discuss and decide the question upon the doctrine of public policy. In City of Concordia v. Hagaman, supra, the prohibitory statute was "An act to restrain state and county officers from speculating in their offices." The contract there was a contract made by Hagaman when he was a member of the city council, for the printing of the ordinances of the city. The court conceded that no recovery could be had if the contract were one expressly prohibited by law, but determined that the legislature had ex industria excluded municipal officers, and had limited the operation of the law to state and county officers. That being so, the contract was left to be considered upon the grounds of public policy alone. And in discussing that question the court says: "In considering the question of illegality of the contract, it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. * * * When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it, nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence the courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."

This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the supreme court of the United States in President, etc., v. Owens, 2 Pet. 527: "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in Coppell v. Hall, 7 Wall. 542, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation." And in our own state it has been said (Swanger v. Mayberry, 59 Cal. 91): "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by a statute on the ground of public policy." Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. "The test," says Judge Duncan in Swan v. Scott, 11 Serg. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." And this must be so; for, while, as a matter of private justice between individuals, it would be but fair that one, under such an illegal contract, should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore there is no place for equitable considerations, presumptions, or estoppels. Fowler v. Scully, 72 Pa. St. 456. Ex turpi causa non oritur actio. Whenever such a contract comes before the court, the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found in some of the cases to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned.

The rule, further, is that, where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it. Swanger v. Mayberry, 59 Cal. 93; Lumber Co. v. Hayes, 76 Cal. 390, 18 Pac. 391; Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880; Merrill v. Nightingale, 93 Cal. 458, 28 Pac. 1068; Wyman v. Moore, 103 Cal. 214, 37 Pac. 230; Light Co. v. Sims, 104 Cal. 332, 37 Pac. 1042; Woods v. Armstrong, 25 Am. Rep. 671; Fowler v. Scully, 72 Pa. St. 456; Seidenbender v. Charles' Adm'rs, 4 Serg. & R. 151; Brooks v. Cooper, 50 N. J. Eq. 761, 26 Atl. 978.

Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms. Both in the charter provision above quoted, and in section 920 of the Political Code, these officers are forbidden to be interested in "any contract" made by them. The only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties; in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Generally, express contracts with a municipality are made under the system of competitive bidding. Usually this is made compulsory by law. To say that implied contracts were not prohibited would be to destroy the purpose and efficiency of the laws, and leave the people at the mercy of careless or unscrupulous officers. The case of Smith v. City of Albany, 61 N. Y. 444, is very similar to the one at bar. The council of the city, of which plaintiff was a member, appropriated $2,500 for defraying expenses of a Fourth of July celebration. Upon the day plaintiff furnished horses and vehicles for use in the celebration, and the fair value of their use was the sum of $139. The New York statute made it unlawful for a member of any common council to become a contractor under any contract authorized by the common council, and authorized such contracts to be declared void at the instance of the city. Here was an implied contract, but it was one prohibited by the statute law as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any position where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the situation here presented. This material was obtained from a member of the city council, and he, as a member of that council, sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and judgment in determining these very questions.

The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863. The duty of treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880. For the foregoing reasons the judgment is reversed, with directions to the trial court to sustain the general demurrer to plaintiff's complaint.

We concur: TEMPLE, J.; McFARLAND, J.

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125 Cal. 94

PEOPLE v. HARRIS et al. (Cr. 512.)

(Supreme Court of California. June 16, 1899.)

JUSTIFIABLE HOMICIDE—MANSLAUGHTER—EVIDENCE.

Deceased inclosed a road crossing his premises, and threatened to kill accused if they attempted to pass over it. Shortly thereafter accused, armed with guns, started to pass over the road in a wagon, cutting the fence. Deceased left his plow, went to the house, and secured a rifle. Accused were about 200 feet away, each with a gun in his hand. Deceased started from the house towards a tree some distance in front of accused and near the road. There was evidence that accused ordered deceased to stop and drop his rifle, and that he ordered accused to turn and retrace their steps. As deceased was about to pass behind the tree, and while about 19 feet from it, accused fired at him and killed him, they being 65 feet distant. The evidence justified the jury in saying deceased did not have his rifle pointed at accused at the time. *Held* to sustain verdict of manslaughter.

Beatty, C. J., dissenting.

In bank. Appeal from superior court, Los Angeles county.

J. I. Harris and George Cardwell were convicted of manslaughter, and they appeal. Affirmed.

R. A. Ling and F. E. Davis, for appellants. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendants have been convicted of manslaughter, and appeal from the judgment and order denying their motion for a new trial. It is insisted that the evidence shows a case of justifiable homicide. The facts, briefly stated, are as follows: The deceased, by a wire fence, closed a road extending across his premises. Two of his neighbors, these defendants, claimed the right to travel upon this road. Ill feeling arose, and deceased informed them that, if they attempted to pass over the road, he would kill them. Some days thereafter the defendants, in a wagon, armed with shotgun and rifle, a third man driving the horses, started to travel over the forbidden road. They cut the wires of the fence, passed on, and as they approached the house of the deceased he left his plow standing in the field, went to the house, and reappeared with his rifle in his hands. At this time defendants were about 200 feet distant. They continued upon their way, one or both of them upon the ground by the side of the wagon, each with a gun in his hand. The deceased started from the house, angling towards a large tree which stood some distance in front of defendants and near the road. There is evidence that at this point of time defendants ordered deceased to stop, and to drop his rifle. There is also evidence that deceased, at about the same time, ordered defendants to turn and retrace their steps. As deceased was about to pass from the view of defendants behind the tree, and some 19 feet distant therefrom, they fired at him, and he fell upon the ground, dead. This point was 65 feet distant from the wagon. The position in which deceased held his rifle at the time he was killed is not clearly disclosed, yet from the evidence the jury would have been justified in saying that it was not pointed towards defendants.

From the foregoing evidence the jury had a right to say that this affray arose between three desperate, determined men; that these defendants began their journey with the intention to travel over the premises of the deceased at all hazards; and that deceased, when he saw them, intended to stop them at all hazards. Upon such a state of facts, any question, legal or equitable, as to the respective rights of these parties in the road, becomes wholly immaterial. In this regard the case is similar to People v. Conkling, 111 Cal. 621, 44 Pac. 316, where the court said: "If it be assumed that at the time of the killing deceased was at the opening in the fence for the purpose of preventing the defendant at all hazards from going through, and if it also be assumed that defendant was there intending to pass through at all hazards, still the question of self-defense is presented to the jury, regardless of the respective rights of the parties to the road. Under such circumstances, the man who began the deadly affray—that is, who by some overt act caused the other as a reasonable man to believe that he was in danger of loss of life or limb—placed himself without the protection of the law, and must take the consequences, whether those consequences be his death upon the ground, or the penalty imposed after trial by judge and jury." Looking at this picture formed from the evidence, we deem the showing made ample to support the verdict. We see but little difference, viewed with the eyes of the law, in the relative positions of these three persons at the moment prior to the shooting. While, if the positions had been reversed, and deceased at that moment had fired and killed the defendants,—and such killing would have been manslaughter or worse,—still it does not follow that defendants may not be guilty. Certainly, if the purpose of deceased was to place himself in the road in front of defendants, and thereby try and stop them from proceeding further on their way, and his rifle was lying upon his arm, not pointed in the direction of the defendants, then they had no right to shoot when they did, for there was no overt act by deceased at that time which justified them in taking his life. Under the evidence, the jury were authorized in declaring the conditions to be such as here suggested. The theory of defendants probably was that deceased was about to use the tree for a barricade, and, safely ensconced behind it, shoot them down. Yet the deceased could well have used his house for that purpose, and never have ventured into the open at all. These things were all matters for the jury to weigh and gauge and reason upon, and matters upon which their conclusion cannot be set aside by this court. As already suggested, from the evidence the jury had a right to say that these three men were within a few hundred feet of each other, in plain view, guns in their hands, fingers upon the trigger, and with enmity and deadly determination in their hearts. The jury had the right to say that at this time they all stood upon common ground, and that the light of the law shone upon all alike. An overt act at this critical period was bound to cause a tragedy; and the jury were justified in saying, under the law and facts, that the defendants should not have fired the fatal shots. We have examined the instructions given and refused, and find nothing demanding a reversal of the judgment. There is no error in the record. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

BEATTY, C. J. I dissent. The claim upon the part of appellants that the verdict of the jury was against the evidence cannot be upheld. There was clear proof of a voluntary killing, from which the law raised a presumption of malice. To rebut this presumption, the burden of proving self-defense devolved upon defendants; and, since the jury were not bound to believe the testimony of their witnesses, it cannot be said, as matter of law, that the verdict is without evidence to sustain it. I cannot, however, agree with the view of the evidence taken in the opinion of the court wherein it seems to be held that, even if it is accepted as true, it does not make out a case of self-defense. The road in question was one which had been used by the defendants and others for years, and was the only means of ingress and egress to and from the valley for loaded wagons. The deceased, when he came to live on the place where he was killed, found the road open and in common use across the public land upon which he was merely a settler, and the evidence shows, without contradiction, that he sought and obtained the consent of his neighbors, including these defendants, to inclose this road upon the express condition that he should construct a new road outside of his inclosure in all respects as good as the old road. In pursuance of this agreement, he put a wire fence across the old road, and made a pretense of constructing a new one, but the evidence, which is wholly uncontradicted, abundantly shows that the new road was impassable for loaded wagons. It was with difficulty that half a load could be hauled over it, and defendants and others were obliged to make two trips to bring in one load. The defendants could not market their produce or obtain supplies for their families. Under these circumstances, they announced to deceased their intention to resume the use of the old road, whereupon he plainly told them that he would kill any man who attempted to pass that way. Emphasis was imparted to this threat by the notoriously bad character of deceased. The evidence shows abundantly, and without contradiction, that he was a quarrelsome, turbulent, and dangerous man, always armed and ready on every occasion to resort to violence. The defendants, on the contrary, were shown to have been men of quiet and peaceable disposition. This, then, was the situation of affairs: The defendants, by the wrongful act of the deceased, were shut off from the only practicable road by which they could take their produce to market or bring in supplies for their families. They were in urgent need of relief. They had a clear legal right to travel over the old road. The obstructions erected by deceased constituted a public nuisance, which they were authorized to abate; but they were warned by deceased that their lives were to be the forfeit if they attempted to exercise their rights. What were they to do? They had the choice to submit to a lawless invasion of their rights, or to assert them. They chose the latter alternative, and, in my opinion, made the proper and manly choice. Nor are they to be blamed for going armed, if their only intention was to defend themselves against a felonious assault, and there is not a particle of evidence that they intended to make any other use of their arms. The open threats of deceased, his notorious bad character, and his constant state of preparation for deadly hostilities warranted the apprehension that they might be called upon to defend their lives, and his subsequent conduct justified their precautions. They entered upon the road without any breach of the peace, and when deceased saw them he left the field where he was at work, proceeded directly to his house, without saying a word, armed himself with a repeating rifle, and made for the secure shelter of a large, live oak tree. But one construction could be put upon his conduct, and that was that he was seeking a position from which he would hold the others at his mercy, and no reasonable man could have avoided the conclusion that their lives were in imminent danger. He was shot when he had only six feet to go to shelter himself behind the tree, and after he had been repeatedly warned to stop by the defendants, according to the testimony of their witnesses. The wife of the deceased, the only other eyewitness of the affair, testified that she had heard no such warning, and to this extent and upon this point alone the evidence is conflicting. Upon the evidence, therefore, assuming it to be true, I consider the plea of self-defense to have been well sustained. But, as above stated, there was against this evidence a legal presumption of malice, from the voluntary killing; and, upon the theory that the jury discredited the testimony for the defense, the verdict may be upheld. I see no reason, however, why the evidence for the defense should have been discredited. So far as it appears upon the record, the witnesses were fair and disinterested, as they were wholly unimpeached. Their testimony makes out a case in which the deceased, a bad and dangerous character, was grossly in the wrong, in which he was clearly the aggressor, and in which the defendants, while peaceably exercising their legal rights, were forced to defend their lives. Such being the case, I think we are justified in scrutinizing closely the instructions of the court on the law of self-defense in order to discover whether they were as full and clear and explicit as the defendants had a right to demand.

As to most of the charge of the court there is no criticism to make; but there were three instructions proposed by the defendants in which the jury were told that, if they believed certain facts to have been established, then the killing was justifiable, and they must acquit the defendants. It is conceded that these instructions were correct as framed, but the court modified each of them by substituting for the direction to acquit the formula that (in the case supposed) the defendants "had the right to defend themselves even to the taking of the life of Hilton." This action of the court is defended upon the ground that the instructions meant just the same thing after the alteration as before. It is perhaps true that they do mean to a lawyer just as much in one form as in the other, but evidently the judge of the superior court thought that, in their modified form, they would carry some different meaning to the jurors, else why should he take the trouble to make the change? The question for the jury was what should be their verdict. In the instructions as prayed they were told, and correctly told, that their verdict, in view of certain supposed facts, should be not guilty. In the altered form of the instructions they were merely told that on the same state of facts the defendants had a right to defend themselves even to the extent of taking life. It is true that to any lawyer, and probably to most laymen, the conclusion from this proposition would appear inevitable that the defendants should be acquitted. But why, when an instruction is properly framed, and states the proper verdict to be rendered upon the hypothetical case, should the court emasculate it by striking out the conclusion and substituting in its place a proposition from which the conclusion can only be inferred? I think the defendants should have a new trial.

125 Cal. 195

In re RUNYON'S ESTATE. (Sac. 655.)

(Supreme Court of California. June 21, 1899.)

EXECUTORS — COMPENSATION — PROVISION IN WILL—RENUNCIATION—EXTRAORDINARY SERVICES.

1. A testator, deeming the commissions allowed by law insufficient, gave his executors $5,000 each in full compensation for their services as executors. One had been in his employ at a salary of $100 per month as manager of his farms, and continued so to act after his death, without renouncing the compensation allowed in the will. *Held* that, under Code Civ. Proc. § 1616, making the provisions in the will for executors' compensation full compensation unless renounced, he was not entitled to further allowance for extraordinary services.

2. The provision of Code Civ. Proc. § 1616, is not affected by section 1618, providing that "in all cases" such further allowance may be made for extraordinary services as the court may deem reasonable, the cases referred to being those provided for in the first sentence of the same section, viz. "where no compensation is provided by will, or the executor renounces all claim thereto."

Department 1. Appeal from superior court, Sacramento county.

In the settlement of the estate of Solomon Runyon, deceased. There was an order settling the annual account of the executors, and they appeal. Affirmed.

A. P. Catlin, for appellants. Albert M. Johnson, for Ora Runyon-Buckman. White & Seymour, for Elmina Adeline Runyon.

HARRISON, J. Appeal from an order settling the annual account of the executors, and striking therefrom an item of $1,226.86 for extraordinary services claimed to have been rendered by one of the executors. The appellants are the executors of the last will and testament of the deceased, and in his will appointing them he made the following provision in reference to their compensation: "In lieu of the commissions allowed by law for executors, which I deem insufficient, I do hereby provide that my said executors shall be entitled to receive the sum of five thousand ($5,000) dollars each as and for full compensation for their services, respectively, as such executors, in addition to their actual expenses." Neither of the executors filed a renunciation of his claim for compensation provided by the will.

The personal estate of the testator was valued in the inventory returned by them at the sum of $245,405, and the real estate at $99,500, and in the account presented by them for settlement it appears that the estate of the decedent accounted for by them amounts to $422,244. The real estate consisted of four farms, not adjoining each other, and aggregating about 1,650 acres, the most distant being about 18 miles apart. A portion of this land was planted to fruit trees, and devoted to the culture and production of fruit, and a portion was rented to tenants. One of the executors (Dann) had been in the service of the testator for upwards of 10 years prior to his death, at a salary of $100 per month, as the active manager of all his farming operations, both in the culture of fruit and other produce, and upon the death of the testator the executors deemed it for the advantage of the estate that he should continue in this management; and he thereupon continued to manage the farms and business connected therewith. It is for this management that his claim for extraordinary services was made, computed at the rate of $100 per month. The court finds that Mr. Dann was well qualified to perform these services, and that they were beneficial to the estate, and that the income of the estate was increased thereby, and also that the services were not such as were incumbent upon him in the common course of his duties as executor.

Section 1616, Code Civ. Proc., provides that the executor "shall be allowed * * * for his services such fees as are provided in this chapter; but when the decedent by his will makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument filed in the court he renounces all claim for compensation provided by the will." As no renunciation of the claim for the compensation provided by the will was filed by either of the executors, the court was required under this section to hold that the provision thus made was a "full compensation for his services," and to deny his claim for any further allowance for extraordinary services. It will be observed that the amount of compensation provided in the will is largely in excess of the commissions to which the executors would have been entitled if no provision had been so made, and it is reasonable to suppose that when the testator appointed the manager of his farms to be one of his executors he had this fact in mind, and made the appointment in order that after his death his estate might continue to receive the benefit of his services and experience as such manager, and that he fixed the amount of his compensation in contemplation thereof. The statement in his will that he deemed the commissions allowed by law to be insufficient compensation implies that he expected that they would perform other duties than those ordinarily required of an executor.

We cannot assent to the proposition of the appellants that the provision in section 1618, Code Civ. Proc., "in all cases such further allowance may be made as the court may deem just and reasonable for any extraordinary services," authorized the court to disregard the provisions of section 1616. The cases here referred to are those provided in the first sentence of the section, viz. "When no compensation is provided by the will, or the executor renounces all claim thereto." The amount provided by the will must be taken as the measure of compensation which the testator deemed ample for all services to be rendered in the execution of the trust, and if the executors, either upon assuming their office, or by reason of unexpected circumstances occurring during the course of their administration of the trust, are called upon to perform extraordinary services, they must first renounce the compensation provided by the will before they can be entitled to any allowance for such additional services. The compensation of an executor, whether according to the rates fixed by the statute, or as determined by the testator, is not a gratuity, but is in consideration of the services he may render, and the amount fixed by the statute is deemed ample compensation for the services ordinarily required. If the executor would claim that his services entitle him to a greater compensation than that allowed by the statute, he must first renounce that provided by the will, and the court can then make him such allowance as will fully compensate him. Unless such renunciation is made, the provision in the will will be held, under section 1616, to be "full compensation" for his services.

The right of an executor to receive compensation for extra services, in addition to the statutory allowance, was very fully considered in Collier v. Munn, 41 N. Y. 143. In that case one of the executors was an attorney at law, and at the request of his co-executors, and upon their agreement with him that he should be compensated therefor, he rendered services as an attorney in certain important litigation for the protection of the estate, which were of great value and advantage to the estate. The court held, however, that, notwithstanding the services rendered did not devolve upon him as an executor, and were not such as could be required of him by virtue of his office, he was not entitled to any compensation therefor; that the commissions allowed by law must be his entire compensation for all the services rendered by him in the discharge of his trust. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

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125 Cal. 168

BERGEN et al. v. FRISBIE. (Sac. 572.)

(Supreme Court of California. June 20, 1899.)

ATTORNEY AND CLIENT—CONTRACTS—PUBLIC POLICY—"EXPEDITING" JUDICIAL DECISIONS.

1. Defendant, having a claim pending before the secretary of the interior for timber-land entries, employed attorneys to "secure a favorable and final decision," and agreed to pay them 10 per cent. of the value of the land should a patent be secured, and, failing that, 5 per cent. of the money already paid, if its return be secured. *Held*, that the contingent character of the fee did not render it an immoral contract.

2. The fact that the attorneys were to assist in securing a "favorable decision" did not taint the contract.

3. The fact that the attorneys did nothing but "expedite" the decision did not avoid the contract, there being nothing unprofessional or against public policy in influencing decisions of the land department in a proper way.

Department 1. Appeal from superior court, Shasta county.

Action by B. F. Bergen and Thomas Jewett against Edward Frisbie. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Garter, Dozier & Wells, for appellant. F. P. Primm, for respondents.

GAROUTTE, J. Defendant, Frisbie, had certain matters pertaining to timber-land entries made by him pending before the secretary of the interior at Washington. He had paid $2,050 to the government upon these entries, and was desirous of the issuance of the patents to him for the land. These matters had been long delayed in the land department, whereupon defendant entered into a contract with plaintiffs whereby he engaged their services as attorneys for the purpose of having the said entries ratified and declared valid; and, if such ratification and confirmation could not be accomplished, then to take action to recover from the government the said sum of $2,050, paid as aforesaid. This contract provided: "In consideration of such services the said party of the first part has this day, * * * and in addition, provided said parties of the second part succeed in securing a favorable and final decision in favor of said entries, the said party of the first part will pay the said attorneys ten per cent. of the then value of the lands embraced in said entries, and should the said attorneys fail in securing such favorable decision, but in lieu of which they succeed in having the United States refund the said two thousand and fifty dollars to the said party of the first part, then and in that case the said party of the first part agrees to pay the said attorneys five per cent. of the amount so recovered." Under this contract plaintiffs wrote various letters to the land department at Washington, urging an early decision of the pending matters, and also retained a firm of attorneys at that place to assist in securing a favorable conclusion of the matters pending. In the course of time patents were issued to defendant, and thereafter plaintiffs brought this action under the contract to recover 10 per cent. of the value of the land as their compensation. Judgment went for plaintiffs, and defendant has appealed from the judgment and order denying his motion for a new trial.

Defendant declares that: "The contract relied upon by the plaintiffs was for services to be performed by them for the defendant by influencing the official action of public officers of the government favorable to the defendant on matters then pending before such officers, for compensation contingent upon success. Such a contract is void as against good morals and public policy, and the performance of the services under such a contract affords no ground of recovery." He attaches much importance to the fact that the fee fixed by the contract for the services to be performed was dependent upon success, namely, issuance of the patents. As tending to indicate the immorality of the contract, the contingent character of the fee works no such result. The contract is good or bad regardless of that question. Hoffman v. Vallejo, 45 Cal. 564; Stanton v. Embrey, 93 U. S. 548. We have carefully scanned the face of this contract, and find nothing whatever there to justify a judicial declaration that it is against good morals. There was no secrecy, no deception, no fraud, no corruption. It was an ordinary, everyday contract. Thousands of similar import probably have been made and executed. The fact that plaintiffs were retained to assist in securing a favorable decision of the matters pending certainly does not taint the contract. Defendant would hardly engage their services for any other purpose.

It is next claimed that the evidence discloses that the plaintiffs did nothing under the contract except expedite the decision of the litigation. Even if it should be conceded that their labors were largely directed towards that end, still such labor upon the part of these attorneys is not of itself unprofessional. The means and manner to be employed are the all-important factors in marking the validity or invalidity of the contract. We see no one of its provisions that stamps it void as against public policy and good morals. Neither do we find anything in the evidence indicating any act done by the plaintiffs that to any degree could be construed improper. The employment of persons to influence legislation, or to influence decisions of the land department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy, and this, too, even though the compensation for the labor to be performed is contingent upon successful results. The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law. We do not see how a contract upon its face would be void as against public policy whereby attorneys were retained by a party litigant to assist in securing a favorable decision from this court upon litigation pending before it, even though the compensation of such attorneys was to be contingent upon success. In the absence of anything to the contrary, this court would certainly assume it to be valid and enforceable at law. If such be the rule of law as to contracts pertaining to the judicial action of this court, that law is good enough to be applied upon a contract in a matter pending before the secretary of the interior. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(125 Cal. 129)

PEOPLE v. CRANDALL. (Cr. 489.)

(Supreme Court of California. June 17, 1899.)

HOMICIDE—PHOTOGRAPHS—COURT'S DISCRETION—EXPERIMENTAL TESTS—WITNESSES—PRACTICE—IMPEACHMENT.

1. It is within the court's discretion to admit photographs of the scene of the crime, in a murder trial.

2. It is not error to allow experimental tests in a murder trial to be made by the prosecuting officers, but it is the better practice to have such tests made by other witnesses.

3. Under Code Civ. Proc. § 2051, providing that a witness may be impeached by contradictory evidence, or by evidence that his reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, a witness cannot be asked on cross-examination as to particular acts of immorality on her part.

In bank. Appeal from superior court, Los Angeles county.

Frank Crandall was convicted of manslaughter, and he appeals. Reversed.

W. H. Shinn and Earl Rogers, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN DYKE, J. The defendant was tried upon a charge of murder, and convicted of manslaughter. He appeals from the judgment and from an order refusing a new trial.

The homicide was committed at Ballona, on a lagoon near the beach, between Santa Monica and Redondo, in the county of Los Angeles. The only defense urged was that the life of the deceased was taken by the defendant in necessary self-defense. Some two weeks prior to the homicide, defendant rented from Hoagland a cabin having but one room, not far from the ocean beach, and near the cottage occupied by Hoagland and his partner, who were fishermen. Soon after, William White and Bowman (the deceased) joined Crandall, at his request, and occupied the cabin with him. On the Sunday preceding the homicide, they were joined by Mrs. Crandall, Mrs. Bowman, wife of deceased, and Maud Nelson, the mistress of White. The parties spent Sunday night at the cabin drinking. During the night a quarrel arose between Maud Nelson and Mrs. Crandall, into which Bowman and defendant were drawn. According to the testimony of the defendant and his wife, Maud Nelson asserted that defendant had made improper proposals to Mrs. Bowman, and, although Mrs. Bowman promptly denied the accusation, Bowman made some direful threats against defendant; and, as White sided with Bowman, defendant, who was an invalid, became alarmed, and left the cabin at about 2 o'clock in the morning. He and his wife went to Hoagland's cottage, where they spent the balance of the night. There they were told of other threats made by Bowman against the defendant. In the morning they rode with Hoagland on his fish wagon to Los Angeles; being afraid, as they testified, to remain at the beach. Nevertheless defendant arranged to return and stop at the cottage with Hoagland, and took along some implements for baking clams, and also took with him a revolver. And on the following Tuesday he procured a buggy from a livery stable, and returned to the beach with one Bremmerman. Then, having put up his horse, he and Bremmerman proceeded to the cabin to get some goods which Crandall had left. While collecting his things, he inquired of White and Maud Nelson for Bowman, and was told where he was. Bowman was at the time lying down upon the sand, some three or four hundred yards distant, and Crandall and Bremmerman then proceeded towards him. Bowman, having seen them coming, got up and met them. When they met, Crandall asked Bowman for a pair of suspenders which he had loaned him. Bowman took them off and handed them to Crandall, and thanked him for their use. All three then turned and walked together towards the cabin. Bowman soon began to complain that Crandall had refused to be security for him for a small bill at Los Angeles, and charged him, also, with having insulted his wife. When Crandall denied this last charge, Bowman suddenly turned upon him, put both hands upon his shoulders, and, "glowering down at him," said: "You lie, you God-damned son of a bitch. I will fix you." Crandall then asked Bowman to let him alone, and jerked away from his grasp, drew his pistol, and shot him. Bremmerman was a witness for the prosecution, and was the only person, other than the parties, who saw the affray, although there were several within hearing. There was a difference as to the number of shots. Defendant testified (and in this he was corroborated by Bremmerman) that two shots were fired as rapidly as could be from a self-cocking pistol. Defendant claimed that both shots were fired while Bowman was standing over him, and Bremmerman testified that they were not more than two or three steps apart when the last shot was fired. Other witnesses testified to four shots, and that defendant had admitted that he had fired four. Bowman turned to run as soon as possible after the firing commenced, and the prosecution contended that the fatal shot was fired while deceased was retreating, and while defendant stood upon a ridge of sand and deceased was running down. The prosecution's theory was that the bullet entered at the back of the neck, and passed downward toward the front, cutting the subclavical artery. The contention on the part of the defense was that the fatal bullet was fired from a point below, and before Bowman turned around to retreat; that it entered the breast near the armpit, and passed back and upward, coming out at the back of the neck. The prosecution seemed to have had two theories,—one, that Crandall bought the pistol and went to the beach to assassinate Bowman, and the other that, even if the first shot was justifiable, the fatal shot was fired after Bowman had, to the knowledge of the defendant, declined further controversy and was retreating. Considering the verdict, the latter was probably the theory adopted by the jury, although it may have been a compromise verdict. Defendant testified that he did not stand upon this ridge when he fired at the deceased, but that Bowman stood above and facing him, and, after the shots, passed over the ridge, falling about 100 feet away from him. To these questions the evidence was mainly addressed.

There had been a previous trial, and, to make things plain, the two deputy district attorneys who prosecuted the case took a camera to the beach, and had Bremmerman and Jacobs point out the localities to them, and took some photographs, which were introduced in evidence at the trial as diagrams. They marked upon the photographs where other witnesses said the dead body of Bowman was lying, and where such witnesses said defendant told them he stood when he shot Bowman. Such witnesses were sworn, and testified that they correctly pointed out such spots to said deputies, and the latter testified that the localities were correctly marked according to the information given to them, but the diagrams were not verified by the other witnesses. These deputy district attorneys also testified as to what could be seen from the window in a cabin, to support the testimony of White, whose veracity had been attacked by other evidence to the effect that the scene of the conflict could not be seen from the window. The defendant strenuously contends that the admission of the photographs and the testimony of the prosecuting officers was erroneous, chiefly on the ground that the evidence was hearsay, was manufactured by the prosecuting officers, and, as claimed by defendant, was a gross abuse of their semijudicial positions, to the prejudice of the defendant. The photographs were used only as diagrams, and, although more complete proofs of their correctness could well have been required, still it cannot be said the trial court abused its discretion in allowing them to be used. We may assume that every one now understands the limitations upon the use of the photograph. It presents but one point of view, and may sometimes make an unfair representation of the points at issue. Like any other diagram, its value must be determined by the jury from all the evidence. The evidence was no more hearsay than any evidence of a surveyor who makes a diagram to illustrate some theory of a case. Its value depends upon other evidence. The evidence was, in a sense, manufactured by the prosecution, but not in an offensive sense. Tests are sometimes made and proven to settle certain disputed possibilities. We are not prepared to say it was error to allow them to be made by the prosecuting officers, although, as a rule, since their office is quasi judicial, it would have been better had the proof been furnished by other witnesses. That the same person should be both advocate and witness is unseemly, and shocks our sense of propriety. There is no application of the recent decision in People v. Hill (Cal.) 56 Pac. 443, to this case.

The defendant's wife was called as a witness and gave important evidence in his behalf. On cross-examination, for the avowed purpose of impeaching her, the district attorney, against continuous objection and protest on the part of the defendant, was allowed to ask a series of questions, which, if answered affirmatively, would disgrace and degrade the witness. They were all wholly collateral and outside the issues in the case, and did not refer to the relation of the witness to the parties, to the subject of the action, or to the previous testimony of the witness. The asking of the questions implied, at least, an assertion of a belief on the part of the attorney that the witness had been guilty of gross immorality. It is charged by the defense that the questions were not asked for the purpose of getting before the jury the testimony of the witness upon the subject of investigation, but to insinuate damaging charges against the witness, which, by the rules of evidence, neither the witness nor the party could rebut, save by the denials of the witness, whose credibility was affected by the insinuations. That this charge was well founded is proven beyond cavil by the record. She was asked, by a great variety of questions, if she did not live by prostitution. She was questioned in reference to particular times and places, and to particular men, and as to whether she did not practice special modes of solicitation for immoral purposes. To all these questions the witness answered in the negative. The defendant's contention, that by the decisions in this state this line of cross-examination is not allowable, is correct. Section 2051, Code Civ. Proc., says: "A witness may be impeached, by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." In other states there is apparently a conflict of decisions upon the subject. See Carroll v. State, 32 Tex. Cr. R. 431, 24 S. W. 100, where the matter is discussed, and the cases cited. But, while there is a controversy as to whether such questions can be permitted, there is no difference in holding that, when allowed, the answer of the witness must be accepted as conclusive. In asking such questions the questioner takes that risk, and justly so, because, under the rules of evidence, no other witness can be allowed to testify upon the subject. Neither the witness whose character is assailed, nor the party the value of whose evidence is sought to be discredited, can sustain the witness on those points by other witnesses. The only evidence, therefore, which is allowed, must be conclusive, and should be taken in good faith as true. This court has held in a number of cases that the answer of the witness to this class of questions must be taken as final and conclusive, and its truthfulness beyond all attack by independent evidence; and it has further been repeatedly held that such callateral matters cannot be gone into, even upon cross-examination. Section 2051 of the Code of Civil Procedure expressly forbids the impeachment of a witness "by evidence of particular wrongful acts." People v. Hamblin, 68 Cal. 101, 8 Pac. 687; People v. O'Brien, 96 Cal. 180, 31 Pac. 45; People v. Un Dong, 106 Cal. 88, 39 Pac. 12; People v. Wells, 100 Cal. 462, 34 Pac. 1078; People v. Silva, 121 Cal. 668, 54 Pac. 146; Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141; Sharon v. Sharon, 79 Cal. 673, 21 Pac. 26; In re James' Estate (S. F. No. 1,467, filed June 5, 1899) 57 Pac. 578. In People v. Un Dong, supra, the court say: "This whole course of examination by the prosecution was improper in the highest degree. The questions asked were not only in large part violative of defendant's rights to have his cross-examination confined to the subject-matter of his testimony in chief [referring to former cases], but the obvious purpose and undoubted effect of such course of examination was to degrade and injure the defendant in the estimation of the jury. Its allowance was therefore erroneous and clearly prejudicial. Nor was the error cured, or the prejudicial effect removed, by the negative answers to the questions allowed, or the sustaining of defendant's objection to others, where, as here, the manifest purpose and inevitable tendency of the questions was to injuriously affect the verdict. The error in such case lies in permitting an examination of that character. People v. Wells, supra." In the case under consideration, after the prosecuting officers had gone out of their way in putting such questions, which were negatively answered, and which answers, under all rules, are made conclusive of the facts, they proceeded in their argument to insinuate to the jury that the answers were not true. This demonstrated conclusively that the purpose of asking the improper questions was to make insinuations against the character of the witness, and not to impeach her testimony, and by this improper mode of procedure to prejudice the defendant. The attorney general argues that other testimony in the case tended to show that the witness belonged to a degraded class. If so, the district attorney should have relied upon such evidence, and should not, as he did, have voluntarily rebutted this theory by the answers of defendant's witness to his improper questions. Judgment and order reversed, and cause remanded for a new trial.

We consur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.

TEMPLE, J. I concur in the judgment and in the opinion of Mr. Justice VAN DYKE, except that I do not agree that questions irrelevant to the issues in a case, asked for the purpose of discrediting the witness, can never, in the discretion of the trial judge, be asked of a witness. It is said that sections 2051 and 2052 of the Code of Civil Procedure prohibit such evidence. In express terms, these sections certainly do not. It is stated that a witness may be impeached (1) by contradictory evidence; (2) by evidence that his general reputation for honesty and integrity is bad; and (3) by proving inconsistent statements. Other modes of impeachment are not expressly prohibited, and, ever since the existence of the statute, other modes have been freely resorted to. Witnesses are constantly cross-examined as to their bias or their interest in the case, their relationship to the parties, and also as to their occupation and position in the community; also, as to what persons they have conversed with about the case, and whether they have been paid to attend court, etc. These are all matters of impeachment, and none of them fall within the modes specified in the statute. The statute has in fact never been treated as prohibiting other usual modes of impeachment; and, if it was intended that a witness could not be impeached except in the specified modes, there would have been no occasion for the one special negative, "but not by evidence of particular wrongful acts." As a general rule, the cross-examination should be confined to the subject-matter of the direct examination, but this rule necessarily cannot apply to matters of impeachment. We all agree that a witness cannot be asked questions merely for the purpose of degrading him, and, while there has been much controversy as to admissiblity of such evidence, no one contends that a party has an absolute right to indulge in such examination. It is not permissible to go into the former life of a witness, and unnecessarily drag to light ancient scandals. The matter is almost entirely within the discretion of the trial court, and such examination should be permitted only when and so far as it seems to be required for the ends of justice. It is said that the earlier rulings were against allowing a cross-examination for the purpose of testing the character of the witness, and yet I find in a work as early as Roscoe's Criminal Evidence the following: "A witness may be questioned in cross-examination not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his character for credibility, his memory, or his accuracy. * * * The moment it appears that a question is being put which does not either bear upon the issue, or enable the jury to judge of the value of the witness' testimony, it is the duty of the court to interfere, as well to protect the witness from what becomes an injustice or an insult, as to prevent the time of the court from being wasted." Greenleaf states the rule pretty much in the same way. 1 Greenl. Ev. § 459. The question discussed by him, and which he says "has not yet been brought into direct solemn judgment," is, whether the witness is privileged, and may decline to answer. He expressly states that the question may be asked, and sees no good reason for allowing a privilege to the witness. Rice, in his work on Evidence, considers the question quite elaborately. He states the rule to be that "such questions should be allowed when there is reason to believe it may tend to promote the ends of justice, but they may be properly excluded when a disparaging course of examination seems unjust to the witness, or uncalled for by the circumstances of the particular case." He cites the case of President, etc., v. Loomis, 32 N. Y. 127, where the discretion of the trial court is asserted, and in which are cited three cases tried by Lord Ellenborough, in one of which, when a witness was asked if he had not been tried for theft, the court ordered the witness to answer, and told him he would be sent to jail if he did not. In another he told the witness he could answer or not, as he pleased, but said, if he were asked such a question, he would refuse to answer. In the third, the judge stopped the examination, and would not permit the question to be answered, although no objection was made by any one. The author makes it plain that there has been no such discrepancy in the English cases as has been supposed. They are nearly all cases at nisi prius, and, whichever way the court held, it was within the rule which lodges the discretion in the trial judge. In the nature of the case, no fixed rule for the exercise of the discretion can be laid down. In White v. McLean, 47 How. Prac. 193, is a full discussion of this subject, as also in Carroll v. State, cited in the principal opinion. In 1 Thomp. Trials, § 458, it is said that the better rule is that the trial court may allow, limit, or refuse such examination, and its ruling is not subject to review except in cases of manifest abuse. See, also, Tayl. Ev. § 1314 et seq. In Stephens' Digest of the Law of Evidence it is said: "Where a witness is cross-examined he may be asked any question which tends (1) to test his accuracy, veracity, or credibility; or (2) to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant to the fact in issue, and however disgraceful to himself, except where the answer might expose him to a criminal charge," and, under our statute, it may be added, where it tends to prove particular wrongful acts. In fact, except in this state, the rule is quite uniform that, in the discretion of the trial court, such questions may be asked. Nor do I admit that a different rule has been established here. Most of the cases cited have no bearing upon the general proposition. Of course, such examination is not allowable in every case. Where it is manifest, as in People v. Wells and in People v. Un Dong, supra, that the examination was not for the purpose of proving the immorality, but to prejudice by insulting questions, it should not be tolerated, and it would be error to permit it. In Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141, an attempt was made to prove upon cross-examination of a married woman that she had been too intimate with her husband before their marriage. The purpose of this examination may well have been held to be to insult the witness. This court simply said, "A witness cannot be impeached in this way." Upon the authorities and upon principle, I think, the trial judge may permit such examination when he deems that the ends of justice would be promoted by so doing; but, if he refuses, his discretion will rarely be interfered with.

We concur: BEATTY, C. J.; HENSHAW, J.

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125 Cal. 154

SCHEERER v. GOODWIN et al. (S. F. 1,130.)

(Supreme Court of California. June 20, 1899.)

EJECTMENT—EXECUTION — INJUNCTION—POSSESSION — COLLUSION — EVIDENCE — PRESUMPTIONS — BURDEN OF PROOF — DEEDS—LEASES — ASSIGNMENTS — CONSTRUCTION — WITNESSES—IMPEACHMENT — EQUITY—VERDICT OF JURY.

1. In an action by one in possession of land to enjoin the enforcement of a judgment of ejectment in an action in which he was not a party, it will be presumed that he obtained possession under the defendants in the ejectment action, in the absence of evidence to the contrary.

2. He does not overthrow such presumption by proof that he obtained possession through a stranger to the action in ejectment, unless he shows that the stranger was in possession before the action in ejectment was commenced, or was entitled to possession under a title adverse to that of plaintiff in ejectment.

3. On the issue as to his right to remain in possession, he has the burden of showing that his possession was rightful, and under a title that had not been determined in the action in ejectment, or that possession was not taken by collusion with defendants in the action.

4. A lessee, selling and assigning the lease, together with all his right and interest in the property, thereby conveys all the title that he may have in the property.

5. In an action to enjoin a sheriff from ejecting a plaintiff under a judgment of ejectment against his father, plaintiff testified that he never heard of the action against his father, but he was shown to have been in the court room during a portion of the trial. He testified that he did not know whether his father was ever in possession of the land, but admitted that he had been living with his father, and had worked for him for several years. He obtained from his father, as general manager of a corporation in possession of the land, a conveyance of the personal property of the corporation, and testified that he agreed with his father to permit the corporation to remain in possession of the land without any charge for rent. He claimed to have taken possession under a deed executed by a director of the corporation shortly after the rendition of a judgment of the supreme court affirming the judgment of ejectment. *Held*, that plaintiff's possession was taken by collusion with his father.

6. On cross-examination of plaintiff's witness, it is proper, for the purpose of impeaching him, to show that his testimony is contradictory to that previously given in another action, though plaintiff was not a party thereto.

7. Instructions given to a jury in a suit in equity are not a subject of an exception, the verdict being merely advisory to the court.

Department 1. Appeal from superior court, city and county of San Francisco.

Injunction by E. V. Scheerer against James W. Goodwin and others. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Chas. G. Nagle, for appellant. Edward R. Taylor, for respondents. Reddy, Campbell & Metson, for sheriff.

HARRISON, J. The defendant Goodwin brought an action in ejectment against Joseph Scheerer and the city and county of San Francisco in 1892, in which judgment was rendered in his favor December 30, 1892, from which an appeal was taken, and the judgment affirmed in this court. 106 Cal. 690, 40 Pac. 18. After the remittitur had been filed in the superior court, he caused a writ of restitution to be issued upon the judgment; and while the sheriff was in the execution of this writ the plaintiff herein brought the present action against him and the sheriff for an injunction against its execution, and for damages, upon the ground that he was in possession of the property and the owner thereof. Upon the trial of the cause the court found that the plaintiff had never been the owner of the property, and that his possession thereof was taken by collusion with Joseph Scheerer, his father, for the purpose of evading the force of the aforesaid judgment. Judgment was accordingly rendered in favor of the defendants, from which the present appeal is taken.

Under the judgment in the action of Goodwin v. Scheerer, the sheriff was authorized to remove from the land the defendants in that action, and all persons found thereon whose possession was derived under the defendants therein, or either of them; and, in the absence of any showing to the contrary, it will be presumed that all persons coming into possession of the premises subsequent to the commencement of that action came in under the defendants therein. This presumption is not overthrown by showing that they came in under a stranger to the action, unless they also show that such stranger was in possession at or prior to the commencement of the action, or was entitled to the possession by virtue of a title adverse to that of the plaintiff in the action, which the court would be authorized to protect against the enforcement of the judgment. Upon the issue of their right to remain in possession, the burden is upon them to show affirmatively that their possession is rightful, and under a title that has not been determined in the action, and that such possession was not taken by collusion with the defendants in the judgment. Long v. Neville, 29 Cal. 131; Leese v. Clark, Id. 664; Wetherbee v. Dunn, 36 Cal. 147.

The findings of the court that the plaintiff never had any interest in the land, and that his entry upon the land was by collusion with his father for the purpose of evading the judgment against his father, necessitated a judgment in favor of the defendants. We are of the opinion, moreover, that the evidence before the court authorized it to make these findings. The plaintiff's claim of title to the land rests upon a conveyance to him by one Freund, and he can have no right to resist the execution of the writ by virtue of this conveyance, unless Freund could himself have resisted the writ. Freund's rights in the property are based upon a deed made to him by Joseph Scheerer in July, 1891, but Joseph Scheerer could convey no greater rights than he himself then had in the land. He testified that in 1875 he "bought out" the contracting firm of Brunt & Thurston, but there is nothing in the record showing that Brunt & Thurston had any possession of the premises or interest in the land, and it was shown that in December, 1890, Joseph Scheerer took a lease of the land from the city and county of San Francisco for the term of three years from that date; and, in the absence of any other evidence on the point, his possession thereafter would be referable to this lease. In February, 1891, he sold and assigned to the "Joseph Scheerer Company, a corporation," this lease, together with all his right and interest in the property described in the lease, so that at the date of his deed to Freund he had no interest in the property which he could transfer to him. The court was also authorized to find from the testimony of Freund that the conveyance to him by Scheerer was merely a security for Scheerer's indebtedness to him.

The court was also authorized to find that the subsequent entry of the plaintiff was collusive and fraudulent. He testified that he had never heard of the suit of Goodwin v. Scheerer, or of his father's litigation with the city, but it was shown that he was present in court during a portion of the trial of that action. He also testified that he did not know whether his father ever occupied or was in possession of the property, but he admitted that he had been working for his father for several years, and had been living with him during all the time. The case of Goodwin v. Scheerer was argued in the supreme court in February, 1895. March 16, 1895, the plaintiff took a bill of sale from the California Paving Company of all the personal property upon the lot. This bill of sale purported to be for the sum of $1,500, but he testified that it was given to him for wages due him from the paving company. His father, as president of the paving company, executed the bill of sale to him; and he testified that he then agreed with his father that the company could remain there without any charge for rent, if they desired it, and as long as they chose, but that he made no agreement on the subject with the company, and that the company continued to use the premises for its business. His father was the president and general manager of the company, and Freund was also a member and one of the directors of the paving company, but the plaintiff did not know whether he was the secretary of the company at that time or not. The judgment in Goodwin v. Scheerer was affirmed in this court April 3, 1895, and in the ordinary course of procedure the remittitur thereon would issue on the 3d of May. On May 1st the plaintiff received his deed from Freund, and assumed control of the property. The observations of the court in Wetherbee v. Dunn, supra, are appropriate here: "We are satisfied, as the court below must have been, that this case presents another instance of an indirect effort through other parties to evade the process of the court, and deprive the plaintiff in an action to recover land, after a long and successful litigation, of the fruits of his judgment."

Joseph Scheerer testified that he had not been in possession of the land since he gave the deed to Freund; that at that time he delivered the possession over to Freund. Upon cross-examination his testimony at the trial of the action of Goodwin v. Scheerer was called to his attention, and the plaintiff objected thereto on the ground that, as he was not a party to that action, he could not be bound by the judgment or proceedings therein. The court overruled his objection, to which an exception was taken, and allowed the witness to be questioned thereon. It was competent, upon the cross-examination of this witness, for the purpose of impeaching his testimony that he had delivered the possession to Freund, to show that he had given contrary testimony at the former trial. It is true that the judgment in that action would not be evidence against the plaintiff herein that Joseph Scheerer was in possession of the land at the time that action was brought, but it was competent to show as a fact herein that he was at that time in possession; and, if such fact could be shown, the judgment would be binding upon all persons thereafter coming in under him. It appeared that at the former trial he testified that he took possession of the premises about two years previous thereto under a lease from the city; that he was then put into possession by the superintendent of streets, and had been there ever since. Upon this testimony being called to his attention, he said that it referred to other property than that involved herein, but it was shown that the property described in the lease was the same as that described in the complaint in this action, and also in the complaint in the action of Goodwin v. Scheerer; and the witness also testified that this was the only lease that he had ever taken from the city. Under this evidence the court was fully authorized to find that he was in the possession of the land at the time of the former action, and, under its finding that the entry of the plaintiff herein was under him, he was bound by the judgment in that action.

The action herein is in equity, but the court called in a jury to aid it in its decision, and a verdict was rendered by the jury in favor of the defendants. It does not appear that there were any special issues submitted to the jury. The court, however, made its findings of fact, in which it adopted the conclusion of the jury. The appellant has objected to certain instructions given to the jury, but, as the verdict was merely advisory to the court, these instructions are not the subject of an exception. Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

125 Cal. 107

KYLE et al. v. CRAIG. (S. F. 1,259.)

(Supreme Court of California. June 17, 1899.)

PLEADING — DEMURRER — GROUNDS — COMPLAINT—CAUSE OF ACTION—SUFFICIENCY—EVIDENCE—LEADING QUESTIONS — RES GESTÆ—COMPETENCY — DEPOSITIONS — OBJECTIONS TO QUESTIONS—TAKING DEPOSITION IN SHORTHAND — APPEAL AND ERROR — FAILURE TO POINT OUT SPECIFIC ERROR.

1. A ground of demurrer "that said complaint sets up two counts for one cause of action" cannot be considered, as it is not a ground of demurrer, within Code Civ. Proc. § 430, providing what shall be grounds of demurrer.

2. Where a complaint alleges that the grantee named in a deed, for which there was no consideration, wrongfully got possession of it and placed it upon record, and claims to own the property, the grantor is entitled to relief, though it is also alleged that such deed was made by the grantor in contemplation of immediate death.

3. A complaint alleging that the transfers of property were made in view of immediate death, and that defendant was to carry out certain written instructions in case plaintiff should die, and asking for a reconveyance of the property, plaintiff not having died, is not uncertain and ambiguous, in that such written instructions are not set out, as the instructions are immaterial, the gist of the action being to compel a reconveyance.

4. The allowance of leading questions is in the discretion of the trial court, and a case will not be reversed on such grounds, unless there is a manifest abuse of discretion.

5. Where there is a question as to whether or not plaintiff transferred his property in contemplation of immediate death, a question calling for the conversation had by the witness with plaintiff just prior to and at the time plaintiff made the conveyance is relevant and material as a part of the res gestæ.

6. Where plaintiff, in contemplation of death, transferred his property to defendant, with the understanding that defendant should, after plaintiff's death, dispose of the property according to certain instructions, testimony of the plaintiff as to his intentions when he made the transfers is competent and material.

7. Under Code Civ. Proc. § 2032, declaring that in taking a deposition, if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination, objections to leading questions in a deposition cannot be made at trial, where the record does not show that the objections were made at the time of taking the deposition, but shows that the counsel attended at the examination.

8. Where the certificate of the notary to a deposition shows that, when the deposition was transcribed into longhand, it was read by the notary to the witness, and subscribed by him, an objection to such deposition being read in evidence, on the ground that it was taken in shorthand by a shorthand reporter not appointed by the court, and transcribed into longhand by such reporter, is properly overruled.

9. Where it is claimed that the court failed to find on some of the material issues, but attention is not called to any material issue upon which there is no finding, and counsel fails to point out in his brief the particular issue or is-

sues upon which there should have been a finding, the court will not search the record to discover such issue or issues.

10. Where the particulars in which the evidence is said to be insufficient to justify any particular finding or part thereof are not pointed out in the assignments of error, the assignment will not be considered.

11. Where counsel failed to point out in his brief or to call attention to the particular finding or findings claimed to have no support in the evidence, and the particulars in which such finding is not supported, the question will not be considered on appeal, though the specifications in the assignments of error are sufficient.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Thomas Kyle and B. Sarle, executors, etc., against Mary Craig to compel a reconveyance of property alleged to be held by defendant in trust for plaintiffs. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

F. J. Castelhun, for appellant. James H. McKnight and Chas. L. Patton, for respondents.

COOPER, C. This action was brought by one Robert Bright to have it adjudged that the defendant holds the legal title to certain real estate described in the complaint in trust for plaintiff, and that defendant be required to execute and deliver to plaintiff a good and sufficient deed to said real estate, and also to recover certain moneys that are alleged to be the property of plaintiff, and held by defendant in trust for him. The facts, as shown by the record and found by the court, are, in substance, as follows: The original plaintiff, Robert Bright, and the defendant were brother and sister, and for many years prior to June 7, 1895, they had lived together in the same house, and on the most friendly and confidential relations. The plaintiff was then about 78 years old, and the defendant about 76. About the 31st of May, 1895, the original plaintiff was afflicted with a severe stroke of paralysis, and became so ill that on the 7th day of June following he was in danger and expectation of immediate death, and while in such condition he assigned to defendant deposits amounting to about $17,000 in certain savings banks, and also executed and acknowledged a deed to defendant of certain real estate in the city and county of San Francisco, particularly described in the complaint. The assignment and deed were made with the understanding that defendant should, after the death of the original plaintiff, dispose of the property according to certain instructions given to defendant by said plaintiff. The deed was never delivered to defendant, but was placed in a drawer of a table in a room then occupied by said plaintiff, and afterwards, without the knowledge or consent of said plaintiff, defendant took the deed from the said drawer, and on January 7, 1896, placed the same of record with the county recorder of the city and county of San Francisco. There was no consideration for the said deed or the transfer of said bank accounts. After the 9th day of June, 1895, the plaintiff ceased to be in danger of immediate death, and afterwards he demanded of defendant that she deed, assign, and transfer the said property back to plaintiff, all of which she refused to do. She not only refused to reconvey the property, but claimed to be the owner of it and seised in fee of the real estate. The plaintiff on the 2d day of March, 1897, and before the trial of this case, died, and on the 8th day of March, 1897, the present plaintiffs, as special administrators of his estate, were substituted, and plaintiffs are now the executors of the last will and testament of the original plaintiff. After the date of the transfers of said real and personal property, and prior to the death of the original plaintiff, defendant had laid out and expended $2,000 for taxes, insurance, nursing of plaintiff, etc. Upon these facts the court below deducted $2,000 from the amount of the said deposits, and gave judgment against defendant for the balance, and that the defendant has no right, title, or interest in said real estate; and that defendant deliver up the said deed to be canceled, and be enjoined from setting up any claim to the lands therein described. A motion was made for a new trial, which was denied, and this appeal by defendant is from the judgment and order. The record is quite voluminous, and counsel for appellant has filed a brief of 34 printed pages. Counsel for plaintiffs have not seen fit to file a reply, and thus the full labor of investigating all the questions raised in appellant's brief is thrown upon this court, with no assistance from plaintiffs' counsel.

Defendant's counsel urges that the demurrer to the amended complaint should have been sustained upon several different grounds. The complaint sets forth what are claimed to be the facts in two counts,—the first count being in regard to the real estate, and the second count in regard to the deposits in the bank. The main facts are set forth by the pleader "as having occurred June 7, 1895, as a part of the same transaction." The principal ground of demurrer, and the one first urged, is "that said complaint sets up two counts for one cause of action." This is not one of the grounds of demurrer laid down in the Code (Code Civ. Proc. § 430), and no others can be considered. Hentsch v. Porter, 10 Cal. 558; Bernero v. Insurance Co., 65 Cal. 386, 4 Pac. 382. The cases cited in appellant's brief relate to where a single act or transaction is made the subject of separate actions. Here we have only one action in regard to one transaction, although the same is set forth in two separate counts. The counts might be both considered together as a narration of the facts upon which plaintiffs rely for a recovery. If the facts are fully set out, although given in what the pleader calls "separate counts," each numbered into separate paragraphs, it can make no difference, and cannot injure or prejudice the defendant in any way. It is next claimed that the first count does not state a cause of action, because it is an attempt to have the court declare a transaction in regard to real property to have been donatio causa mortis, and that a gift in view of death applies to personal property only. The answer to this is that the pleader states that the deed was without consideration, and was never delivered to defendant. If a grantee named in a deed, to whom the deed was never delivered, and for which there was no consideration, wrongly gets possession of the deed and places it upon record, and then claims to own the property therein described, it seems to us that the grantor, upon stating and proving these facts, would be entitled to relief. The point is further urged that the complaint is uncertain and ambiguous, in that it avers that the defendant would dispose of the real and personal property in accordance with certain written instructions, and that the same are not set out, and it is impossible to determine what they were. The complaint sets forth that, as the transfers were made in view of immediate death, defendant was to carry out certain written instructions in case plaintiff should die. As the plaintiff did not die, but lived to claim his property, and as the gist of the action is to compel a reconveyance, the written instructions are immaterial. There is no claim that any written instructions should be enforced, and no claim as to anything caused by the want of such instructions being carried out. We think the demurrer was properly overruled. For the reasons given in regard to ruling upon the demurrer, it was not error for the court to refuse to compel the plaintiffs to proceed upon one count only of their complaint. It is claimed that the court committed many errors in overruling defendant's objections to testimony. There are 87 of these assignments of error in the transcript, argued under 27 different assignments in appellant's brief. In the first assignment it is said that the court erred in overruling the defendant's objections to three questions asked of the witness Dr. Mays. The witness had attended Robert Bright more or less for five years. He was called in to see him professionally about May 21, 1895, and attended him about twice a day until June 17th. The questions were then asked of the witness: "Q. Did you find him in the same condition during that time?" The witness answered: "His condition varied, improving slightly after a few months. During the first week following the 30th of May his condition became worse. Q. As a matter of fact, doctor, was Robert Bright in danger of death at that time?" The witness, in answer, said: "There was considerable danger of death. For some time I thought death might ensue at any time. * * * Q. Did he take these opiates in sufficient quantities to impair his capacity?" The witness answered: "No; simply sufficient to allay the pain." All these questions were objected to upon the sole ground that they were leading, and the objection overruled. This court would not reverse a case for error in the matter of admission of testimony, unless the errors were in regard to a material matter affecting the substantial rights of the parties. Kiler v. Kimbal, 10 Cal. 267. It is a well settled rule in this state that the allowance of leading questions is in the discretion of the trial court, and that a case will not be reversed on such ground, unless there is a manifest abuse of discretion. White v. White, 82 Cal. 452, 23 Pac. 276. We think, while the questions were leading, that there was not such an abuse of discretion as would warrant us in holding the rulings to be reversible error. One Capp had been for many years and was on the 4th of June, 1895, the agent and business manager of the said Robert Bright. He was sent for by Bright on said day, and for the purpose of having some disposition made of his property in case he should die. When called as a witness, after some preliminary questions, and after stating that, in response to a call from a messenger, he went to the house where Bright was staying, this question was asked: "Q. State what conversation you had with Mr. Bright on this occasion." This question was objected to upon the ground "that it was incompetent, irrelevant, and immaterial." The objection was overruled, and exception taken. It is said that this ruling was error, for the reason that the conversation was not had in the presence of defendant, and that, even if she had been present, it was irrelevant and immaterial; and, further, that a deed cannot be invalidated by subsequent declarations of the grantor. We think the evidence was relevant and material as a part of the res gestæ. The witness had been called upon to make certain arrangements about Bright's property in case he should die. It seems Bright wanted to make a will, and at first talked about that, but afterwards concluded to make a deed to his sister, and gave the witness a statement of what he wanted his sister to do with the property in case he should die. It was alleged in the complaint that the transfers were made without consideration and in expectation of immediate death. The answer took issue upon this. It was therefore necessary to inquire fully into the acts done by Robert Bright, and his motives and intentions. The very question to be determined was as to whether or not the transfers were made with a belief on the part of Robert Bright that he was nearing the presence of the monster, Death. The testimony was not as to what Bright said after the transfers, but what he said before he made them, and as a part of what was to be done. Where it is necessary to inquire into the motive of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character. 1 Greenl. Ev. § 108; 1 Rice, Ev. § 211b; 1 Phil. Ev. 233. In the case of Lund v. Inhabitants of Tyngsborough, 9 Cush. 43, the court, in a very learned and exhaustive review of the law as to the admissibility of hearsay evidence, said: "Perhaps the most common and largest class of cases in which declarations are admissible is that in which the state of mind or motive with which any particular act is done is the subject of inquiry;" and, after discussing the many rules and exceptions, laid down the rule: "When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay."

It is earnestly contended that the court erred in allowing Bright to testify, under the objections of defendant, as to his intentions when he executed the deed and transfers of property to defendant. We think the testimony was competent and material. The intentions and motives of Bright were the material matters being investigated. In such cases the universal rule is to receive the witness' testimony as to his intentions. Whart. Ev. §§ 482, 508, 955; Snow v. Payne, 114 Mass. 526; Barnhart v. Fulkerth, 93 Cal. 499, 29 Pac. 50. The objections and exceptions in the transcript from the seventh to the eighty-seventh, inclusive, are to questions asked in the deposition of the plaintiff, which was admitted and read in evidence. A large number of the questions are objected to upon the ground that they are leading. It does not appear from the record whether or not the objections were made at the time of taking the deposition, but it does appear that counsel for defendant attended at the examination. The Code (Code Civ. Proc. § 2032) lays down the rule that in taking a deposition, if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. We have examined all the assignments as to errors in receiving testimony, under the objections of defendant, and we do not find any one of sufficient importance that we think we would be justified in holding the rule prejudicial error. The deposition of Robert Bright was offered in evidence, and counsel for defendant objected to it being read, upon the ground "that it was taken in shorthand by a shorthand reporter not appointed by the court, and transcribed into longhand by such reporter, against the objections of defendant's counsel made at the time." The court below asked counsel for defendant if there was any claim that the deposition was not correctly transcribed, and counsel said: "That as to that he could not say." The certificate of the notary shows that, when the deposition was transcribed into longhand, it was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness in the presence of the notary. It is claimed that the words of the witness must be written down by the notary, unless the parties agreed upon a different mode,—citing Code Civ. Proc. § 2006.

Counsel says in his brief: "It is not claimed that the notary might not have employed a clerk to write down the questions and answers with a pen or machine, but it was improper to employ the sister of counsel for plaintiff." It does not appear, except in the brief of counsel, that the sister of counsel for plaintiff was employed as shorthand reporter. If the notary could employ a clerk to write down the questions and answers with a machine, we fail to see why a reporter could not take down the questions and answers. When a witness gives an answer, and it is written out in longhand, it could not be a valid objection that the answer remained in the memory of the writer until he committed it to paper. But, clearly, when an answer is given by a witness, it remains with the person writing and in his memory until it is transferred to paper. If the writer should take it down in characters only known to himself, and thus preserve the memorandum of each question and answer until he afterwards had time to write it down in longhand, we fail to see why, when finally transferred to longhand, it is not written down as completely as if done as the words fell one by one from the lips of the witness. We think the Code clearly contemplates this course. Code Civ. Proc. § 2038. The language is, "Upon the appearance of the witness the judge or justice must cause his testimony to be taken in writing," etc. It is also provided that the deposition, when completed, must be carefully read to the witness and corrected, if desired, and then subscribed by him. This makes the reading, correcting, and signing the necessary and material thing to be done, and it was done in this case. The object of requiring the witness to sign the deposition is to make him responsible for its phraseology, for by signing he adopts the language as his own. Weeks, Dep. § 321. It is claimed that the court failed to find on some of the material issues. Our attention is not called to any material issue upon which there is no finding, and, as counsel has not seen fit to point out in his brief the particular issue or issues upon which there should have been a finding, it cannot be expected that we will go through the record on an independent voyage of discovery.

Defendant's counsel assigns some 15 errors in which he claims the evidence is insufficient to justify the findings. The only specification wherein the evidence is alleged to be insufficient is, "The evidence is insufficient to justify," etc. Unless the particulars in which the evidence is said to be insufficient to justify any particular finding or part thereof are pointed out in the assignment of error, we cannot notice the assignments here. Code Civ. Proc. § 659; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825. And, even if the specifications in the assignments of error were sufficient, counsel has not pointed out in his brief and called our attention to the particular finding or findings claimed to have no support in the evidence, and the particulars in which such finding is not supported by the evidence. In such case we do not deem it our duty to investigate the questions as to the insufficiency of the evidence. We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

125 Cal. 220

BANE v. PEERMAN. (S. F. 1,005.)

(Supreme Court of California. June 23, 1899.)

REPLEVIN — COMPLAINT—ALLEGATION OF OWNERSHIP—AIDER BY FINDING.

1. In claim and delivery, it is not sufficient to allege ownership and right of possession at some time previous to the beginning of the action. They must be alleged to exist at the time the action was begun.

2. In claim and delivery, the failure to allege ownership and right of possession by the plaintiff at the time the action was begun is not cured by a finding in favor of the plaintiff, notwithstanding the existence of an allegation of ownership and right of possession at some time previous to the beginning of the action.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county. Action in claim and delivery by Margaret E. Bane, administratrix, against M. H. Peerman. There was judgment for plaintiff, and defendant appeals. Reversed.

A. B. Ware and Thomas Rutledge, for appellant. R. M. Swain and Barham & Miller, for respondent.

HAYNES, C. Since this appeal was taken respondent, D. C. Bane, died, and Margaret E. Bane, administratrix of his estate, has been substituted by this court as plaintiff and respondent. This action is in claim and delivery. Findings and judgment were in favor of the plaintiff, and the defendant appeals from the judgment on the judgment roll. It is contended by appellant that the complaint does not state facts sufficient to constitute a cause of action, and that the findings are defective, and do not support the judgment. The complaint alleges: "That on the 9th day of July, 1896, said plaintiff was the owner and entitled to the immediate possession of all the following goods and chattels: * * * That the said defendant, on the 9th day of July, 1896, at Santa Rosa, Sonoma county, without plaintiff's consent, and wrongfully, took said goods and chattels from the possession of plaintiff, and has continuously retained the same." A demand is alleged to have been made "on the 9th day of July, 1896," for possession of said goods, and that defendant "still unlawfully withholds and detains said goods and chattels," etc. The complaint was sworn to and filed on July 23, 1896. The defects in the complaint in this case cannot be distinguished from those considered in Truman v. Young, 121 Cal. 490, 53 Pac. 1073, and upon the authority of that case, and others there cited, we conclude that it does not state a cause of action. Respondent contends, however, that the defective allegations in the complaint are cured by the findings. But here there is a total failure to allege that the plaintiff was the owner of the property and entitled to its possession at the time the action was commenced, and not a defective allegation that he was the owner and entitled to the possession at that time. Sufficient findings to support a judgment must have a basis in the pleadings, and never cure the absence of an essential allegation. Findings of fact must be within the issues, and there was no issue as to the ownership and right of possession when the action was commenced. The issue as to the ownership and right of possession on the 9th of July was immaterial. I advise that the judgment appealed from be reversed, with leave to the plaintiff to amend the complaint.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, with leave to the plaintiff to amend the complaint.

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125 Cal. 151

PEOPLE v. SHEA. (Cr. 509.)

(Supreme Court of California. June 19, 1899.)

RAPE—EVIDENCE.

In a prosecution for rape, evidence is admissible tending to prove that prosecutrix had previously had intercourse with other men.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Patrick Shea was convicted of rape, and from an order granting him a new trial the state appeals. Affirmed.

Atty. Gen. Fitzgerald, for the People. A. E. Mack and A. D. Lemon, for respondent.

GAROUTTE, J. Information charging the crime of rape. Defendant was convicted, and on his motion the court made an order granting a new trial, from which order the people have appealed. The question involved in this appeal arises upon the admissibility of certain evidence. This evidence was offered by defendant, and tended to prove that the prosecutrix, previous to the time when the commission of the offense here charged was laid in the information, had consented to the having of sexual intercourse with other men. In the early case of People v. Benson, 6 Cal. 221, this identical question was involved, and it was there held that such evidence was competent and admissible. In People v. Johnson, 106 Cal. 289, 39 Pac. 622, the Benson Case is cited, and the court said: "This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." It may be conceded that the weight of authority is opposed to the rule laid down in the Benson Case. Yet there is respectable authority supporting the doctrine as there declared. State v. Sutherland, 30 Iowa, 573; Benstine v. State, 70 Tenn. 175; State v. Patterson, 88 Mo. 91; People v. Abbot, 19 Wend. 190; Brennan v. People, 7 Hun, 171; Woods v. People, 55 N. Y. 515. The Benson Case was quite well considered. And in view of the fact that it has stood so many years as evidencing the law of this state upon the proposition, the reasons urged for its overthrow at this time are not deemed sufficient by the court. For the foregoing reasons, the order granting the new trial is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; HARRISON, J.; VAN DYKE, J.

McFARLAND, J. I dissent for the reason that, in my opinion, the court erred in allowing evidence tending to show specific acts of adultery by the prosecutrix with other men. The general rule undoubtedly is that specific acts cannot be proven for the purpose of impeaching a witness, and I see no force in the reasoning that such acts are admissible because they tend to show that the prosecutrix probably consented at the time of the alleged rape. Such acts were no more admissible than would former assaults on others by a man charged with murder be admissible because they would tend to the probability that the defendant committed the murderous assault charged. In People v. Benson, 6 Cal. 221, the court was evidently not sure of its position, because, having referred to section 214, 3 Greenl. Ev., where an exactly opposite rule is declared, and which, as the court say, was probably founded upon Rex v. Hodgson, Russ. & R. 211, and other English cases, it uses this language: "But, admitting the full force of the rule in Rex v. Hodgson, still we are of the opinion that the circumstances of this case modify the rule," and proceeds to say, in effect, that the prosecutrix in that case, being young and ignorant, probably had no general reputation. This reasoning is entirely unsatisfactory to me, and I think that upon principle and upon the great weight of authority People v. Benson should be held as improperly decided. The reason that specific acts cannot be proven, while general reputation may, is as old as the law, and founded upon the stable ground that a witness is supposed to be able to maintain his or her general reputation, while witnesses cannot be expected to be able to disprove testimony as to special acts to which their attention had not been called. I think that if counsel for defendant in cases like this are allowed to even ask questions tending to prove that a prosecutrix had sexual intercourse with another man, great injustice and wrong will follow. For this reason I think that the order granting a new trial should be reversed.

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6 Cal. Unrep. 293

YORE v. SEITZ et al. (Sac. 510.)

(Supreme Court of California. June 21, 1899.)

APPEAL AND ERROR—REVIEW.

A finding supported by evidence will not be disturbed on appeal.

Department 2. Appeal from superior court, Sierra county.

Action by J. J. Yore against F. J. Seitz and F. J. Seitz, administratrix of the estate of Anna Maria Seitz. There was judgment for plaintiff, and defendants appeal. Affirmed.

F. D. Soward, for appellants. Frank R. Wehe, for respondent.

PER CURIAM. This is an action to foreclose a pledge of 200,000 shares of the capital stock of the Butte Saddle Gold-Mining Company, a corporation. By appellants it is contended that the stock was the separate property of Anna Maria Seitz, the wife of appellant F. J. Seitz; that certain payments or advances made by the pledgee were not within the terms of the pledge; and that as to them he does not hold the stock as security. The court, however, found that the pledged stock was community property. This finding is attacked, but it cannot be overthrown. There is evidence sufficient to support it. The questioned payments were made at the request of the husband, F. J. Seitz, and under his contract the stock was made security for them. The judgment and order appealed from are therefore affirmed.

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125 Cal. 213

CLUNE v. QUITZOW. (S. F. 1,004.)

(Supreme Court of California. June 23, 1899.)

DEFAULT—JUDGMENT ON THE MERITS.

Under Code Civ. Proc. § 594, providing that "either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court, for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require," a defendant may proceed with the case upon the failure of the plaintiff to appear, and judgment may be entered on the merits.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. E. Clune against H. W. Quitzow. Plaintiff failed to appear at the trial, and judgment was entered for defendant on the merits. Plaintiff appeals. Affirmed.

P. L. Koscialowski and Sullivan & Sullivan, for appellant. H. W. Quitzow, in pro. per.

HAYNES, C. This action was based upon three separate causes of action to recover certain sums of money. The defendant answered, putting the facts in issue, and sought to recover from the plaintiff $404.37. Plaintiff failed to appear at the trial. The defendant, as appears from the judgment, was sworn and examined as a witness, and the court thereupon entered judgment that plaintiff "do take nothing by his said action as against H. W. Quitzow, defendant, but that judgment be, and the same is hereby, entered herein in favor of the defendant for his (defendant's) costs and disbursements incurred in this action, amounting to the sum of ten dollars." The plaintiff appeals from the judgment, upon the judgment roll, contending that "plaintiff having failed to appear at the trial, having offered no proofs, and having, in effect, abandoned the case, the judgment should have been a judgment of dismissal, and not on the merits."

Appellant relies upon sections 581 and 582 of the Code of Civil Procedure. Section 581 contains six subdivisions, setting out the circumstances under which an action may be dismissed, or a nonsuit entered. Under subdivision 3 the defendant might have had the action dismissed, but he was not bound to do so. The plaintiff could not have had the action dismissed, under this section, without the consent of the defendant, because affirmative relief was sought by the answer. Section 582 provides, "In every case, other than those mentioned in the last section, the judgment must be upon the merits." Section 594, Code Civ. Proc., provides, "Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court, for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require." It was the right of the defendant, under the provisions of said section, to proceed with the case, and to have a judgment entered finally disposing of the case, and the court did not err in granting it. I advise that the judgment be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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125 Cal. 222

MESENBURG v. DUNN. (S. F. 1,035.)

(Supreme Court of California. June 23, 1899.)

JURY TRIAL—EQUITABLE ISSUES.

In an action to annul contracts to purchase land entered into by plaintiff, and to recover money paid to defendant thereunder, on the ground that such contracts were procured by fraud, when the answer denies merely the fraud, and not the amount paid, the defendant is not entitled to a jury trial.

Department 2. Appeal from superior court, city and county of San Francisco.

Bill by Herman Mesenburg against James Dunn. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Daniel Titus, for appellant. Otto Tum Suden, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of the plaintiff, and the only point made for a reversal is that the court erroneously denied appellant's demand for a jury trial. It is averred in the complaint that plaintiff was induced by false representations, which are set forth, to enter into certain written contracts with defendant, by which he agreed to purchase certain lands from the defendant, and that he paid to defendant as a part of the purchase price the sum of $760; and he prays for a decree of the court declaring said contracts null and void, and also that he have judgment for said $760. The demand for a jury was general, and embraced the whole case, the language being, "demands a jury, and that said cause be tried by a jury." The main purpose of the action, to wit, to have the contracts declared null and void, clearly brought that part of the action within equitable jurisdiction; and under no view was the defendant entitled to have the whole case tried by a jury. But, waiving that point, his demand for a jury was, upon general principles, properly denied. The recovery of the part payment made under the contract was merely incidental to the main issue, and the court, as a court of equity having jurisdiction of the main action, properly determined the whole controversy so as to prevent future litigation, no issue being raised except as to the matters upon which plaintiff founded his demand for the equitable interposition of the court. In his answer the appellant merely denied the alleged facts as to the false representation, and no issue is raised as to the amount of money paid on the contract; and therefore it is not a case where a legal defense strictly cognizable in a court of law is made to a complaint which is in form a bill of equity; and is unlike Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, Newman v. Duane, 89 Cal. 597, 27 Pac. 66, and other cases cited by appellant. The case at bar is within the principles declared in Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271, where some of the cases cited by appellant are reviewed, and distinguished from cases like the present one. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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125 Cal. 188

CITY AND COUNTY OF SAN FRANCISCO v. BRODERICK, Auditor. (S. F. 1,436.)

(Supreme Court of California. June 21, 1899.)

STATUTES—LOCAL AND SPECIAL LAWS—APPOINTMENT OF DEPUTIES AND ASSISTANTS BY COUNTY CLERK—COUNTIES—COMPENSATION OF EXTRA DEPUTIES AND ASSISTANTS.

1. St. 1880, p. 20, § 1, providing that in certain cases the county clerk of any city and county having over 100,000 inhabitants is authorized

to appoint deputies, assistants, and copyists, and St. 1891, p. 5, re-enacting the former statute, except that its operation is limited to any city and county or counties having 120,000 inhabitants, since they create offices and fix the duties of the officers in but one class of counties, which class is arbitrarily created and designated by population, are in violation of Const. art. 11, § 5, declaring that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of county clerks and such other county officers, and Const. art. 4, § 25, subd. 28, forbidding the legislature from passing local or special laws creating offices or prescribing the powers and duties of officers in cities and counties.

2. Under St. 1893, p. 367, § 61 (St. 1897, p. 475, § 59), declaring that every county officer may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office, the county clerk may appoint additional deputies and assistants if the needs of his office so require; but allowance of compensation of these extra deputies and assistants out of the treasury is prohibited, as being in violation of Const. art. 11, § 13, providing that no person shall be granted power to control, appropriate, supervise, or in any way interfere with county funds.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by the city and county of San Francisco against William Broderick, as auditor of the city and county of San Francisco, to enjoin defendant from allowing demands of certain assistant register clerks and copyists appointed by the county clerk. There was a judgment of dismissal, and petitioner appeals. Reversed.

H. T. Cresswell, for appellant. G. W. McEnerney, for respondent.

HENSHAW, J. This action was instituted to enjoin the auditor from allowing the demands of certain assistant register clerks and copyists appointed by the county clerk of the city and county of San Francisco. The auditor demurred to the petition, and his demurrer was sustained. The city and county declined to amend, and a judgment of dismissal was entered. From that judgment this appeal is taken.

The principal question thus presented is not so much that of the power of the clerk to appoint, as it is the duty of the city and county to pay the salaries of, the appointees. At the time when the present constitution took effect there were upon the statute books certain acts affecting the office of the county clerk of the city and county of San Francisco. These need not be particularized further than to state that they authorized the clerk to appoint certain deputy clerks, court-room clerks, register clerks, assistant register clerks, record clerks, and copyists, with specified salaries for each, payable out of the treasury. Whatever may have been the effect of the present constitution upon these acts, it is conceded that the act of February 13, 1880 (St. 1880, p. 5), an act passed after the adoption of the present constitution, was a general act, which revived and continued in force these earlier acts, and fixed the duties of the deputies and assistants appointed thereunder. Thereafter the legislature passed an act entitled "An act in relation to certain deputies" (St. 1880, p. 20), section 1 of which provided: "In all cases in which by statutes in force on the 31st day of December, 1879, the county clerk of any city and county having over one hundred thousand inhabitants is authorized to appoint deputies, assistants and copyists, in or in connection with the courts which are abolished by the constitution now in force, the county clerk may appoint four competent persons as such deputies, assistants and copyists, for each superior court, and where by law such superior court is entitled to more than one judge he may appoint three persons as such deputies, assistants and copyists for each additional judge; and such deputies, assistants and copyists, so appointed, shall be entitled to the same compensation as is provided in said statutes, and the same shall be audited and paid at the same time and manner, and from the same sources, as is provided therein. He may also appoint such additional number of copyists as the duties of his office shall in his discretion from time to time require," etc. In 1891 the legislature passed an act amendatory to this last statute, entitled "An act in relation to certain deputies, assistants and copyists of county clerks, approved April 2, 1880." St. 1891, p. 5. This act was a re-enactment of the act of 1880, saving that its operation was limited to any city and county or counties having over 120,000 inhabitants, and it created the office of chief deputy clerk, at a salary of $250 per month. It is not seriously questioned in this case but that these statutes last cited are in violation of the terms of the constitution, and void. Indeed, it cannot successfully be denied that such is the case. Section 5, art. 11, of the constitution declares that "the legislature by general and uniform laws shall provide for the election or appointment in the several counties of boards of supervisors, * * * county clerks, * * * and such other county, township and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office." Subdivision 28, § 25, art. 4, Id., forbids the legislature from passing local or special laws "creating offices or prescribing the powers and duties of officers in counties, cities and counties, cities, township, election or school districts." These acts are obnoxious to the constitution, then, in that they create offices and fix the duties of the officers in but one class of counties, which class is arbitrarily created, and designated by population, notwithstanding the fact that the constitution declares that this shall be done only by general law, and that the counties of the state may be classified by population only for the purpose of fixing the compensation of their officers. Earle v. Board, 55 Cal. 489; Rauer v. Williams, 118

Cal. 401, 50 Pac. 691. See, also, Farrell v. Board, 85 Cal. 408, 24 Pac. 868.

Notwithstanding the invalidity of these statutes, it is contended that the power to appoint these officers may be found in the county government act, itself admittedly a general law; that the county government act provides that in counties of the first class, to which San Francisco belongs, "the officers shall receive as compensation for the services required of them by law, or by virtue of their office, the salaries and fees fixed by law as compensation" (St. 1897, p. 547, § 188); and that reference may be had to these unconstitutional acts for the purpose of determining what salary is to be allowed (People v. Bircham, 12 Cal. 50; State v. City of Cincinnati, 52 Ohio St. 419, 40 N. E. 508). Section 61 of the county government act is the section containing the authority which it is contended authorized these appointments. It is a general section, and reads as follows: "Every county, township or district officer, except a supervisor or judicial officer, may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing and filed in the office of the county clerk, and until such appointment is so made, and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy." St. 1893, p. 367; St. 1897, p. 475, § 59. This is certainly a grant of power from the legislature to the designated officers, authorizing them to appoint necessary deputies, but the question of the compensation of these deputies, when appointed, is quite a different matter. It does not follow that because deputies may be appointed their salaries must be paid by the county. It will not seriously be contended that this permission which the legislature has accorded is to be construed into a power placed in the hands of these officers to appoint deputies at will, and make their salaries a charge against the counties. Such a construction would result in a grievous interference with the county funds, and would come clearly within the purview of section 13, art. 11, of the constitution, which prohibits the legislature from delegating "to any 'individual' any power to make, control, appropriate, supervise or in any way interfere with any county, city, town, or municipal improvement, money, property or effects, whether held in trust or otherwise." Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092; Tulare Co. v. May, 118 Cal. 303, 50 Pac. 427. The county government act, as the constitution ordains, classifies counties by population for the purpose of fixing the compensation of their officers. It declares in section 216 (St. 1893, p. 507, and St. 1897, p. 572) that: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." As to the payment of these officers and their deputies, a twofold plan or scheme is provided by the act. In certain counties, as in counties of the first, second, third, fifth, and other classes, the county clerk is allowed a salary for himself, and is given a certain number of deputies at fixed salaries, payable out of the county treasury. In counties of the fourth, seventh, eighth, tenth, and other classes the county clerk is allowed a fixed amount, out of which he is required to pay all deputies as well as himself. By both of these systems a fixed and determinate amount only can be drawn from the treasury in payment of the salaries of the chief official and his deputies. Both of these salary schemes have been upheld. Farnum v. Warner, 104 Cal. 679, 38 Pac. 421; Tulare Co. v. May, 118 Cal. 303, 50 Pac. 427. If this limitation were not imposed, and if the officers were allowed to appoint deputies at will, making their salaries a charge upon the treasury, the scheme itself would be in violation of the provisions of the constitution above quoted. Article 11, § 13. But it is precisely this which it is contended that the county clerk of the city and county of San Francisco can do,—that he may appoint at will such deputies and assistants as he deems necessary under the provisions of section 61 of the county government act; and these appointees in turn may compel payment of their salaries out of the county treasury. But this may not be done. The county clerk of the city and county of San Francisco, by the act of February 13, 1880 (St. 1880, p. 5), is given a fixed salary, and is allowed a fixed number of deputies and assistants, whose compensation is a charge upon the treasury. He has the power, under section 61 of the county government act, to appoint additional deputies and assistants if the needs of his office so require, but in the present condition of the law the compensation of these extra assistants and deputies must be paid for by himself. The judgment is therefore reversed, with directions to the trial court to overrule the auditor's demurrer.

We concur: BEATTY, C. J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; VAN DYKE, J.

I dissent: McFARLAND, J.

125 Cal. 174

ROCHE v. REDINGTON et al. (S. F. 1,056.)

(Supreme Court of California. June 21, 1899.)

NEGLIGENCE—IMPUTATION — INSTRUCTIONS—APPEAL — EXCESSIVE DAMAGES — CONFLICTING EVIDENCE—EARNINGS.

1. In an action for a personal injury caused by the collision of defendant's buggy with plaintiff, an instruction that even if it were proved that the ground was wet and slippery, and that, when defendant tried to turn out, the buggy slipped against plaintiff, yet this would not conclusively repel the presumption of negligence, is not erroneous.

2. In an action for personal injury, an instruction that if it was proved that the injury was immediately due to slippery ground, whereby defendant's buggy slipped against plaintiff despite his attempt to turn out, yet the imputation of negligence would not be conclusively repelled, does not contravene the statute forbidding a charge with respect to matters of fact.

3. Where the evidence is conflicting, and there is some evidence to support the verdict, it will not be disturbed on appeal.

4. A verdict for damages will not be set aside merely because it is excessive, but only where it appears to be the result of prejudice or passion.

5. Where plaintiff, who was employed as a street sweeper, had his leg broken by a collision with defendant's buggy, and a permanent shortening of the leg resulted, rendering him less able to earn a living, a verdict for $4,000 is not so large that it will be set aside.

6. Plaintiff in an action for personal injuries was asked if he had been able to earn any money since the accident. *Held* that, as it appeared from the testimony of plaintiff that the question referred to his injury, it was relevant and properly admitted.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action for personal injury by Thomas Roche against W. P. Redington and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Chickering, Thomas & Gregory and Van Ness & Redman, for appellants. Charles F. Hanlon, for respondent.

CHIPMAN, C. Action for personal injury. Trial by jury, and verdict for plaintiff, awarding him $4,000 damages. Defendants appeal from the judgment upon the verdict, and from the order denying motion for a new trial. On September 10, 1895, plaintiff was in the employ of the city and county of San Francisco as a street sweeper. An employé of defendants in the course of his employment was driving a business buggy or vehicle, drawn by one horse, along Kearny street, and, while so driving, the hub of one of the hind wheels of the vehicle struck plaintiff, breaking his thigh bone, and otherwise seriously injuring him. The evidence tends to show that the driver of the vehicle (one Goddard) was the solicitor of defendants, and was engaged in the discharge of his duties as such at the time of the accident; that plaintiff, about 10 o'clock a. m. of September 10th, was lawfully in the employ of the city, and was rightfully engaged in the discharge of his duties, and was standing near to, but just outside, the east rail of the west track on Kearny street, about 35 feet north of the north crossing of Jackson street, and was in the act of pushing the débris southwesterly from within the west track towards the west side of the street, with his back turned north, towards Pacific street. He was an old man, of 73 years, but in good general health, and vigorous and strong for one of his age, and able to do a good and satisfactory day's work as a street sweeper. Goddard took the west track on Kearny street with his wagon at Pacific street, and drove at a speed of about five or six miles an hour towards Jackson street, and where plaintiff was working. Plaintiff's feet were outside the track, but he was stooping over, and his head and body were over the track. At a distance of about 200 feet from plaintiff, Goddard noticed plaintiff, and he testified that he called out to plaintiff; but plaintiff testified that he heard no call and no noise, although his hearing was good, until the horse was beside him. He straightened up, and endeavored to protect himself with his broom, but the wagon struck him immediately, and so soon that it was not possible for him to get out of the way. Goddard did not slacken his pace as he approached plaintiff, until he got quite near to him, when, observing that plaintiff did not move, he pulled his horse to the right, out of the track, and the hind wheels of the buggy held the track and "slewed" forward, one of them striking plaintiff, causing the injury. There was evidence tending to show that it had rained that morning, and that the track was wet; but it was not raining at the time of the accident, and the evidence tended to show that it had not rained after 9 o'clock.

It is urged (1) that the evidence does not justify the verdict; (2) that the verdict (four thousand dollars) is grossly excessive; and (3) that the court erred in instructing the jury, and its rulings upon evidence.

1. The court instructed the jury as follows: "There has been considerable evidence in this case in respect to the weather at or prior to the time of the injury in question, relative to the track,—whether it was wet or not. In respect to that matter, I will instruct you that if you should find from the evidence that the driver of the defendant endeavored to avoid injuring the plaintiff, by turning out of the railroad, roadbed, or place whereon he was driving, *and that, in consequence of the wet rails or wet street, the wheels of the vehicle slipped, that such slipping would not conclusively repel any imputation of negligence.*" The words in italics present the part of the instruction claimed to be error. The court had just previously instructed the jury as to the definition of "negligence," and stated: "It [negligence] is always relative; that is to say, it depends entirely upon the nature of the situation and surroundings." And the court followed the instruction complained of by the statement: "If the condition of the street is such that a prudent driver would exercise more care in driving through a pub-

lic highway, lest he should injure another, then the party driving is required to exercise such care; and that is what I mean by saying that negligence is relative in its character, depending always upon the time, situation, and circumstances wherein the parties may be placed." In the instruction complained of, we think the court, in effect, instructed the jury that it cannot be said that the mere slipping of the wheels, if they find such slipping, as matter of law, would repel the imputation of negligence. It was only another way of saying that the circumstance, if found to exist, would not justify a conclusive presumption, or show conclusively that there was no negligence. Such an instruction was proper, and was not a violation of the constitutional prohibition to charge the jury with respect to matter of fact.

2. Upon some points the evidence was conflicting, but there was evidence tending to show that Goddard drove at considerable speed almost onto plaintiff before he pulled the horse out of the track, and that the injury was the result of want of ordinary care and prudence, if not of recklessness, on the part of the driver, and without the fault of plaintiff, who was oblivious of his danger. We think there was evidence sufficient to justify the verdict.

3. Defendant devotes much attention to the claim of excessive damages, and counsel on both sides have brought to our attention, with much industry, a large number of cases bearing upon this question. The injury to plaintiff was serious, and resulted in a permanent shortening of the broken leg, and in rendering plaintiff less able than formerly to do a day's work. He had not entirely recovered at the time of the trial, and was then suffering pain from the injury. The attending physician, Dr. Kenyon, testified: "My best impression is that it does not seem to me that this man will ever be able to do a fair day's work. * * * It is now a year and a quarter since his injury, and he is not in a condition to-day to do that kind of work" (referring to such work as street sweeping). The rule in this class of cases has been many times stated in this court, and it is that, while the verdict of the jury "is subject to review by the court, it will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, but only where it appears that the excess has been given under the influence of passion or prejudice." Lee v. Railroad Co., 101 Cal. 118, 35 Pac. 572. We cannot say that the verdict in this case was given under the influence of passion or prejudice.

4. The plaintiff was asked, and, over defendants' objection, was allowed to answer, the following question: "Have you earned any money since the accident, or been able to earn any money since?" It is urged that this was error, because plaintiff's inability to earn money might have had no connection with the accident. I think it appears from the evidence of the plaintiff, given before and after this question, that it had reference to his condition as the result of the accident. Discovering no reversible error, it is advised that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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125 Cal. 198

KNIGHT et al. v. WHITMORE. (L. A. 563.)

(Supreme Court of California. June 22, 1899.)

ATTORNEY AND CLIENT—ACTION FOR SERVICES—DEFENSES—PLEADING—EVIDENCE.

1. Where a written agreement, relied on as a defense, is not denied by affidavit, as provided by Code Civ. Proc. § 448, its genuineness and due execution are admitted for all purposes of the trial.

2. Defendant, in an action by attorneys to recover for services, relied on an agreement, executed by a member of the firm, undertaking in the firm name to perform the services without charge. Plaintiffs claimed that the firm was dissolved prior to the making of the agreement, and that such member was without authority to bind them; but they did not deny the execution of the agreement by affidavit, as provided by Code Civ. Proc. § 448. *Held* that, having admitted its execution, and the authority of such member to sign, by the failure to deny it, they could not avoid its effect by a dissolution of the firm.

3. Where the genuineness of a writing set out in the pleading is admitted, a formal offer in evidence of the original instrument is not necessary.

4. Where, in an action by attorneys to recover for services, defendant relies on an agreement, executed by a member of the firm, undertaking to perform the services without charge, a contention that defendant did not allege that the services performed were under the agreement is unavailable, where the matters alleged were equivalent to such an allegation, and evidence was introduced to that effect without objection.

Department 1. Appeal from superior court, Los Angeles county.

Action by R. H. Knight and another against Rosa L. Whitmore. From a judgment for defendant, plaintiffs appeal. Affirmed.

Knight & Harpham, for appellants. J. G. Rossiter and Ben Goodrich, for respondent.

GAROUTTE, J. Plaintiffs have brought this action to recover for legal services, and, judgment going against them, have appealed to this court.

They rely upon an alleged oral contract of hiring. As a defense the defendant set out an agreement in writing, which is in the following language: "Pasadena, Cal., April 8, 1895. In the Matter of the Estate of George S. Foster, Deceased. Agreement as to Compensation. We do hereby agree with Mrs. Rosa L. Whitmore, administratrix of said estate, that we will proceed immediately with the above estate in the superior court, and will push the same as fast as possible, and will pay all extra costs in said case occasioned by an error upon our part; and, when the case is entirely completed, and the property distributed, and she is properly discharged as such administratrix, she shall determine for herself what our compensation as attorneys shall be, and we will make no charge or demand against her or said estate for our services as attorneys. [Signed] Knight, Simpson & Harpham, by C. M. Simpson." The aforesaid agreement was not denied by affidavit, as provided in section 448 of the Code of Civil Procedure. Therefore its genuineness and due execution must be deemed admitted for all the purposes of the trial. Moore v. Copp, 119 Cal. 429, 51 Pac. 630.

Simpson was a member of the legal firm of Knight, Simpson & Harpham for a year immediately prior to April 1, 1895; but it is now claimed by plaintiffs that this firm was dissolved upon said April 1st, and that, therefore, Simpson had no authority to bind them by the contract he entered into in behalf of the firm with defendant. It seems to be somewhat strange that a member of the bar should enter into a contract purporting to bind a firm of which he had been a member, and which had been in existence at a very recent date, if the firm was not in existence at the time the contract was made. This fact alone might be deemed sufficient to create a conflict in the evidence upon the question as to whether or not the firm of Knight, Simpson & Harpham was dissolved in fact at the time this contract was entered into. But we need not rest alone upon this proposition. The contract upon its face shows that Knight, Simpson & Harpham agreed to perform the services specified without charge or demand against defendant or said estate. Plaintiffs admit the genuineness and due execution of this contract. Such admission carries with it the genuineness of the signatures and the fact of its execution, and also, necessarily, the further fact that Simpson had authority to sign the names of these plaintiffs to the document. It follows therefrom that this contract bound plaintiffs to do this work equally with Simpson, and they could not evade the force and effect of its provisions by a dissolution of the firm after that time. If such a firm was in existence, they were bound as a firm. If it was thereafter dissolved, they were bound individually. Even conceding that plaintiffs alone did all the work, it makes no difference. It would require very clear evidence to indicate that there was a second contract entered into by plaintiffs with defendant, under which they performed this labor, and that this written contract was displaced thereby. The jury declared to the contrary, and we are entirely satisfied with the view they took of the facts.

The trial court refused to give the jury the following instruction: "The jury are instructed that the only effect of the failure to deny under oath the contract of April 8, 1895, is to admit its due execution and genuineness; but this does not dispense with its introduction in evidence, and, as the defendant did not offer the contract in evidence, the jury are not to take the same into consideration in forming their verdict in this case." This instruction was properly refused. The writing having been set out in the pleading, and its genuineness and due execution having been admitted, a formal offer in evidence of the original document was not necessary. Rosenthal v. Bank, 110 Cal. 198, 42 Pac. 640; Brooks v. Johnson, 122 Cal. 570, 55 Pac. 423.

The point is made that there is no allegation in the affirmative defense alleging that the services performed by plaintiffs were performed under the said written contract. Even conceding such an allegation necessary, we deem the matters set out are fairly the equivalent of such an allegation, and evidence was introduced to that effect without objection.

There is no merit in the remaining questions raised by the appeal. For the foregoing reasons, the judgment and order are affirmed.

We concur: McFARLAND, J.; HARRISON, J.

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125 Cal. 201

WALLER v. WESTON. (S. F. 1,568.)

(Supreme Court of California. June 22, 1899.)

JUDGMENT—DEFAULT—JURISDICTION—COSTS—FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. Upon motion to set aside a default for want of service of summons upon the defendant, the relief should not be conditioned upon the payment of costs by defendants, as in cases where relief is sought from the party's own error or mischance, wherein Code Civ. Proc. § 473, provides relief may be granted upon "such terms as may be just."

2. An order upon a motion to set aside a default for want of jurisdiction should not be accompanied with findings of fact and conclusions of law, as Code Civ. Proc. §§ 632, 633, provide for such findings and conclusions only in cases where there is a trial of a question of fact by the court, followed by a judgment; and, under section 590, an issue of fact arises only upon allegations in a complaint being controverted by the answer, or upon new matters in an answer.

Department 2. Appeal from superior court, Contra Costa county.

Action by J. B. Waller, plaintiff, against F. F. Weston, defendant, for the foreclosure of a mortgage. A motion by defendant to set aside a default entered against him was overruled for the failure of defendant to pay costs, and he appeals. Reversed.

Fitzgerald & Abbott, for appellant. J. T. Pidwell and Black & Leaming, for respondent.

HENSHAW, J. F. F. Weston was defendant in an action to foreclose a mortgage. Summons was issued, and a return made by the sheriff showing personal service upon him. Upon his failure to answer, judgment was taken against him, and a decree of foreclosure entered. A sale was had, and a deficiency judgment docketed. The judgment was entered on the 16th day of October, 1897; and on the 15th day of February, 1898, Weston gave notice of his motion, supported by affidavits, to set aside the default and judgment and quash the service of summons, upon the ground that service of summons had never been made upon him, and that the court had never obtained jurisdiction over him. Upon the hearing it seems to have been satisfactorily established that the defendant had never been served in the action, but that the sheriff by mistake had served his brother in his stead. After hearing, the court made a conditional order vacating the judgment and quashing service of the summons, provided that defendant pay to plaintiff within 10 days the sum of $109. The defendant refused to comply with the terms of the order imposing costs as a condition to the vacation of the judgment. This provisional order vacating the judgment and quashing service of summons upon terms was made upon April 1, 1898. After Weston's refusal to comply with its conditions, the court, upon the 25th day of April, 1898, made and filed certain findings of fact, conclusions of law, and a so-called judgment, by which last order or so-called judgment, the minute order of April 1, 1898, and Weston's refusal to comply with its terms being recited, his motion was denied absolutely. Defendant moved to strike from the files the so-called findings of fact and conclusions of law, which motion was also denied. He then appealed from the minute order of April 1, 1898, vacating and setting aside the judgment, and quashing service of summons provisionally and upon terms; from the so-called judgment and order of April 25, 1898, finally and absolutely denying his motion; and from the minute order of April 25, 1898, denying his motion to strike out the findings of fact and conclusions of law.

Appellant's motion was made, not upon the ground that the judgment had been taken against him through mistake, surprise, or his excusable neglect, but solely upon the ground that he had not been served with process at all. In making its conditional order quashing service of summons, the court must have determined the fact to be in accordance with appellant's contention. Such being the case, appellant was not a suitor before the court, under section 473 of the Code of Civil Procedure, seeking relief from his own error or mischance, and becoming entitled to such relief only by compliance with such proper terms as the court might exact. He was not seeking to be permitted upon terms to come in and answer. He was before the court, insisting that it had never obtained jurisdiction over him, and that a judgment against him, void for want of jurisdiction, should be set aside. His case is like those considered in Norton v. Railroad Co., 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452, and Mott Iron Works v. West Coast Plumbing Supply Co., 113 Cal. 341, 45 Pac. 683. Knowledge—even actual knowledge of the suit against him—was not the equivalent of legal notice and process, and did not make it compulsory upon him to appear in the action, or warrant the court in entering judgment against him for his failure so to do. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. Under these circumstances, it was not within the power of the court to impose terms upon him as a condition to granting him an absolute right. For the right was absolute, if the application for relief was timely presented. The motion was made within six months after the entry of judgment, and this is sufficient. People v. Temple, 103 Cal. 447, 37 Pac. 414; People v. Dodge, 104 Cal. 487, 38 Pac. 203; Young v. Fink, 119 Cal. 107, 50 Pac. 1060. The foregoing renders unnecessary any especial consideration of the second order, wherein the rule was made absolute upon appellant's refusal to comply with the terms. As it was error for the court to impose terms, the later order must fall with that determination.

Upon the appeal from the court's refusal to strike out its findings of fact and conclusions of law, it may be said that the issues of fact upon which findings are permitted or required are those specified in section 590 of the Code of Civil Procedure. Sections 632 and 633 of the same Code provide that upon the trial of a question of fact by the court, and in giving its decision, the facts found and the conclusions of law must be separately stated, and judgment upon the decision must be entered accordingly. Notwithstanding the somewhat hasty declaration to be found in the very early case of Semple v. Burkey, 2 Cal. 321, it is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings, under section 590 of the Code of Civil Procedure, where the decision of the court following the findings is a judgment. Findings of fact and conclusions of law, therefore, had no proper place in this proceeding. The orders appealed from are reversed.

We concur: McFARLAND, J.; TEMPLE, J.

(125 Cal. 51)

WHEELER v. KARNES et al. (S. F. 975.)[1]

(Supreme Court of California. June 13, 1899.)

APPEAL—REVIEW—BILL OF EXCEPTIONS—RECORD—MOTION FOR NEW TRIAL—DELAY AFTER NOTICE.

Where there is nothing in the bill of exceptions or the record on an appeal from the judgment and an order denying a motion for a new trial, made on a statement of the case, to account for or excuse delay to move for the new trial within 10 days after service of the notice, as required by Code Civ. Proc. § 659, unless further time is allowed, the statement will not be examined, and the judgment and order will be affirmed.

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[1] Rehearing denied July 11, 1899.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by C. C. Wheeler against Mary Ellen Karnes and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

W. P. Thompson and G. G. Goucher, for appellants. Horace Hawes and H. H. Welsh, for respondent.

COOPER, C. Action to recover judgment on a promissory note and for the foreclosure of a mortgage given to secure the same. Findings were filed, and judgment ordered for plaintiff. The judgment was entered November 19, 1896. Defendants made a motion for a new trial, which motion was denied, and this appeal is from the judgment and order. There is no attack made by defendants upon the judgment, and no claim made that the judgment is not the legal conclusion from the facts found. It is sought to review an order denying a motion for nonsuit, certain findings as not being supported by the evidence, and certain alleged errors of law occurring at the trial, on appeal from the order denying a motion for a new trial. These alleged errors can only be reviewed upon a properly authenticated statement or bill of exceptions. The motion was made upon a statement of the case settled by the judge of the court below. We are met at the threshold with the objection that the statement cannot now be considered on this appeal, for the reason that it was not served upon plaintiff's counsel within the time prescribed by statute, and we think the objection will have to be sustained. The notice of intention to move for a new trial was served and filed November 28, 1896. The statute says (Code Civ. Proc. § 659): "If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending or the judge thereof may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party." The proposed statement was served January 6, 1897. It does not appear that the time for the service of the statement had been extended either by stipulation or order of the court, nor that any amendments were proposed by plaintiff to said proposed statement. On the 18th day of March, 1897, the statement was settled, the plaintiff objecting to the settlement of the same on the ground that it was not proposed or presented to plaintiff within the time allowed by law. The learned judge of the court below thought that he did not have the power or authority to sustain the objection, and settled the statement subject to the objection, so that this court might pass upon the validity of the objection. Plaintiff saved an exception to the action of the court in settling the statement, and it was accordingly settled subject to said exception. The same objection to the statement was made upon the hearing of the motion for a new trial, and the same ruling, and plaintiff excepted. In Higgins v. Mahoney, 50 Cal. 445, the bill of exceptions was presented after the time had expired, and respondent objected to its settlement on the ground that it was presented too late. The judge of the court below settled the bill, but incorporated the objection and exception in the statement. This court held that it had no power to consider the bill of exceptions, and in the opinion said: "The right of the appellant to present a bill of exceptions, after the entry of judgment, is limited in point of time to the period of 30 days. After the expiration of that period, unless further time had been in the meantime obtained, the right to present the bill of exceptions is taken away. If, therefore, the respondents, objecting to the settlement of the bill of exceptions, rely upon the lapse of the period limited by the statute, it becomes the duty of the appellant, in answer to the objection, to incorporate into the bill the matter, if any, going to excuse his apparent delay; otherwise, the exceptions, though settled, cannot be considered here." In this case, the objection being made, and there being nothing in the bill or record accounting for or excusing the delay, we must follow the rule laid down in Higgins v. Mahoney. The rule has been adopted and applied in the following cases: Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780; Bunnell v. Stockton, 83 Cal. 319, 23 Pac. 301; Connor v. Road Co., 101 Cal. 429, 35 Pac. 990; Tregambo v. Mining Co., 57 Cal. 503; Henry v. Merguire, 106 Cal. 144, 39 Pac. 599. As we cannot examine the statement, it is presumed that the findings are supported by the evidence, and that the rulings on the trial were correct. We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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125 Cal. 227

MONTGOMERY et al. v. RAUER. (S. F. 1,197.)

(Supreme Court of California. June 24, 1899.)

TRUSTS—GUARDIAN AND WARD—RELEASE BY GUARDIAN—PLEADING.

1. Where one has received from a guardian money belonging to the ward, knowing whose money he was receiving, he cannot justify his retention of the money upon the ground that he has applied it to a personal debt due to him from the guardian.

2. Under Civ. Code, § 2219, which provides that any person who assumes a relation of personal confidence with another becomes a trustee for all persons over whose affairs, by that confidence, he has obtained control, one who receives money belonging to a ward from the guardian, with whom he stands in relation of personal confidence, is a trustee for the ward, and consequently cannot apply the trust money to a personal debt owing to him by the guardian.

3. In an action to recover money intrusted by plaintiff's guardian to defendant, the defendant denied that any money remained due to the ward, and, in support of it, relied upon a release executed by the guardian covering all claims against the defendant. *Held*, that the ward was entitled to prove that his interests had not been protected in the transaction, and that the release was a fraud upon his rights, notwithstanding the fact that no issue was made upon the validity of the release.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Queen Montgomery and others against J. J. Rauer. There was judgment for plaintiffs, and defendant appeals. Affirmed.

G. H. Perry and Fisher Ames, for appellant. M. Rosenthal, for respondents.

HENSHAW, J. Plaintiffs, who are minors, sued defendant by an action in form for moneys had and received. Defendant answered, alleging that "the above-named minors have received all of the moneys deposited by their said guardian, Agnes S. Montgomery, with this defendant." He followed this averment by a denial that the sum of $4,000 demanded in the complaint, or any other sum of money, was due, owing, and unpaid from him to the plaintiffs. The action was tried before a jury, which returned a verdict against him in the sum of $1,500. From the judgment and from the order denying him a new trial he appeals.

The following are the salient facts: Mrs. Montgomery was a widow and the mother of the plaintiffs. Defendant, Rauer, possessed her confidence, and managed many of her business and legal affairs. She was guardian of the estates of her children. She put into Rauer's hands $2,000 of her own money, and $5,000 of the money of the children. Rauer received these funds with full knowledge of their origin, character, and ownership. He knew that the $5,000 were the trust funds of the minors, and so received same. Other moneys of Mrs. Montgomery passed into his hands. Over these there is a conflict in the evidence; over the others, none. Defendant contends that he paid back to Mrs. Montgomery more money than he received; also that, in adjusting the accounts and finding the balance, allowance of many sums which should have been credited him was improperly withheld, on the ground that they could not be charged against the minors' moneys. He insists that he was justified in offsetting against all the moneys which he had received from Mrs. Montgomery all the payments which he had made to her, and all items chargeable against her, and that he was not accountable to the minors for their separate funds as such. But Rauer received the children's moneys from their guardian, knowing its character. Knowing them to be trust funds, and having received them as such, he could not charge them with the individual debts of the guardian. Wallace v. Brown, 41 Ind. 436; Baughn v. Shackleford, 48 Miss. 255; Austin v. Wilson's Ex'rs, 21 Ind. 252. Yet this in many instances is precisely what he attempted to do. Moreover, there being evidence to establish the fact that a voluntary relation of personal confidence and trust existed between Mrs. Montgomery and Rauer, Rauer became a trustee for the minors, under section 2219 of the Civil Code, which declares that "every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquired information which was given to such person in the like confidence, or over whose affairs by such confidence he obtained any control." Therefore, if Mrs. Montgomery personally became indebted to him, it was not permissible to charge such debts against the minors' funds. If he repaid the minors' money or any part of it to the guardian, he is of course not concerned with the future disposition which she might make of it, nor is he accountable therefor, but he cannot set off against these trust moneys Mrs. Montgomery's individual liability to himself. The court upon this matter correctly instructed the jury. But whether the amount due be estimated upon this basis, or whether it be computed by subtracting from all the moneys in Rauer's hands all payments made by him to Mrs. Montgomery, and all items chargeable against her individually, in either case the evidence supports the verdict.

But for a further defense appellant relies upon two written instruments signed by Mrs. Montgomery before the commencement of this action. One is in form a receipt for the repayment of the sum of $5,000, and is signed by Mrs. Montgomery as guardian of the minors. The other is a longer document, and recites that whereas, Mrs. Montgomery individually, and as guardian of her children, and J. J. Rauer, have settled all of their accounts, "upon which settlement it is mutually agreed and understood that the sum of one hundred dollars is at this present date due and owing from said J. J. Rauer to said Agnes S. Montgomery in her capacity as above stated": Therefore, in consideration of the receipt of the sum of $100, Agnes Montgomery releases and discharges Rauer from all claims, demands, and charges, from the beginning of the world until the present date. It is contended by appellant that this release is absolutely binding upon the parties, except it be avoided upon some ground of equitable cognizance; that this action is not an action to annul the instrument upon the ground of fraud or mistake; and that, therefore, the judgment is erroneous. But it is to be noted that the defense does not set up an accord and satisfaction, nor tender an issue upon the release in any way. It rests simply upon a denial that any sum is due from the defendants to the plaintiffs, coupled with an averment that all of the minors' moneys which had come into defendant's hands had been repaid by him. This is an action by the minors to recover their money. Mrs. Montgomery's individual demands against Rauer are in no wise involved. If Rauer relied upon the release as an estoppel, he should have pleaded it; but in such a case as this it is only when the settlement has been fair and free from fraud and mistake, and one by which the rights of the minors have been fully protected, that it can operate to bind them. Mrs. Montgomery admitted that she signed these documents, but contended, and supported her contention by evidence, that her signatures were procured through mistake, misrepresentation, and fraud. This was accompanied by evidence to the satisfaction of the jury that the settlement was not fair, because, as they found, there was $1,500 of the minors' money still in Rauer's possession. It was therefore permissible for the minors to go behind this settlement, and show the facts. So showing, they have their election to pursue either the guardian, his sureties, or the person with whom the settlement was made. This is their right, independent of any statute requiring a guardian to obtain the consent of the court to such a settlement. Hayes v. Insurance Co., 125 Ill. 626, 18 N. E. 322; Culp v. Lee, 109 N. C. 675, 14 S. E. 74; Hagy v. Avery, 69 Iowa, 434, 29 N. W. 409; Lundy v. Thomas, 26 Ga. 537. And it matters not whether the burden of proof to impeach the settlement is upon the ward, as seems to have been held in Torry v. Black, 58 N. Y. 185, or whether the duty of showing its fairness is upon the debtor, as laid down in Hagy v. Avery, 69 Iowa, 434, 29 N. W. 409; for in this case the wards took upon themselves that burden, and successfully carried it. Nor may the further objection of appellant be sustained that the plaintiffs, not having pleaded an avoidance of the release, should not have been permitted to prove it. They were not compelled to anticipate defenses. If the release and discharge had been set out in bar of the action, still, under our system of pleading, which permits no replication, the defense of fraud would have been open to the plaintiffs without special averment. Equally is it open to them to rebut the effect of the release by the same evidence when, though not pleaded by defendant, it is offered and admitted in evidence. The case was tried upon the principles announced, and we perceive no just ground for criticism of the court's instructions. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

RIEGO v. FOSTER et al. (S. F. 1,418.)

(Supreme Court of California. June 21, 1899.)

INSOLVENCY—AUTHORITY OF ASSIGNEE TO SUE—JUDGMENT—COLLATERAL ATTACK—ORDER STRIKING OUT PLEADING—FRAUD.

1. Under Insolvent Act, § 22, making a certified copy of the assignment conclusive as to the assignee's authority to sue or defend, his authority cannot be impeached by proof that the signers of the insolvency petition were not actually creditors of the insolvent in the amount required by the statute.

2. Aside from the statute, the judgment of an insolvency court, regular on its face, cannot be thus collaterally attacked.

3. A motion to strike out parts of answer specifically quoted the parts of the pleading attacking the validity of insolvency proceedings sought to be struck out, and the order was that the motion "be, and the same is hereby, granted as to all those portions of the answer which attack the validity of the insolvency proceedings referred to therein." *Held* that, though it would have been better if the order had quoted in full the parts ordered stricken out, or referred to them by line and page, still it clearly indicated what was meant, and, in the absence of proof of prejudice, it would be presumed harmless.

4. A finding that transferees knew that a transfer was being made with intent to prefer creditors, and to prevent the property from coming to the assignee in insolvency, is not inconsistent with a finding that they were free from actual fraud, and believed their conduct lawful; actual fraud not being essential to avoid a transfer in violation of the insolvency act.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Raymond Riego, assignee of Briare & Kenny, against Samuel Foster and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Edwin L. Forster and A. J. Bruner, for appellants. Barrett & O'Gara, for respondent.

McFARLAND, J. The plaintiff, as assignee in involuntary insolvency of Briare & Kenny, insolvent debtors, brought this action to recover the value of certain property alleged to have been assigned by said insolvents to the defendants within one month prior to the filing of the petition in insolvency, and in violation of section 59 of the insolvent act of 1895. Judgment went for plaintiff, and defendants appeal from the judgment. The points made for reversal arise upon the pleadings and findings, and a short bill of exceptions showing a certain ruling of the court striking out part of the answer. No other ruling of the court not shown by the judgment roll is before us, nor is any evidence brought up.

The petition of creditors to have the persons named declared insolvent, the decree adjudging them insolvent, and all the proceedings in insolvency down to and including the assignment by the clerk to the respondent, were regular on their face. But the appellants, in their answer in this present case, set up as a defense, among other things, that the signers of the petition were not actually creditors of the insolvents in the amount required by the act, and that, therefore, the proceedings were void, and conferred no authority on respondent to maintain this action. On motion of respondent the court struck out that part of the answer, and the principal contention of appellants is that this ruling was erroneous. This contention, however, cannot be maintained. Section 22 of the insolvent act expressly provides that "in suits prosecuted or defended by the assignee a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue or defend." See Fitzgerald v. Neustadt, 91 Cal. 603, 27 Pac. 936; Luhrs v. Kelly, 67 Cal. 289, 7 Pac. 696. Moreover, on principle, and under the general authorities, the judgment of an insolvent court, regular on its face, like other judgments, cannot be thus collaterally attacked. In Notes of Decisions (Bump, Bankr. [9th Ed.] p. 545) many authorities are cited to the principle there stated, as follows: "Neither the validity of the adjudication of bankruptcy, nor the existence, sufficiency, or validity of the debt of the petitioning creditor, can be collaterally drawn in question. In all suits brought by an assignee, the assignment is conclusive evidence of his right to sue." In Michaels v. Post, 21 Wall. 398, the United States supreme court states the principle (we quote from the syllabus) as follows: "If on a petition and other proceedings regular in form a decree in bankruptcy is made in such a case, and an assignee in bankruptcy is appointed in a way regular on its face, the decree of bankruptcy, though it be a decree pro confesso, cannot, in a suit by the assignee to recover from a preferred creditor the property transferred, be attacked on the ground that the party petitioning had released his debt, was no creditor, that his petition was accordingly fraudulent, and that the decree based on it was void."

We see nothing in the point that the order of the court below striking out part of the answer was too indefinite. The motion to strike out specifically mentioned and quoted all the parts of the answer which respondent sought to have stricken out, and the order of the court was that the motion "be, and the same is hereby, granted as to all those portions of the answer which attack the validity of the insolvency proceedings referred to therein; otherwise, the motion is denied." It would have been better, perhaps, if the court had, in its order, quoted in full the parts intended to be stricken out, or had referred to them by line and page; but it clearly indicated what was meant, and we do not see how appellants could have been deceived or prejudiced by the form of the order, and, in the absence of any showing to the contrary, we will presume, in favor of the judgment, that appellants were not so deceived or prejudiced.

The contention of appellants that the judgment ought to be reversed because the seventh and the eighth findings are contradictory cannot be maintained. By the eighth finding the court found that the assignment and transfer were not made in the usual and ordinary course of business, and that at the time of the assignment defendants knew and believed, and had reasonable cause to know and believe, that the firm was insolvent, and that the transfer was being made with intent to prefer certain creditors represented by appellants, and with a view to prevent the property from coming to the assignee in insolvency, and to delay the operations and evade the provisions of the insolvent act, etc.; and appellants contend that this finding is inconsistent with the latter part of finding 7, that "defendants were free from actual fraud, and believed their conduct to be lawful." "Actual fraud" was not an element in the case, and "if the provisions of the insolvent act are violated, the transfer is void, and this is true regardless of any question of honesty and fairness, good faith, or actual fraud." Matthews v. Chaboya, 111 Cal. 440, 44 Pac. 169. The finding of specific facts in finding No. 8 is not weakened by the finding in No. 7 touching the appellants' notion or belief as to the law. Moreover, the averments in the complaint of the facts found in finding No. 8 are not denied by the answer. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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125 Cal. 183

LILIENTHAL et al. v. BALLOU et al. (L. A. 413.)

(Supreme Court of California. June 21, 1899.)

PLEDGES—POSSESSION—VALIDITY.

A transfer of personal property to trustees, as security for a debt, under an agreement that said trustees are to conduct the business of the grantors, through one of the latter as their agent, for six months, when, if found unprofitable, they are to sell the goods, and providing that, when certain creditors shall have received 50 per cent. of their claims, and all costs and expenses, then the trust shall be terminated, and the assets remaining shall be transferred to the said grantors, is a pledge; and, if actual possession is not taken by the trustees, as required by Civ. Code, §§ 2986, 2988, it is invalid, as against a subsequent attachment of the property by a creditor of the pledgor.

McFarland, J., dissenting.

In bank. Reversed.

For opinion in department, see 55 Pac. 251.

TEMPLE, J. This is an action for the recovery of personal property, brought against the sheriff, Ballou, and Orman, an attaching creditor. Defendants appeal from the judgment, and from an order refusing a new trial. The property was levied upon under a writ of attachment against Phillips Bros. & Co. On and prior to September 8, 1896, Phillips Bros. & Co. were engaged in merchandising at Arroyo Grande, in San Luis Obispo county. At that time their property was attached by various creditors, and remained under attachment until October 23, 1896, when it was released, in pursuance of an agreement made with all the creditors of the firm except Orman, and transferred to plaintiffs in trust for such creditors. The terms are expressed in the agreement. On the 1st day of December, 1896, Orman commenced suit to recover a debt due him from the firm, and the goods were levied upon, and the defense in this case consists of a justification under that writ. The question is whether plaintiffs, under their transfer, can hold against Orman, who was a creditor of the firm before the goods were transferred, and also prior to the attachments of the creditors for whom plaintiffs held as trustees.

Phillips Bros. & Co. is a partnership, composed of Adolph Phillips and L. A. Phillips. Adolph Phillips had always been the managing partner, L. A. Phillips residing in San Francisco. The agreement was signed by Phillips Bros. & Co., and by 61 of their creditors, and, among other things, provided, in effect: (1) That the parties appoint plaintiffs trustees, "to receive, manage, operate, use, and dispose of all the aforesaid property of the aforesaid parties of the first part, upon the terms and conditions hereinafter mentioned. (2) Parties of the first part will, within 30 days, convey to trustees all of their property, except that which is exempt. (3) The trustees shall receive, manage, operate, use, and conduct the merchandise business of said parties of the first part at Arroyo Grande, Cal., and all assets of property connected therewith, as to them (the said trustees) shall seem meet and proper," with requisite authority, including power to replenish stock for cash from the receipts from the said business. (4) To collect debts due the firm and compromise claims. (5) To conduct the business for 6 months, and, if then found unprofitable, may terminate the trust, and sell the goods at public or private sale. (6) All "recoveries" to be distributed through the board of trade to the undersigned creditors. (7) During all the time they conduct the business, Adolph Phillips, one of the partners, "shall be employed by said trustees, and shall give his exclusive time and services to said business, under the supervision of said trustees, and shall receive as remuneration and compensation for his services the sum of $125 per month." (8) Whenever the creditors receive 50 per cent. of their claims, and all costs, expenses, etc., "then this trust shall be terminated, and all the aforesaid assets, property, and effects, or the replenishments, remaining in the hands of the said parties of the second part, shall be transferred and surrendered unto the said parties of the first part or their nominees." There were further enumerated conditions, which I do not deem important here. Transfers were made in pursuance of the agreement, and the goods were at once released from attachment, and the store was opened by Adolph Phillips, with the same employés which he had previously had, except the bookkeeper. The store buildings were marked very conspicuously with the signs of Phillips Bros. & Co., which were permitted to remain, but a new sign, much less conspicuous than the others, was put up containing the names of the trustees, and, under the names, the words, "Trustees, Successors to Phillips Bros. & Company." The firm advertised quite extensively. After the transfer, as before, the business was advertised as that of Phillips Bros. & Co., without mention of any change. Money received was deposited in the county bank in the name of the trustees, and the old billheads and receipts were used; the names of the trustees being added by the use of a rubber stamp.

It is evident, from the language of the agreement, that the transfer to the trustees, who were simply the agents of the first attaching creditors, was for security only. It was not a sale, or an absolute transfer of title, even if its validity be conceded. In no event was the property to become the property of the trustees, and they were never to have any rights with reference to it, except to have it sold, and the proceeds applied to the payment of their debts, which still were to continue to exist as debts until they were paid, or all the property had been sold, and the proceeds applied in payment of the debts and costs. Phillips Bros. & Co. still remained the owners of the property, subject to the rights of the trustees to hold it as security, and still had a leviable interest in it, and the only question was how the levy should be made. It was not a chattel mortgage under the statute, and, therefore, the statutory provisions in regard to levies upon personal property mortgaged do not apply. If it was a valid pledge, or chattel mortgage dependent on possession, the goods could not be seized, but garnishment was the proper mode. If it was not a valid pledge, it was properly attached, and the justification was fully made out. A pledge is a deposit of personal property as security (section 2986, Civ. Code), and is dependent on possession, and is not valid until the property is delivered to the pledgee (section 2988, Id.). The delivery must be as complete as is required in case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open. George v. Pierce (Cal.) 55 Pac. 775. In the agreement it was stipulated that the business should be managed by Adolph Phillips under the supervision of the trustees, but the trustees not only did not take personal possession, but they could not take such possession until after the expiration of six months; for they were bound to carry on business for that length of time, and also bound to employ Phillips as manager, and, in fact, the business did go on, as though nothing had happened, under the management of Adolph Phillips, who had always been sole manager for the firm. That this is not a sufficient change of possession is evident. No other authority is required, except the case of George v. Pierce, above cited. If, in case of a sale, there need not be an immediate delivery, when the property is not in the possession of the vendor, that will not help plaintiffs here, for this was not a sale. If the debtors were not then in control of the property, they were in no condition to make a pledge, and, in any event, it would have no validity until possession was given, and that possession must not be constructive. A change of possession is not effected merely by having the former owner manage the property as the servant, agent, or clerk of the pledgee; and this is especially so where there is so little outward sign of a change of ownership. Public policy requires a real and substantial compliance with the statute, and a failure should not be condoned for the hardships of a particular case. The judgment and order are reversed, and a new trial ordered.

We concur: BEATTY, C. J.; HENSHAW, J.; HARRISON, J.; GAROUTTE, J.; VAN DYKE, J.

McFARLAND, J. I dissent, and adhere to the views expressed when the case was decided in department, which need not be here restated. 55 Pac. 251. The point upon which the majority decision seems to rest—that the transfer from Phillips Bros. & Co. to the plaintiffs was not an absolute sale, but was in the nature of a pledge—was not raised at the trial, and has no place in the transcript. The appellants defended under section 3440 of the Civil Code, upon the theory that Phillips Bros. & Co. were in possession at the time of the transfer to the respondents, and that, therefore, if there was not an immediate delivery, followed by an actual and continued change of possession, the attempted transfer was void, and the court so instructed the jury; but there was no question raised, so far as I can discover, about the character of the transfer touching the nature of the title or right which passed by it. It appeared that Phillips Bros. & Co. made an absolute deed of the real estate to the respondents, and gave an absolute bill of sale of the personal property, and there was no question as to the transfer being a mere pledge. Moreover, section 3440 refers to "every transfer," without reference to the kind of title or right which passes by the transfer, and declares it void for want of change of possession only where the party making the transfer is in possession. In the case at bar the jury must have found, under the instructions of the court, that Phillips Bros. & Co. were not in possession at the time of the transfer; and therefore section 3440 does not apply. George v. Pierce (Cal.) 55 Pac. 775, in my opinion, has no applicability to the case at bar. It was merely held in that case that there could not be a valid pledge of property without surrendering possession.

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125 Cal. 204

PORTER v. ELIZALDE. (S. F. 894.)

(Supreme Court of California. June 23, 1899.)

ATTORNEY'S AUTHORITY TO EMPLOY COUNSEL—EVIDENCE—RATIFICATION.

1. An attorney at law has no general authority, by virtue of his retainer, to employ counsel or assistants, at the expense of his client, without previous authority, or assent on the part of the client.

2. The authority of an attorney to employ counsel cannot be established by his own declarations, in the face of evidence that he had no authority.

3. Where an attorney has agreed with his client to pay all the expenses of the litigation, and the client gives him no authority to employ other counsel, the knowledge of the client that he has engaged another attorney to assist him, consulting with such attorney and accepting the benefit of his services, without objection, will not render the client liable for his fees.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Elizalde against one Porter. From an order denying defendant's motion for a new trial, he appealed. Reversed.

E. P. Cole and Graves & Graves, for appellant. S. M. Van Wyck, for respondent.

HARRISON, J. The plaintiff recovered judgment against the defendant upon an action assigned to him by Mr. James L. Crittenden, for services rendered as counsel upon the trial of a contest of the will of her husband. A motion for a new trial was made upon the ground that the finding by the court of an employment by her of Mr. Crittenden was not sustained by the evidence. The motion was denied, and the defendant has appealed.

The defendant had filed a contest against the probate of her husband's will in the county of Santa Barbara, and for that purpose had employed as her attorneys Messrs. Graves & Graves and Mr. John J. Boyce, upon an agreement with them that they would advance and pay all the costs and expenses to be incurred in the contest, and that, if successful, she would transfer and convey to them one-half of the property she might recover thereby. Some months after this contest had been filed, Mr. Ernest Graves employed Mr. Crittenden to assist him at the trial of the contest; and, in pursuance of the employment, Mr. Crittenden attended at the trial, and acted as leading counsel therein. The trial lasted about two weeks, and resulted in a verdict in favor of the contestant. Mr. Crittenden had no interview with the defendant until he went to Santa Barbara, a day or two before the trial began, nor did the defendant know until that time that he was to have anything to do with the case. He was then introduced to her by Mr. Graves as the gentleman who was coming there to assist in the trial. After his arrival at Santa Barbara, he discussed the case with her, the evidence that could be given, and who were her witnesses, and from that time on through the trial had frequent interviews with her concerning the testimony and witnesses, and also with the witnesses in the case,—usually in company with Mr. Graves or Mr. Boyce, or both. Mr. Crittenden never had any conversation with her about the terms of his employment, except that he told her at the time of his introduction to her that he was employed to try the case. Nor did he at any time say anything to her, or she to him, on the subject of his compensation, or by whom he was to be paid. Neither did he at any time say anything to her about paying him for his services, until the day the present action was commenced,—about two years after the trial of the contest,—when he sent her a telegram requesting payment, to which she replied by directing him to see Mr. Graves about it. When Mr. Crittenden was employed, he was informed by Mr. Graves that his fee in the matter was contingent upon success; and, although no definite amount was agreed on as his compensation, a sum was named which was satisfactory to both. He was also informed that Mr. Graves was to pay all the expenses of the litigation, and Mr. Graves did in fact pay Mr. Crittenden's expenses at Santa Barbara during the trial of the contest. Nothing was said by Mr. Graves as to who was to pay Mr. Crittenden, but on one occasion, after the trial, he requested payment from Mr. Graves. It is not claimed that there was any direct employment of Mr. Crittenden by the defendant, and he testified that it was his understanding that his employment was by Mr. Graves, as her agent. There was no evidence that Mr. Graves was ever authorized by her to employ him, and the defendant testified that she never employed him as her attorney, or authorized any one to employ him on her behalf, and Mr. Graves testified that he had no authority from the defendant to employ Mr. Crittenden, but that he employed him upon his own account, and that the understanding between them was that he would pay him when the estate was distributed and he received his contingent fee. Upon this evidence the court was not justified in finding that the services of Mr. Crittenden were rendered to the defendant at her special instance and request, or that he was employed by her as counsel upon the trial of the contest. An attorney at law has no general authority, by virtue of his retainer, to employ counsel or assistants at the expense of his client, without previous authority or assent on the part of the client. Paddock v. Colby, 18 Vt. 485; Young v. Crawford, 23 Mo. App. 432; Voorhies v. Harrison, 22 La. Ann. 85; Mechem, Ag. § 813; Weeks, Attys. at Law, § 246. The statement of Mr. Crittenden that it was his understanding that Graves represented the defendant is insufficient to render the defendant liable. The authority of an agent cannot be established by his own declarations, in the face of evidence that he had no authority.

The respondent contends, however, that the appellant is liable for the value of the services rendered by reason of having accepted them, without objection; that as she was present at the trial, and made no objection to having Mr. Crittenden act in her behalf therein, she is under an implied obligation to pay their value. It is undoubtedly, in general, the rule that when one knows that another is rendering him services, and tacitly assents thereto, if nothing more appears the law will imply a provision on his part to pay for such services. The rule is not uniform or absolute, however, but will be recognized or refused according to the circumstances of the particular case in which it is invoked. See Moulin v. Columbet, 22 Cal. 508. And when it appears that the services were rendered under an express employment by an agent, or by a third person who assumed to act in the interest of the one in whose behalf they were rendered, the authority of that person, and the terms of the employment, become important factors in determining the liability or the right of recovery. The mere silence of the party will not be held to constitute such assent or acquiescence in the acts of the agent as to amount to a ratification or adoption of these acts, without also considering the circumstances under which the silence existed. Especially in a case like the present, where there was no authority in the defendant's attorney to engage counsel at her expense, and where he had agreed with her to pay all the expenses of the litigation, will the law refuse to imply from her mere silence a promise to pay for the services rendered under such employment. In Price v. Hay, 132 Ill. 543, 24 N. E. 620, it was held that the acquiescence of a client in the appearance of an attorney and performance of services by him in the case is not legitimate evidence from which a jury may infer an implied contract between them to pay for such services, where the client has previously employed other counsel therefor at a fixed fee. Similar rulings have been made in Holmes v. Board, 81 Mo. 137; Young v. Crawford, 23 Mo. App. 432; Bank v. Benton, 2 Metc. (Ky.) 240; Evans v. Mohr, 153 Ill. 561, 39 N. E. 1083; Ennis v. Hultz, 46 Iowa, 76.

The respondent has cited certain cases in support of his contention, but in each of the cases where this question was presented for decision there was some controlling circumstance upon which the court relied to determine the liability of the client. In Briggs v. Town of Georgia, 10 Vt. 68, the attorney who had the management of the suit was the agent of the town, as well as its attorney at law; and in Paddock v. Colby, supra, this fact was alluded to by the court as distinguishing the case from the general rule that an attorney cannot employ counsel at the expense of his client, without his consent. In King v. Pope, 28 Ala. 602, the attorney had informed the client of the employment of counsel, and he not only expressed no dissent, but afterwards conferred with him about the case at the trial. In Jackson v. Clopton, 66 Ala. 29, the liability of the client was placed upon his "recognition of the relationship during the progress of the trial." In Hogate v. Edwards, 65 Ind. 373, the liability of the client was maintained upon the ground that his conduct at the trial amounted to a ratification of the employment by his attorney. In none of these cases had the attorney made an agreement with the client to pay all the expenses of the litigation. In Ennis v. Hultz, 46 Iowa, 76, where there was an agreement between the client and his attorney for a contingent fee, the court said, "The plaintiff in the case at bar cannot be allowed to say that the defendants looked on and saw him do work for them, and therefore impliedly agreed to pay him, because the plaintiff had an express contract with Dixon," and distinguishes the case from McCrary v. Ruddick, 33 Iowa, 521, cited by the respondent herein, in that in the earlier case McCrary was employed by one of the co-defendants in the action, and the facts were such that he had the right to assume that he was employed by all of the defendants.

It was testified herein that, in his argument to the jury, Mr. Crittenden stated that the contestant, the defendant herein, would pay all the attorney's fees in the case; that she was present at the time, and neither then nor at any subsequent time repudiated or disputed this statement; and this fact is relied upon by the respondent as a reason for holding her liable herein. It is only upon the ground of an estoppel that she can be held liable by reason of not having disputed this statement, and it is manifest that there are here no elements of an estoppel. It was not a case where she was under any obligation to deny the statement, nor was the statement made with any view to obtain an assent or dissent from her, upon which Mr. Crittenden was to determine his course of action. Moreover, the place and conditions under which the statement was made were not such as to permit her to express any dissent. See Wilkins v. Stidger, 22 Cal. 231. The judgment and order denying a new trial are reversed.

We concur: VAN DYKE, J.; HENSHAW, J.

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125 Cal. 210

DAVIS v. POST, Auditor. (Sac. 516.)

(Supreme Court of California. June 23, 1899.)

COUNTIES—SUPERVISORS—ROAD COMMISSIONERS—COMPENSATION—VALIDITY OF STATUTE.

1. Pol. Code, § 2641, as amended in 1893, provides for the payment of all road commissioners at 20 cents a mile. Act 1893 fixes the salaries of supervisors, and allows them an additional amount as ex officio commissioners in some counties, but is silent as to other counties, and provides that the salaries provided for in the act are in full for all services as officers or ex officio officers. *Held*, that under the act of 1893 the intention was not to pay extra salaries as road commissioners to the supervisors in those counties in which they were not provided for, and, the act being subsequent in point of time to section 2641, prevailed over it.

2. County Government Act 1893, § 195, is not unconstitutional.

Department 1. Appeal from superior court, Stanislaus county.

Action by Alfred Davis against C. A. Post, auditor, etc. There was a judgment for defendant, and plaintiff appeals. Affirmed.

P. J. Hazen, for appellant. L. W. Fulkerth, for respondent.

GAROUTTE, J. The opinion of the trial court in this case is clear, concise, and conclusive upon all the questions involved in this appeal, save a single one, and that question is now raised for the first time. That opinion is as follows: "This is an application for a writ of mandate to compel the defendant, the county auditor, to draw his warrant in favor of the plaintiff for the sum of thirty-four dollars and twenty cents, claimed by plaintiff to be due him for mileage as road commissioner for the month of April, 1897. On the argument the contention of the plaintiff was that he was entitled to receive for his services as road commissioner twenty cents a mile, not exceeding in any year three hundred dollars, as provided by section 2641 of the Political Code, as amended in 1893; while defendant claimed that plaintiff is entitled to receive only his actual expenses while supervising the roads of his district, not exceeding ten dollars in any one month, as provided by subdivision 15 of section 191 of the county government law of 1897. The county government law of 1897, being the latest enactment on the subject, must control, if it be a valid law. But plaintiff contends that section 191 was never passed by the two houses of the legislature; that the court can examine the journals of the houses to see if the section was duly passed; and further, that, if duly passed, the law of 1897 is in contravention of the constitution. On none of these propositions do I express an opinion, because it may be conceded that no law was passed on the subject in 1897; and still I do not think plaintiff is entitled to the writ. Section 2641 of the Political Code was amended March 9, 1893, and the amendment took effect immediately. The county government law of 1893 was passed March 24, 1893, and took effect in January, 1895. That portion of the act of 1893 relating to this county declares that supervisors shall receive a salary of six hundred dollars a year and mileage in going to the place of meeting of the board, and makes no provision for any compensation for their services as ex officio road commissioners. By the act of 1893 the salary of supervisors, as such, is fixed at a certain sum and an additional amount allowed them as road commissioner in a number of counties, and these additional amounts are different from the compensation fixed in the section of the Political Code, and the reasonable construction of the act is that, where the intention was to pay them anything for their services as ex officio road commissioners such intention found expression in the act itself. Indeed, section 216 provides that 'the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided.' And section 236 declares that 'all acts and parts of acts inconsistent with this act are hereby repealed.' The supervisors are ex officio road commissioners. This act of 1893 provides for the payment of the road commissioners in some counties of a per diem, in others of mileage, and in others, of which this county is one, simply for the salary of the supervisor with the general provision that the salary provided for is to be in full for all services rendered by the officers named in the act, either as officers or ex officio officers. The section of the Political Code provides for the payment of all road commissioners at the rate of 20 cents a mile. The laws are clearly inconsistent in this matter, and the act of 1893, being the latest, will prevail. I do not say that the county government law of 1893 is now the law, but only that, if the law of 1897 was not really passed by the legislature, then the law of 1893 will prevail over the section of the Political Code, because the latest expression of the legislative will."

It is now insisted that the county government act of 1893 is unconstitutional, and therefore the aforesaid section of the Political Code was not repealed by that act. We find no constitutional objection to section 195 of the county government act of 1893. The objections made by appellant to subdivision 15 of section 191 of the act of 1897, even conceding them to be sound in law, cannot be taken to the act of 1893, as there are no such provisions in that act. For the foregoing reasons, the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(125 Cal. 232)

ESTRELLA VINEYARD CO. v. BUTLER et al. (S. F. 791.)[1]

(Supreme Court of California. June 24, 1899.)

PLEADING—ELECTION—EVIDENCE—PRINCIPAL AND AGENT—INSTRUCTIONS.

1. Where a complaint, in an action to recover a sum of money due from a sale of raisins by defendants for plaintiff, alleges in the first count

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[1] Rehearing denied July 20, 1899.

a delivery to defendants as commission agents under an agreement to make returns of proceeds at a given price, and the second count is laid on quantum meruit, and the third count alleges an agreement to sell and deliver for a given price, plaintiff is not obliged to elect upon which count he would go to trial.

2. Where a complaint contains an allegation that defendants agreed that plaintiff would receive from defendants three cents a pound for each pound of raisins delivered, testimony of plaintiff's agent that defendants agreed to take the crop, and give three cents, or see that plaintiff got three cents, a pound, or probably better, tends to sustain the allegation, though one of the defendants testifies that no such agreement was made, so that a finding for plaintiff on the issue will not be disturbed.

3. Where a contract does not show on its face that the person named was acting as agent of anybody, and no reference is made to the alleged principal, and on trial no offer is made to prove that the person named in the instrument was acting for the alleged principal, and with his authority, in executing the contract, and the person named in the contract testifies that he had no authority to sign it for the alleged principal, such contract is inadmissible in evidence against the alleged principal.

4. In an action to recover a sum of money due from a sale of raisins by defendants for plaintiff, where there is evidence that the agreement between plaintiff and defendant called for raisins of a good quality, and there is evidence tending to show that the raisins were sold in the F. market, and were to be delivered at F., evidence of the quality of the raisins and of the market value at F. is admissible.

5. Instructions upon questions of fact are properly refused, as invading the prerogative of the jury.

6. A refusal to give an instruction covering a certain point is not error, where such point is fully covered by other instructions.

7. An instruction referring to a contract, it being impossible to say whether the contract referred to is the contract alleged by plaintiff or defendant, is properly overruled, as being misleading, and of no aid to the jury.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by the Estrella Vineyard Company against A. B. Butler and William Forsyth, partners under the style of the Raisin-Growers' Packing Association. From a judgment for plaintiff, and an order denying motion for a new trial, defendants appeal. Affirmed.

L. L. Cory, for appellants. H. H. Welsh and Geo. E. Church, for respondent.

CHIPMAN, C. Action to recover the value of 255,000 pounds of raisins, alleged to be worth $7,650, on account of which plaintiff had received only $4,090.82, leaving due the sum of $3,559.18. The cause was tried by the court with a jury, and plaintiff had a verdict for $2,840, upon which judgment was entered. The appeal is from the judgment, and from an order denying motion for a new trial, and comes here on a statement of the case. The complaint sets forth three separate causes of action: (1) That between September 1, 1894, and January 1, 1895, at Fresno, Cal., plaintiff delivered to defendants the raisins in question, to be sold by defendants as commission agents of plaintiff; and that defendants agreed, in consideration of said delivery, and prior thereto, that plaintiff would receive from defendants for the sale of said raisins a price not less than three cents per pound, and that defendants would account to plaintiff, and pay plaintiff as the proceeds of said raisins a price not less than three cents per pound. (2) Alleges the delivery of the raisins at the request of defendants, that they afterwards sold the same, and that the reasonable value thereof was $7,650, no part of which has been paid, except $4,090.82. (3) Alleges the delivery of the raisins to defendant upon an agreement that they would pay plaintiff three cents per pound therefor. Defendants answered, specifically denying most of the material allegations of the complaint, but admitted the delivery of the raisins, and alleged that they were so delivered "to be handled, marketed, and sold by said defendants upon commission, and as the agents and representatives of plaintiff, upon commission." In an amended answer defendants set up a contract in writing, dated May 11, 1894, between one G. W. Taft and defendants, under which it is alleged that the raisins were delivered to defendants, and not otherwise. This contract provided, in brief, that defendants were to receive the raisins in the sweat box, and pack and otherwise prepare them for market, and sell them upon a commission of 5 per cent. of the proceeds of this sale.

1. Defendants allege error in refusing their motion to compel plaintiff to elect. In the first count or cause of action plaintiff alleges delivery to defendants as commission agents, under a specific agreement by defendants to make returns of proceeds at a given price. The second count is laid on quantum meruit. The third count alleges an agreement to sell and deliver for a given price. Plaintiff, upon such complaint, was not obliged to elect. Code Civ. Proc. § 427; Cowan v. Abbott, 92 Cal. 100, 28 Pac. 213.

2. It is claimed that "the evidence is insufficient to sustain the allegation that defendants agreed that plaintiff would receive from defendants three cents a pound for each pound of raisins delivered." It appears from the testimony of Taft that he was the agent of plaintiff, and disposed of the raisins for plaintiff. He testified that he spoke to William Forsyth, one of defendants, in May, 1894, about raising some money on plaintiff's crop, and was told that defendants would supply what money they wanted if defendants were allowed to handle the crop. Witness replied: "I will give you a show at it, if you will do as well by me as anybody. He says: 'All right; we will give you the $2,000, and take a crop mortgage on the crop.' " The crop mortgage was drawn, and is dated May 14th, and witness sent it to plaintiff company for execution, and it was executed and delivered, and was recorded May 24th. He testified: "He [Forsyth] handed me some contracts for me to send to the company, to be signed by the president and secretary. I sent them down to be signed, and they were signed and sent back to me. It

was probably a week before they came back to me. After they came back from Bakersfield I kept them." This is a contract similar in form to that under which defendants claim they received and handled the raisins. It was executed by plaintiffs, but the evidence is that it was never delivered to defendants. This phase of the case will be noticed later on. Taft testified that, after getting the money on the crop mortgage, he did not see Mr. Forsyth until August. As to what then took place he testified: "I saw Mr. Forsyth, and we got to talking about the crop. He wanted to know how much there was going to be,—wanted to know if he was going to handle it. I told him that he would handle it if he would get me just as much as I could get anywhere else, or a little better, and he promised me that he would do as well by me as anybody else, and a little better. * * * He said he wanted the crop, knew it would be good, knew I understood curing, that it is a good large crop, and that he wanted it, and would give me three cents, or see that I got three cents a pound, and probably better. He said he had got to have the crop,—had sold 500 cars, and was depending on these large crops. I says: 'All right, Colonel; three cents is what I want, and that is what I am figuring on.' * * * He says: 'All right, Taft; you go ahead.' I informed the company of the matter by letter. I subsequently saw the secretary of the company, probably a week or ten days after, and before the raisins were delivered." The deliveries began September 22d, and continued to October 1st, amounting to 255,000 pounds. The testimony of this witness was that the agreement was to take all the crop of good raisins, and that all that were delivered were of No. 1 quality. There was other evidence that the market price for similar raisins at Fresno ranged from 2½ to 3 cents per pound. It was admitted that defendants had disposed of all the raisins, and the undenied allegation of the verified complaint is that they had made returns of only $4,090.92. Defendant Forsyth testified that he made no such agreement as was testified to by the witness Taft. It is not within the province of the court to say which one of these witnesses the jury should have believed. The evidence of plaintiff tends to sustain the allegations complained of.

3. Defendants offered in evidence the contract set forth in the answer, but the court excluded it, and defendants excepted, and claim that the ruling was error. As this evidence tended to show an entirely different agreement from any claimed to have been made by plaintiff, it becomes important to determine whether the court erred in refusing the evidence. Defendant Forsyth testified as to the advance of $2,000 secured by mortgage, and, continuing, said: "At that time and place certainly there was something said about the execution of some papers by myself and Mr. Taft. He was to indorse the Estrella Vineyard Company's note for $2,000 after he had signed the contract. He went with me to the office of Butler & Forsyth, and signed the contract that day. (Paper handed witness.) That is the contract Mr. Taft signed on the 11th day of May. That is George W. Taft's signature. I saw him sign it." Plaintiff objected to the admission of the contract as irrelevant, immaterial, and incompetent, and on the further ground "that it purports to be an indenture of mutual covenants, that it was not executed by the party defendant, and that it has never been delivered." The witness continued: "There must have been two papers signed at that time. There is generally the duplicate and this one. My signature, I presume, was on the other one,—the signature of Butler & Forsyth. There were two papers. I handed one to Mr. Taft and kept the other. They were identical. It was an oversight I didn't sign this paper before yesterday. I didn't think it was necessary. I had Mr. Taft's signature on that document, and it was all I supposed was necessary." The objection was then sustained, and defendants excepted. This agreement is dated May 11, 1894, and purports to be between George W. Taft, of the county of Fresno, and defendants. Throughout the contract the party of the first part is Taft, and the conditions in terms are to be performed by him on the part of first party, and the agreement is signed, "G. W. Taft." Forsyth further testified, without objection: "The contract under which I received those raisins is the paper marked 'Defendant's Proposed Exhibit No. 1' (the contract last referred to). After the execution of that contract I never entered into, or attempted to enter into, any other contract with Mr. Taft in relation to the delivery of these raisins." Upon cross-examination of Forsyth, plaintiff handed him a contract, dated May 16, 1894, in all particulars identical with that testified to by Forsyth, except that the party of the first part is plaintiff, instead of Taft. Forsyth recognized his signature to the contract of May 16th, but was unable to remember anything about its execution. He testified that he had "forgotten all about it." As to the contract of May 16th, when asked where it had been since its execution, Taft testified: "Part of the time at my office, and part of the time at Mr. Welsh's. It was never delivered to Butler & Forsyth, because I had instructions from the company, at the time they sent it to me, not to deliver it unless it was for the best possible means that I could do in the way of disposing of the raisins." He had already testified to the subsequent parol agreement of August. Taft further testified: "If at any time during the month of May, June, or July, and before August 15th, I signed a raisin contract to the Raisin-Growers' Packing Association, I had no authority to sign it from the company,"—and in that connection said: "I spoke this morning of some papers having been drawn

and sent down for execution to Bakersfield. They were contracts between Butler & Forsyth and the plaintiff corporation. That was a little after this chattel mortgage was sent down. I think, probably, within a week." The mortgage was dated May 14th.

Defendants' counsel claim that the contract was admissible because (1) it appeared by its terms to be in duplicate; (2) Taft did not deny that he executed it; (3) Forsyth testified that he saw Taft sign it; (4) that Forsyth said he presumed that the signature of Butler & Forsyth was on the other copy; (5) Forsyth testified that defendants received the raisins under this contract. The general rule, subject to some exceptions, is that, in order to bind the principal, and to make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument, or, at least, the terms of the instrument should clearly show that the principal is intended to be positively bound thereby, and that the agent acts plainly as his agent in executing it. Story, Ag. § 147. It is not necessary to point out the distinction made between instruments under seal and not under seal, nor to show what classes of instruments fall under the exceptions to the rule. There was nothing on the face of the instrument to show that Taft was acting as agent of any person. No reference whatever is made to plaintiff as principal or otherwise, and no offer was made to prove that Taft was acting for plaintiff, and with its authority, in executing the contract. It was not enough to show that defendants received the raisins under this contract. It was necessary also to show, or offer to show, before it was admissible to bind plaintiff, that the latter authorized Taft to make the contract, or the plaintiff delivered the raisins to defendants with knowledge, actual or implied, that the contract was so entered into on its behalf. As an exception to the general rule as above stated, evidence is admitted, not to contradict the written instrument, or deny that it binds the person whom on its face it purports to bind, but to show that it also binds another, because the act of the agent in signing the agreement, in pursuance of his authority, is in law the act of the principal. Story, Ag. § 160a and notes; Id. § 270 and notes. The only written contract of which there is any evidence that plaintiff had knowledge, or signed, or authorized to be signed, was the contract of May 16th; and as to this contract the undisputed evidence is that it was never delivered by plaintiff, and defendants make no claim under it, and Taft testified that he had no authority to sign the contract of May 11th. We cannot say that the court erred in excluding the latter contract.

4. The trial court admitted evidence of the quality of the raisins under the first cause of action, and, generally, of their market value at Fresno; and these rulings are assigned as error. Taft testified that the agreement called for raisins of good quality, and we think it was competent to show that they were such. As to the evidence of market value at Fresno, we think it was admissible. The evidence tended to show that the raisins were sold in that market, to be delivered at Fresno. Taft testified: "I did not know what he was going to do with them [the raisins]. I did not know that they were to be shipped on consignment. Couldn't tell whether to ship east, or where. * * * I did not care what they done with them." There was evidence tending to show that there was a market value for raisins at Fresno, and several witnesses testified what that market value was. The evidence presents a different case from that of Pugh v. Porter Co., 118 Cal. 628, 30 Pac. 770, relied upon by defendants, in which the raisins were sold to be marketed at Chicago.

5. The court instructed the jury on its own motion. Thereupon defendants submitted 10 additional instructions, all of which the court refused to give; and this is assigned as error. Our attention is invited to the sixth, seventh, tenth, eleventh, fourteenth, and sixteenth. The instructions marked 7, 10, and 14 are clearly an invasion of the prerogative of the jury, being instructions upon questions of fact. The sixth gives the rule as to burden of proof, upon which the court fully instructed the jury. The eleventh instruction refers to a contract under which the raisins are assumed to have been delivered, but it is impossible to say whether the contract referred to was the contract alleged by plaintiff or by defendant. As offered, the jury could not have been aided by the instruction, and might have been misled. There is no point in the sixteenth instruction not covered by the instructions given quite as favorably as defendants could fairly ask. Indeed, we think the court erred, if at all, in giving instructions under which the jury could render a verdict (as it evidently did) for less than the contract testified to by Taft would have warranted. It is advised that the judgment and order should be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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125 Cal. 272

DARROUGH v. HERBERT KRAFT COMPANY BANK et al. (Sac. 581.)[1]

(Supreme Court of California. July 7, 1899.)

SUBROGATION.

Where the owner of premises pays off a senior lien, without actual knowledge of the existence of a junior lien, it will be presumed that he made the payment for his own benefit; and for the protection of his interests, and equity will treat such owner as the assignee of the original senior lienholder, and will revive and enforce it for his benefit.

[1] Rehearing denied August 5, 1899.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county.

Action by C. H. Darrough against the Herbert Kraft Company Bank, the Bank of Tehama County, and others. A demurrer to the complaint was sustained, and from the judgment plaintiff appeals. Reversed.

Johnson & Chase, for appellant. Coffman & Coffman, for respondents.

GRAY, C. A demurrer to the complaint as amended was sustained. Plaintiff refused to further amend his complaint, and the judgment was entered against him, from which he appeals.

From the complaint and amendments thereto it appears that on May 13, 1893, the defendant Halley executed a note for $1,050 to the defendant Bank of Tehama County, and on the same date, to secure the payment of said note, said Halley executed a trust deed of certain real estate to the defendants Brown and Cahoone, as trustees. Thereafter, and on the 26th of April, 1895, Herbert Kraft recovered and docketed a judgment against said Halley for $611.71. On April 29, 1895, this judgment was assigned to defendant the Kraft Company Bank. On the 13th of May, 1895, appellant purchased from Halley his equitable interest in said real estate for $112, receiving a grant deed therefor, under which he has been in possession of said premises ever since. On May 15, 1895, appellant paid the balance due to the Bank of Tehama County on said note, amounting to upward of $1,100, and the said trustees named in said deed of trust made a deed of reconveyance of said real estate to appellant, and appellant had the same duly recorded, and the note was marked "Paid" by the bank, and surrendered to Halley. Appellant paid this note and took this deed under a mistake of fact. He, knowing nothing of the judgment of Kraft, believed the premises to be free from that incumbrance. Had he known of the judgment, he avers, he would have taken an assignment of the note, and directed the trustees to sell the said real property to satisfy the same. Appellant seeks in this action to be treated as the equitable assignee of said note, and to be subrogated to all the rights that the Bank of Tehama County had therein and in said trust deed, to have the said real property sold to satisfy said note, and to have the rights under the aforesaid judgment subordinated to appellant's rights under the trust deed and promissory note, and also to have the Herbert Kraft Company Bank enjoined from selling said real property under execution under said judgment. It appears further that the said real property is of less value than the amount claimed to be due to appellant as equitable assignee of said note.

I am of opinion that the facts stated bring the case within the principles laid down by this court in Matzen v. Shaeffer, 65 Cal. 81, 3 Pac. 92, Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196, and Hines v. Ward, 121 Cal. 115, 53 Pac. 427, and that the demurrer should have been overruled. The above cases seem to hold that a junior lienholder shall derive no advantage over a senior lien, where such senior lien has been paid off and canceled by the owner of the premises to which the liens attached without actual knowledge on the part of such owner of the existence of such junior lien, and that it will be presumed that such owner made the payment for his own benefit, and not for the benefit of the junior lienholder, and for the protection of his interests equity will treat such owner as the assignee of the original senior lienholder, and will revive and enforce such senior lien for his benefit. The cases cited above treat altogether of mortgage liens, but I take it that the same doctrines of equity therein discussed are applicable to trust deeds given to secure the payment of promissory notes. I find this same doctrine of "equitable assignment" applied to a trust deed by the supreme court of Illinois in Young v. Morgan, 89 Ill. 199. In that case the court held that where a party sold land subject to a deed of trust, which was a prior lien to that of a judgment, the purchaser assuming the payment of the debt secured by the trust deed as a part of the purchase money, and the purchaser paid the same, taking a release of the trust deed instead of an assignment thereof, in equity the lien of the trust deed was not extinguished in favor of the judgment creditor, but that the purchaser was entitled to assert the same for his own protection, and have a sale under execution issued on said judgment set aside. The court said in that case: "The payment of the debt secured by the trust deed was not a voluntary payment by a stranger, but it was a payment which appellant was compelled to make in order to the protection of his title to this land which he had purchased." Respondent cites Guy v. Du Uprey, 16 Cal. 197, in support of the judgment; but that case differs as to the facts from the case at bar, for the court therein say, "The person who advanced the money had no interest in the payment of the debt or the release of the mortgage;" and further, "He was fully advised of the facts." In the case under consideration the appellant clearly had an interest in the payment and discharge of the debt which was an incumbrance upon the land he had bought, and, besides, he was not "advised of the fact" of the existence of the subsequent judgment lien. The constructive notice inferred from the docketing of the judgment is of no value here, and does not estop the appellant to urge that the note was canceled and not assigned because of his mistake arising out of an absence of all knowledge as to the existence of the judgment. Shaffer v. McCloskey, supra. In Persons v. Shaeffer, 65 Cal. 79, 3 Pac. 94, and Richards v. Griffith, 92 Cal. 493, 28 Pac. 484, cited by respondents, the prior liens were canceled of record prior to the time the subsequent liens attached, so that the subsequent lienholders and purchasers were in position to claim the rights of bona fide purchasers without notice. In this case, however, no such claim can be made, as the trust deed was a matter of record, and the land had not been redeeded or the note paid at the time the judgment was docketed and the judgment lien became attached to the land. Respondents were not misled to their prejudice by any act of appellant, and, notwithstanding it be held herein that the appellant is entitled to the relief asked in his complaint, their judgment lien is of no less value to them on that account than when it first attached.

Those objections to the complaint, other than such as are based on the ground of insufficiency of facts to show a cause of action, do not require treatment in this opinion. The propriety of an injunction is not here discussed. For the foregoing reasons, I advise that the judgment be reversed, and the cause be remanded, with directions to the court below to overrule the demurrer.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

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125 Cal. 276

CLARK v. ALLEN. (L. A. 487.)

(Supreme Court of California. July 7, 1899.)

REAL-ESTATE BROKER—TAKING COMMISSIONS FROM BOTH PARTIES—EXCHANGE OF LANDS —NEW TRIAL—EVIDENCE—VARIANCE.

1. If the duty of a real-estate broker is simply to bring together two persons who desire to exchange their lands, and the broker's entire duty is performed when he has brought them together, he is a mere middleman, not representing conflicting interests, and may receive compensation from both parties.

2. An order granting a new trial on the ground of the insufficiency of the evidence to support the findings will not be disturbed on appeal, where the evidence is at all conflicting.

3. An employment of a real-estate broker to find a purchaser, and an allegation in his complaint in an action for commissions that a purchaser was found, are satisfied by evidence that a party was found, with whom defendant exchanged lands,—especially where all the evidence introduced that tended to show an exchange of lands was offered and received without objection.

Department 1. Appeal from superior court, San Bernardino county.

Action by Thomas M. Clark against Charles W. Allen. From an order granting a new trial after judgment for plaintiff, he appeals. Affirmed.

E. A. Rogers and B. E. Vickery, for appellant. W. A. Harris and L. T. Eggers, for respondent.

GAROUTTE, J. This action is brought to recover commissions for an exchange of real estate. Judgment went for plaintiff, and a new trial was granted upon motion of defendant. The appeal is prosecuted by plaintiff from the order granting a new trial.

For a defense to the action, defendant claimed that plaintiff's assignors, the brokers, received compensation for their services from the other party to the trade, without his (defendant's) knowledge, and for that reason he now insists that the brokers are barred from recovering any compensation from him. In other words, it is claimed that the law will not allow the brokers to act as the agents of both parties, and a contract of that kind for compensation will not be recognized by the courts. As a general principle, this contention is sound; but there are circumstances where a party may act for two persons, and charge compensation from both for his services. If the duty of the broker was simply to bring together two men who desired to exchange their lands, and the broker's entire duty was performed when he had brought the two men together, then we see nothing against good morals and a sound public policy in allowing compensation to the broker from each of the parties. In such a case the broker is in no sense representing conflicting interests. He has nothing whatever to do with the trade. Under the contract, his advice and assistance to either party are not called for. Upon the state of facts here assumed, the broker may be termed a "middleman," and not an "agent," in the strict sense of the term. In speaking to such a state of facts, the court said in Manders v. Craft, 3 Colo. App. 239, 32 Pac. 837: "In this case there was technically no purchase or sale. No money passed. It was an exchange of one kind of real estate for another. With the prices, details, and trade, the agent had nothing to do, and the arrangement was that he should not have. His sole action and employment terminated with bringing the parties together, which he did. The trade was made by the parties. Consequently the agent is not obnoxious to the charge of double employment, under the law. There was nothing in the relation of the agent to either to prevent compensation from both, if both agreed to pay." In Green v. Robertson, 64 Cal. 76, 28 Pac. 446, this court said: "The matters set up in the answer as to the employment of plaintiff by Tucker do not constitute a defense. The plaintiff made no bargain for the sale of the property. He was not authorized to make a bargain. He undertook to bring the buyer and seller together, and he did so. They made their own bargain, and after plaintiff had rendered his services and brought them together, and after they had made their bargain, the defendant executed the instrument in suit."

If the brokers in this case were merely middlemen, as in the cases above cited, the defendant could not defeat plaintiff's cause of action upon the ground that the other party to the exchange of property had paid him a fee for the services rendered. This question was essentially one of fact, and one upon which the trial court found in favor of plaintiff. Yet, while the evidence was ample to support such a finding, there was some evidence to the contrary,—possibly sufficient evidence to justify a finding the other way, if one had been made. The new trial appears to have been granted upon the ground of the insufficiency of the evidence to support the findings; and, where the evidence is at all conflicting, we cannot disturb the order which grants the new trial. For these reasons the order appealed from must be affirmed.

By the brokers' contract with the defendant in this case, they were employed to make a "deal" for him respecting a certain piece of property. By plaintiff's complaint, he alleged that under this contract the brokers procured a purchaser able and willing to purchase the land. Under the contract, and under this allegation of the complaint, evidence was introduced showing an exchange of land, rather than a purchase. We do not deem such evidence at variance either with the terms of the contract or with the allegations of the complaint. An employment to find a purchaser and an allegation that a purchaser was found are satisfied by evidence that a party was found, with whom the contracting party exchanged lands. Especially should that be held in this case, where all the evidence introduced tending to show an exchange of lands was offered and received without objection. For the foregoing reasons, the order appealed from is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

125 Cal. 251

PEOPLE v. CLARK.

(Supreme Court of California. June 28, 1899.)

CRIMINAL LAW—APPEAL—STAY OF PROCEEDINGS.

Petitioner having appealed from a judgment of imprisonment, and the judge before whom he was tried, and likewise the presiding judge, being absent, and the judge temporarily acting in his place having refused a stay pending return of the trial judge, the supreme court will stay proceedings till the trial judge returns and hears application for a certificate of probable cause, or till some other judge of the same court appointed to act in his place has heard and decided it.

Application by Joseph Clark for a stay of proceedings. Granted.

L. P. Boardman, for petitioner.

BEATTY, C. J. It appears by an affidavit filed herein that the defendant above named has appealed to this court from a judgment of imprisonment in the state prison imposed by the superior court of the city and county of San Francisco, that the judge before whom he was tried is absent from said city and county on vacation, that the presiding judge of said court is also absent, and that the judge temporarily acting in his place refuses to grant any stay of proceedings pending the return of said trial judge. The result is that the defendant is compelled to apply here for relief to which he was clearly entitled on application to the superior court, and that, unless he can obtain a stay of proceedings here, he must be deprived of an undoubted statutory right,—the right, that is to say, of having it determined by the trial judge or by a justice of this court whether there is probable cause for his appeal, and, in case it is found that there is such probable cause, to have the proceedings stayed. Pen. Code, § 1243; In re Adams, 81 Cal. 163, 22 Pac. 547.

It is beyond question that a part and a very important part of the right of appeal, in cases of this kind, is the right to a stay of proceedings in a proper case; and if the judge of the trial court refuses or neglects to pass upon the question whether there is probable cause for the appeal, or improperly denies a certificate to that effect, the appellant has the right to apply to a justice of this court for such certificate, and, as we have said more than once, is entitled to a reasonable stay of proceedings until the record can be made up and certified here for examination. For these reasons, and because some judges of the superior court have refused to grant the stay necessary to enable the appellant to present his application to a justice of this court, we have been compelled, in the exercise of our appellate jurisdiction, to make such orders ourselves. The present case, however, presents the matter in a new aspect. Owing to the absence of the trial judge on vacation, no application can be made to him, and other judges of the same court, although they undoubtedly have the power to stay the proceedings during his absence, refuse to do so. We will not, therefore, make the usual order staying proceedings until the record can be presented to a justice of this court, but will make such order as should have been made in the superior court, viz. an order staying proceedings until the trial judge returns and hears the application for a certificate of probable cause, or until some other judge of the same court, appointed to act in his place, has heard and decided it. It is so ordered.

We concur: HENSHAW, J.; McFARLAND, J.; TEMPLE, J.; VAN DYKE, J.; HARRISON, J.

125 Cal. 240

PATCH v. MILLER et al. (S. F. 1,477.)

(Supreme Court of California. June 26, 1899.)

FINDINGS—APPEAL—WHEN LIES.

1. Findings that, for and during the period of two years immediately preceding decedent's death, plaintiff performed work, labor, and services for him, and that the same were of the value of $25 per month, mean that plaintiff

worked for deceased said two years, and that the value of such work was $25 per month.

2. Remedy for inconsistency between judgment and finding may be had under Code Civ. Proc. § 963, providing for an appeal from final judgment; no intention to repeal or modify this section appearing in sections 663, 663½ (St. 1897, p. 58), providing a remedy by motion in the trial court to vacate and set aside the judgment and enter another and different judgment.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Hattie Patch against Charles A. Miller and others, executors. From a judgment for plaintiff for less than asked for, she appeals. Reversed.

Marcus Rosenthal, for appellant. Wm. H. Schooler and Jacob Samuels, for respondents.

GRAY, C. Action for work and labor. Plaintiff claimed $720 to be due her, and appeals from a judgment in her favor for $200.

The defendants are sued as executors of the last will and testament of J. M. Miller, deceased. The court found in the second finding as follows: "That, for and during the period of two years immediately preceding the time of the decease of said J. M. Miller hereinafter mentioned, the said plaintiff, at the special instance and request of said J. M. Miller, rendered and performed certain work, labor, and services to and for the said J. M. Miller, and that such work, labor, and services were and are of the reasonable value of twenty-five dollars per month." The seventh finding is to the effect that no part of the claim has been paid. The above is all that is said in the findings as to the length of time that plaintiff worked for deceased; and, while it is not as clear a statement of the fact as might have been made, yet we think a fair construction of its language will make the finding mean that the plaintiff worked for deceased two years or twenty-four months, and that the reasonable value of such work was and is $25 per month. Upon this construction of the findings the judgment should have been for $600 in plaintiff's favor.

It is insisted that plaintiff's remedy for an inconsistency between the judgment and finding is not by appeal from the judgment, but is to be obtained under the provisions of the new sections added to the Code of Civil Procedure in 1897, and numbered 663 and 663½ (see St. 1897, p. 58), by a motion in the trial court to vacate and set aside the judgment and enter another and different judgment. We do not find anything in these added sections to indicate that it was the intention of the legislature to repeal or in any way modify section 963, Code Civ. Proc., which provides for an appeal from a final judgment. It would therefore seem that an appeal from a final judgment entered in the superior court has the same effect, and is to be heard and determined in the same way, as before the enactment of the added sections. We hold that those sections were not intended to affect the remedy by appeal already existing, but were intended to provide a remedy in addition thereto, and advise that the judgment be reversed, and that the cause be remanded, with directions that the court below enter judgment for plaintiff for $600 and costs.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions that the court below enter judgment for plaintiff for $600 and costs, the same to be payable in due course of administration of the estate of J. M. Miller, deceased.

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125 Cal. 249

SANTA CRUZ BANK OF SAVINGS & LOAN v. TAYLOR et al. (S. F. 981.)

(Supreme Court of California. June 28, 1899.)

CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.

A motion to change place of trial for disqualification of judge, though it should have been granted immediately by him, not having been acted on till his term had expired, and one not disqualified had succeeded him, is properly denied.

Department 2. Appeal from superior court, Santa Cruz county.

Action by the Santa Cruz Bank of Savings & Loan against Arthur A. Taylor and others Defendants' motion to change place of trial was denied, and they appeal. Affirmed.

Chas. B. Younger, for appellants. Wm. T. Jeter, for respondent.

TEMPLE, J. This action was brought in the county of Santa Cruz, to foreclose a mortgage, on the 5th day of July, 1895. The defendant Mary P. Taylor appeared and filed a demurrer to the complaint December 17, 1895. On the 30th day of January, 1896, which was within 10 days after the service of summons upon the said Mary P. Taylor, she again appeared and filed her affidavit of merits, and moved the court to change the place of trial because the judge of the court was disqualified. When the motion to change the place of trial was submitted does not appear, but it is stated in the bill of exceptions that it was submitted while Hon. James H. Logan was superior judge of the county. Perhaps it was submitted near the end of Judge Logan's term; but, at all events, the motion was taken under advisement by Judge Logan, and was never passed upon by him, although it was admitted upon the hearing of the motion that Judge Logan was disqualified. In March, 1897, counsel for plaintiff called up the motion before Hon. Lucus F. Smith, who had succeeded Judge Logan, and the motion was by him denied, and defendant excepted. It was not claimed that Judge Smith was disqualified. Undoubtedly it was the duty of

Judge Logan promptly to transfer the cause to the nearest and most accessible county, where the like objection did not exist, and he had no discretion in the matter except to determine which court was the proper court under the statute. Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800. But Judge Logan went out of office without taking any action in the matter, and when he ceased to be judge there was no foundation for the motion. It was no longer true that the superior judge of the county was disqualified, and the statute no longer authorized or required the transfer of the cause. The fact that Judge Logan had no discretion, and could not have retained the case, or have called in another judge, did not deprive that court of jurisdiction; and, when the judge himself became qualified to try the action, it was his duty to retain the case as against such a motion. The statute does not authorize a transfer because a person who is not a judge of the court, and could not sit as judge in the case, could not act as judge, if he had in fact been judge. The reason why the judge of the county cannot call another to try the case is stated in Krumdick v. Crump. It is that the judge shall neither try his own case nor select his judge. This case is not within the evils provided against by that rule. Judge Smith's ruling must be tested by the conditions which existed when it was made. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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125 Cal. 224

KNOWLES v. BALDWIN. (S. F. 1,045.)

(Supreme Court of California. June 24, 1899.)

BUILDING CONTRACT—LIEN—DEMURRER—INTEREST—APPEAL—RECORD.

1. Under Code Civ. Proc. § 1184, providing that by the terms of a building contract 25 per cent. of the contract price shall be made payable at least 35 days after completion of the contract, and section 1187, providing that the contractor, at any time after completing his contract, till expiration of 60 days, may file his notice of lien, he may file notice of lien before expiration of the 35 days; and the provision of a contract to do work for $3,000, that the last payment of $750 shall be paid 35 days after completion, provided the building is free from liens placed thereon by the contractor or any one claiming to have furnished him labor or material, is not a stipulation that the contractor shall not file a lien within 35 days.

2. A general demurrer to complaint to recover balance on a building contract, and to have it declared a lien, is ineffectual, where the complaint is good at least as to all but one payment.

3. Interest on respective payments under a building contract should be allowed from the time they are due.

4. Entries in the transcript purporting to be minute orders cannot be noticed on appeal; they having been inserted after the certificate of the clerk to the judgment roll, and not being certified as a part of it, and under Code Civ. Proc. § 670, not being a part of it, even if so certified.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by William Knowles against E. J. Baldwin. Judgment for plaintiff. Defendant appeals. Affirmed.

Henry I. Kowalsky and George Hayford, for appellant. Wm. H. Jordan, for respondent.

COOPER, C. Action to recover for balance due on contract for repairs, labor, etc., and to have the same declared a lien on premises described in complaint. Judgment for plaintiff. Defendant appeals from the judgment on the judgment roll alone.

The principal point on which defendant relies is the order of the court below overruling defendant's demurrer to the complaint. The complaint was in two counts, and alleged, in substance: That on the 25th day of August, 1896, the plaintiff entered into a written contract with defendant, by the terms of which plaintiff was to make certain improvements and changes in the building known as the "Baldwin Hotel," situate in the city and county of San Francisco, upon the premises described in the complaint, for the sum of $3,000, to be paid as follows: $750 when the basement should be ready for plastering, $750 when the plastering should be completed, $750 when all should be completed and accepted; and the final payment, "seven hundred and fifty dollars, thirty-five days after completion and date of acceptance, provided said building and premises were free and clear from any and all liens and incumbrances arising from or created or placed thereon by the said contractor, or any person claiming to have furnished him labor or materials for the erection and completion of said work." That the work was fully completed, according to the contract, on December 8, 1896, and that $1,500 had been paid, and no more. That on the 4th day of January, 1897, plaintiff duly filed his notice of lien with the county recorder, which notice stated the statutory requirements. That the premises described in the complaint were necessary for the convenient use and occupation of the building thereon. The second count alleged that the plaintiff did certain extra work, at the request of defendant, of the reasonable value of $275, no part of which had been paid, and contained like allegations as to description, filing of lien, etc. The complaint and each count thereof were demurred to upon the ground that it did not state facts sufficient to constitute a cause of action.

The defendant contends that the complaint does not state facts sufficient, for the reason that the contract upon which the lien is sought to be foreclosed provides that no lien shall be filed for 35 days after the completion of the contract. Such construction is sought to be placed upon the clause quoted from the complaint. The complaint was filed February 12, 1897, and there is no question but that the full amount of the contract price, according to the complaint, was overdue at the time of the commencement of the action. The only question is as to the last $750, which was to become due 35 days after the completion and date of acceptance of the contract, "provided said building and premises were free and clear from any and all liens and incumbrances arising from or created or placed thereon by said contractor." It is claimed that the clause last quoted is equivalent to an express agreement that no lien shall be filed by the contractor till after the expiration of the 35 days. We do not think so. The Code (Code Civ. Proc. § 1184) provides that by the terms of the contract at least 25 per cent. of the contract price shall be made payable at least 35 days after the final completion of the contract. In this case there is no question but that the contract complied with the said section. Section 1187 provides that the contractor, at any time after the completion of his contract, and until the expiration of 60 days, may file his notice of lien. Reading the two sections together, it is plain that by the terms of the contract at least 25 per cent. of the contract price must not become due until 35 days after its completion, and that at any time after the completion, and before the expiration of the 60 days, the notice of lien may be filed. In fact, the giving of credit for a longer period would not affect the time within which the notice of lien must be filed. This is shown by section 1190, which provides that suit must be brought to enforce a lien within 90 days after filing the lien, unless by the terms of the contract credit was given, and in such case within 90 days after the expiration of the credit. Moreover, the demurrer was general, and in such case it should be overruled if the complaint entitles the plaintiff to any relief. Fleming v. Albeck, 67 Cal. 227, 7 Pac. 659. The defendant's argument as to the demurrer in this case does not apply to any portion of the complaint except the last payment of $750 in the first count. If we should hold that a special demurrer would lie to that portion of the first count which set up the time when the last $750 payment would be due, we would still have a good complaint as to the third payment of $750, and as to the $275 for extras.

It is claimed that the judgment directed interest from March 23d, instead of April 30th, the date of filing the findings. The plaintiff was entitled to interest at the legal rate upon the respective payments from the dates they become due. The findings directed interest from February 12, 1897, which was less than the interest to which plaintiff was entitled. The decree which was entered directed interest from March 23, 1897, which was less than directed by the findings. The findings and decree recite that the action came on for trial March 23, 1897, and we must presume they speak the truth.

We cannot notice the entries in the transcript purporting to be minute orders. They are inserted after the certificate of the clerk to the judgment roll, and are not certified as being a part of it, and, if so certified, they would not be a part of it. Code Civ. Proc. § 670. It appears to us that this appeal is entirely devoid of merit, and we advise that the judgment be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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125 Cal. 215

SWAIN v. JACKS. (S. F. 1,103.)

(Supreme Court of California. June 23, 1899.)

CONTRACT—REDEMPTION OF MORTGAGE—TENDER IN MORTGAGEE'S ABSENCE—RESCISSION.

1. An agreement between a mortgagor and mortgagee, in which time was the essence of the contract, provided that, upon payment of a certain sum by the former to the latter, he would bid in the premises at foreclosure for the full amount of his claim, and, if some third party should redeem the premises within a certain time by paying his claim in full without the aid of such sum, then the same should be repaid to the mortgagor. There was no other provision for repayment of the money, and no redemption was made. *Held*, that the sum paid to the mortgagee could not be recovered.

2. Where a mortgagee is absent from the state during the period of redemption, the tender to redeem must be made as required by Civ. Code, § 1489, providing that the tender may be made at his residence or place of business, if the same can be found, and, if not, at any place within the state.

3. The failure of a mortgagee to offer to perform a contract providing for the redemption of the premises, and his absence from the state in parts unknown during the redemption period, do not constitute a rescission of the contract.

Department 2. Appeal from superior court, Santa Clara county.

Action by Lucinda J. Swain against David Jacks. Defendant had judgment on demurrer, and plaintiff appeals. Affirmed.

H. V. Morehouse and F. J. Hambly, for appellant. Frs. E. Spencer, for respondent.

McFARLAND, J. A demurrer to the amended complaint was sustained in the court below, and judgment went for defendant. Plaintiff appeals.

The action is to recover $2,000, alleged to have been received by defendant for the use of plaintiff. The alleged cause of action is founded upon a written contract, set out in full in the complaint, between defendant and one Devendorf (plaintiff's assignor), executed February 14, 1892. The contract is, in substance, as follows: It recites that Jacks had brought an action for the foreclosure of a mortgage executed to him by Devendorf and one Capp, dated June 22, 1887, for $4,000, with interest at 8 per cent. per annum, compounded semiannually, and that Jacks proposed to proceed to judgment, and have the mortgaged premises sold. Then Devendorf agrees to pay Jacks $2,000 upon the latter's agreement to bid in the premises at the foreclosure sale for the amount of the judgment; and Jacks agrees that, upon the payment to him of the $2,000, he will bid in the premises "for the full amount of his judgment, claim, interest, costs, and expenses of said action." Jacks further agrees that, in the event that no redemptioner shall redeem from the sale within six months, if Devendorf, within the redemption period, shall pay him the full amount which he had bid, less the said sum of $2,000, with interest on the balance, etc., he will assign to Devendorf the certificate of purchase. Jacks further agrees that in case no redemption is made, and Devendorf also fails to pay said balance within the six months, Jacks will, at any time within 30 days after he shall receive a sheriff's deed, upon payment to him by Devendorf of the full amount of the original bid, with interest, taxes, etc., execute and deliver to Devendorf, or any one he may appoint, a deed conveying all the interest and estate in the premises acquired by him by the sheriff's deed, Devendorf, however, to pay all taxes, costs, expenses, etc., which Jacks may have incurred, with interest on the same at 8½ per cent. per annum, and all costs and expenses for drawing and recording papers, etc.; and Jacks also agrees that he will receive in part payment of the purchase money the promissory note of the purchaser for the sum of not exceeding $4,000, payable two years after date, with interest, and with other conditions not necessary to be named, the promissory note to be secured by a first mortgage on the premises. It is then provided as follows: "Time is of the essence of this contract; and, after the expiration of thirty days from the date of said sheriff's deed, all the rights of said Devendorf accruing by virtue of this agreement shall absolutely cease and determine." It is also further provided that, "in case a redemption shall be made from said Jacks by any party entitled thereto within the time allowed by law, and for the full amount bid by said Jacks at said sheriff's sale, with two per cent. per annum thereon, up to the time of redemption, then and in that case said Jacks shall repay the said Devendorf the sum of two thousand dollars. It is further provided that, if said real estate shall be bid in by any other person at said sheriff's sale for the full amount of said Jacks' judgment, interest, costs, and expenses, then this agreement to be void and of no further effect." It is averred in the complaint that thereafter, on or about April 22, 1892, Devendorf assigned all his rights and equities under the contract to the plaintiff herein; and that Jacks recognized the plaintiff as such assignee, and placed her in possession of the premises as a person entitled to all the rights of Devendorf under the contract. It is further averred that thereafter the sheriff's sale took place, and Jacks bid in the land for the full amount of his claim, and that the plaintiff paid $2,000 to him on or about the said 22d day of April, 1892, and that, no one having redeemed within the statutory period, the sheriff executed the deed of the premises to Jacks. It is then averred that, within 30 days after the execution of the sheriff's deed, plaintiff "was ready, willing, and able to comply in all respects with the above-quoted terms, conditions, and provisions of said contract, and repay the moneys therein required to be paid, and to receive said conveyance of said premises from said Jacks, and to make and execute and deliver to him the note and mortgage provided to be given by her; but the said plaintiff, Lucinda J. Swain, avers that the said Jacks, on his part, utterly failed and neglected to perform, or offered to perform, his part of said contract, or make or execute or deliver, or offer to deliver, said deed, but, on the contrary, by his acts and negligence, made impossible the performance of said contract by said plaintiff." The said "acts and negligence" are then averred to be these: "That during said period of 30 days, and for some weeks prior thereto, and for several months thereafter, the said Jacks was absent from the state of California in some portion of the Eastern states unknown to said plaintiff, and that during his said absence the said Jacks left and had no agent or attorney in fact within the state of California empowered to execute any of the terms of said contract, or to make or deliver said deed, or receive said money or said note and mortgage of said plaintiff;" and that during said 30 days she "made every reasonable and proper effort, by correspondence and by inquiry, to find and communicate with said Jacks, and to procure the completion of the terms of said contract and the title in her to the said property, and she was totally unable so to do." It is then averred that, "by reason of the facts aforesaid," plaintiff was prevented from performing her part of the contract, and defendant failed to perform or offered to perform his part thereof, and thereby "elected to rescind" said agreement, and that the same was thereby rescinded, and that "the failure of both plaintiff and defendant to comply with the terms thereof within 30 days, as therein provided," terminated the contract, and that the same has thereby become at an end. It is then averred "that, by reason of the facts aforesaid, plaintiff alleges that said defendant received from said plaintiff the sum of $2,000 to the use of said plaintiff."

The demurrer was properly sustained. It will be observed that there is in the contract an express provision that Jacks shall repay the $2,000, and the contract shall end, in the event of a redemption by a third party, and that there is no other provision whatever for the repayment of the money. There was evidently a consideration for the payment of the $2,000 by Devendorf in the fact that Jacks was to bid the whole amount of his claim, and thereby relieve the former from any deficiency judgment; and, as a corollary to this, it was agreed that if some third person should redeem by paying the full amount of Jacks' bid, with interest, percentage, etc., so that Jacks' entire claim should be satisfied without the aid of the $2,000 paid by Devendorf, then the last-named sum of money should be repaid to Devendorf. But this event, upon the happening of which the money was to be repaid, never occurred. Therefore appellant is not justified in taking the position that the contract should be treated as an ordinary simple contract to sell land, where there has been part payment of the purchase price. But, if this view could be taken of it, still the complaint is insufficient, because no tender of performance of her part of the contract was made within the 30 days, or at any time. See Townsend v. Tufts, 95 Cal. 257, 30 Pac. 528, which, on this point, is nearly identical with the case at bar; also Scott v. Glenn, 98 Cal. 168, 32 Pac. 983, and cases there cited. No sufficient excuse is alleged for not making the tender. Section 1489 of the Civil Code prescribes how a tender shall be made, under the circumstances set forth in the complaint. Samuel v. Allen, 98 Cal. 406, 33 Pac. 273. The facts averred do not constitute a rescission of the contract by respondent. Haile v. Smith, 113 Cal. 661, 45 Pac. 872, and cases there cited; Glock v. Colony Co. (Cal.) 55 Pac. 713. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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125 Cal. 242

In re WALKER'S ESTATE. (S. F. 1,327.)

(Supreme Court of California. June 28, 1899.)

ADMINISTRATOR—ACCOUNTING—DEBT FROM SELF.

Though an administrator should be charged with a debt from himself to the estate, existing before his appointment, as money on hand, yet he never, while administrator, having had the means to pay any part of it, the decree settling his accounts should show this, that he may not be charged with contempt for not paying it over as directed.

Department 2. Appeal from superior court, Sonoma county.

In the matter of the estate of John Walker, deceased. From a decree settling the final account of J. M. Walker as administrator, he appeals. Modified.

J. M. Thompson, for appellant. J. R. Leppo, for respondent.

TEMPLE, J. The appellant, J. M. Walker, is the administrator of John Walker, deceased, and the appeal is from the decree settling his final account as administrator, he having resigned his trust. Before the death of John Walker, appellant was indebted to him in the sum of $8,000, with interest, and alleges that he was at the time of his appointment, and ever since has been, entirely insolvent. Upon the settlement of his final account he offered evidence to prove his insolvency, and that the debt due from him to the estate remained uncollected, without his fault. An objection was made to the offered evidence on the ground of incompetency, irrelevancy, and immateriality, and because the matter has been adjudicated and settled in the decree settling the annual account. For the purposes of this appeal, therefore, the evidence rejected must be deemed sufficient to establish the fact that the debt was uncollectible, and the controversy is as to its materiality. It may be remarked here, however, that insolvency might not be a reason for not charging the administrator, even if the view contended for by the appellant be correct. One may be insolvent, and yet be able to pay a particular debt. He may have some property, and yet not enough to pay all his debts, and if, in law, he could prefer one creditor over another,—which ordinarily he may,—then it was his duty, as administrator, to pay this debt so far as he could. The appellant admits that the general rule is that the administrator is to be charged with a debt due from him to the estate as money on hand, but contends that he may show, at least on his final settlement, that he has never at any time while administrator had the means to enable him to pay the debt, or any part thereof. Further than this, unquestionably, the contention could not logically go, since, as he cannot sue himself, and yet it is his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed the duties of his trust according to law, and his sureties may also be held; for it is so nominated in the bond. But in this case it stands, for the purposes of this appeal, admitted, that the administrator has at no time during his term had one dollar which he could have so applied; and the decree finds and adjudges that he has something over $10,000 in cash on hand, which decree renders him liable to be imprisoned for contempt for not paying over as directed, and perhaps liable to prosecution for embezzlement, and constitutes an estoppel against his bondsmen, who will, in consequence, be required to pay money to the estate which has not been lost by the administrator, and which otherwise the estate would never have received. They have not only become liable for the faithful discharge of his duties,—which is all they expressly undertook,—but also that the administrator is solvent, and will pay his indebtedness to the estate. In other words, they are held liable, although the administrator has in fact faithfully performed the duties of his trust according to law, because of a fiction of the law that money due from an administrator shall, as against him, be deemed money in hand. All fictions of the law, we have been taught, were created to enable the court to do justice, and where, to indulge a fiction, is to cause injustice, its just limit has been found. "In fictione juris semper æquitas existit."

The courts have not considered the debt from an insolvent administrator or executor to the estate money in hand for all purposes. When an application is made to sell property to pay debts, it is no reply to say that the administrator has sufficient money in hand for that purpose, if this be fictitious money, consisting of a debt due from an insolvent executor. It is then regarded as an uncollectible asset. In re Georgi (Sur.) 47 N. Y. Supp. 1061. Even in Massachusetts, where the doctrine is more strictly adhered to, and where it is held that the sureties are bound for the debt of an insolvent administrator (Stevens v. Gaylord, 11 Mass. 269; Winship v. Bass, 12 Mass. 199), it was nevertheless held that, if the debt is secured by a second mortgage, the estate could redeem from a sale made under the first (Kinney v. Ensign, 18 Pick. 232). Of course, if the money had been paid, the lien was discharged, and the estate had no right to redeem; but Judge Shaw said: "The taking of administration by a debtor is not, in fact or in law, to all purposes, payment of the debt. As between the administrator himself and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself. But this is in the nature of an estoppel; and it is a well-settled rule that, although a party is bound by an estoppel as of a fact proved or admitted, yet it shall not be taken as a substantial fact, from which other facts can be inferred, * * * but such a legal fiction will never be allowed to work wrong and injustice." So the estate was allowed to redeem, which it would have had neither the occasion nor the right to do if it already had the money due from its debtor. The force of the last case may be somewhat weakened by the subsequent case of Tarbell v. Jewett, 129 Mass. 457. No question is raised in that case, however, as to the effect the insolvency of the administrator might have upon the question. I am not disposed to deny that, so far as the administrator has the means to pay, he and his sureties may be charged with the money as in the hands of the administrator. In the case of Baucus v. Stover, 89 N. Y. 1, while the court strenuously insists that the debt must be deemed collected, it nevertheless holds that it will not, for all purposes, stand on the same footing as money collected. He (the administrator) cannot be committed for a contempt for not paying it over in pursuance of a final decree. Here it is interesting to ask, why? It has been solemnly adjudged that he actually has the money in hand, and, of course, that being so, he can and should pay it over. Is not the mistake in allowing a decree so absolute to be entered? In fact, it was also said that it would be well for the surrogate in the decree charging the executor with the debt as so much money "to specify the charge thus made separately, so as to save all the rights of the executor, and to protect him against consequences which ought not to follow from such a charge." Whether the sureties would be bound for the debt under such a decree the court expressly declined to decide. This was the case of an executor, and the state of New York has a statute from which section 1447 of our Code of Civil Procedure was taken. The two provisions are practically identical. The court was applying the language of the statute to the case, and felt bound by its absolute terms. The appeal was from a decision of the general term, reported in 24 Hun, 109. The lower court was reversed, but the appellate tribunal seems to have been impressed with the views of the lower court, and apparently attempted to avoid some inconveniences pointed out in an able opinion rendered by Judge Bockes. Judge Bockes thought, while the executor might be held liable to the estate, he should not be made subject to be imprisoned for debt, as he would be if charged by such a decree. Nor should his sureties be made to pay his individual debt if it has not been lost by his failure to do his duty as executor. The court of appeals met these objections by suggesting to the probate court to show by its decree how much was real money in the hands of the executor and how much was constructive money. This constructive money may be a just liability against the executor, but the fiction becomes an unjust reality when the charge is entered, without qualification, in the final decree. The sequel to the case of Baucus v. Stover was a suit on the bond against the executor and his sureties. The appeal to the supreme court is reported in 45 Hun, 582. It was held that the decree was not conclusive against the sureties nor against the executor in a contempt proceeding. This, as the court determined, was in accordance with the ruling in Baucus v. Stover, and of the following cases from other states: Harker v. Irich, 10 N. J. Eq. 269; Ordinary v. Kershaw, 14 N. J. Eq. 528; McCarty v. Frazer, 62 Mo. 263; Garber v. Com., 7 Barr, 265; In re Piper's Estate, 15 Pa. St. 533. The court said that the sureties did not agree to augment the estate, but that the executor would not waste it, or be in default; that the executor was not in default, and there was no deficiency to make good. He had all that had come to his hands, and all that, by the greatest diligence, he could get. All this he was ready to distribute. More he could not do, unless he could make something out of nothing. This judgment was affirmed. Baucus v. Barr, 107 N. Y. 624, 13 N. E. 939.

Sureties are usually entitled to be subrogated to the securities held by the creditor. Here they would succeed to the debt against the administrator. They are simply compelled to purchase a worthless debt, which they did not guaranty. Is it possible that this legal fiction can work such a result? The estate has lost nothing by the administration. By the procedure recommended in Baucus v. Stover as to the form of the decree settling the final account the estate would still retain the personal demand against the administrator, changed to a judgment. And, there being no official delinquency, except that created by the fiction which must stop where equity fails to go with it, there can be no reason for holding the sureties. They are considered as estopped by the decree founded, not on a fact, but on the fiction. The administrator, so far as the decree can subject him to imprisonment for failing to pay over the money, has equal reason to complain of its form. The same conclusion was reached in a different way by the supreme court of Vermont in Lyon v. Osgood, 58 Vt. 707, 7 Atl. 5. It was a suit in equity by a surety to reform the decree because it charged the executor with his entire personal debt, whereas it was alleged he had the means to pay only a part of it. The relief was granted, the court saying that the executor should not be charged for his personal debt beyond his actual ability to pay, "for only to that extent does he, by his appointment, receive money from himself belonging to the estate." And again the authorities are cited. They need not be repeated here. Unquestionably there is a conflict, but Woerner, in 2 American Administration, p. 1140, states that sureties are held not bound when the administrator is utterly insolvent in Indiana, Maine, Wisconsin, New Jersey, New York, Oregon, Pennsylvania, Tennessee, and Vermont. If this view is to prevail, there may arise a question as to the proper form of entering the decree settling the final account. It seems to me the mode suggested in Baucus v. Stover is a proper method, and that the decree involved here should be so modified. The administrator should be charged with the entire sum, including the debt due from himself, and the decree should then show what portion of that amount consisted of debts due from the administrator which he reported as cash on hand. Of course, if it appears that he actually has the money, this formula would be unnecessary. But under such a decree the administrator might be able to purge himself of contempt, and the sureties, if it should be held to be a defense,—for that is not involved here,—could show that some portion of it the administrator never had the means to pay. And the heirs could still proceed against the administrator, and collect the amount from him if he acquired the means. The case of Treweek v. Howard, 105 Cal. 434, 39 Pac. 20, is much relied upon by respondent. That was against the sureties of an executor. That decision was based upon the estoppel of the decree and upon section 1447 of the Code of Civil Procedure, which was construed to mean that the liability of the executor for such debt was in all respects the same as for money in his hands. That decision may be justified by the estoppel of the decree. The question is not so presented here. So far as it is based upon the statute, it is apparently in conflict with the cases in New York construing the statute from which our code provisions are taken. This is, however, not the case of an executor. The Code lays down no such rule in regard to administrators. They are still left under the common-law rule, under which, as we have seen, the debt due the estate from an insolvent administrator is not for all purposes regarded as money on hand, but is so regarded only by a fiction of law which can only subsist with justice. I do not see, under this view, that the appellant was injured by the ruling rejecting the offered evidence. The court should, perhaps, have permitted the evidence to be given, but the only relief it could have entitled him to receive is warranted by the evidence, put in by the contestant. The decree settling the annual account, including the findings, show that the administrator was charged, not for money actually received, but for a debt due from him to the estate. In Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639, it was held that the decree is in reality a judgment, and the findings are a part of the judgment roll. The findings in the matter of the first contest contain a full statement of the facts. The case is remanded, with directions to modify the decree so that it will appear upon the face thereof that a certain portion of the money in the hands of the administrator, to be stated therein, is for a personal debt due from the administrator to the estate of the decedent.

We concur: McFARLAND, J.; HENSHAW, J.

(6 Cal. Unrep. 294)

In re WALKER'S ESTATE. (S. F. 1,326.)

(Supreme Court of California. June 28, 1899.)

APPEAL—HARMLESS ERROR.

The striking out of evidence is harmless where it would have authorized no other relief than that warranted by the evidence admitted.

Department 2. Appeal from superior court, Sonoma county.

In the matter of the estate of John Walker, deceased. From an order settling the first annual account of J. M. Walker as administrator, he appeals. Affirmed.

J. M. Thompson, for appellant. J. A. Leppo, for respondent.

TEMPLE, J. This is an appeal from an order settling the first annual account of the administrator. The appeal was submitted at the same time as the appeal from the order settling the final account, a case similarly entitled, and numbered S. F. 1,327 (57 Pac. 991). As will appear from the opinion rendered in that case, it is not necessary to reverse or modify the order entered to give the appellant all the protection he can properly obtain, and that he was not injured by the ruling striking out the evidence introduced by him. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(125 Cal. 253)

CAMPBELL et al. v. DRAIS et al. (Sac. 504.)[1]

(Supreme Court of California. June 29, 1899.)

ADMINISTRATOR'S SALE — JURISDICTION — GUARDIAN AD LITEM — ESTOPPEL — LIMITATIONS.

1. Under Code Civ. Proc. § 1537, providing that, to obtain an order for sale of real estate to pay decedent's debts, petition must be made, and section 1538 that, if it appear to the court necessary to sell the real estate, an order must be made directed to persons interested to show cause why an order to sell should not be granted, and section 1539, providing that a copy of the order to show cause shall be served on persons interested, an order of sale is void; the court having obtained no jurisdiction of infants interested, in the absence of an order to show cause and service thereof on them.

2. Under Code Civ. Proc. § 1718, providing that, "at or before the hearing of petitions * * * for sales of real estate" to pay debts of decedents, the court may appoint some attorney to represent minors, the attorney for minors cannot be appointed till the court has obtained jurisdiction of the minors, by service on them as provided by section 1539, of the order to show cause; and waiver of the order to show cause by an attorney appointed for minors, without it, is ineffectual.

3. Code Civ. Proc. § 1573, providing that action for recovery of an estate sold by an administrator shall be commenced within three years next after the settlement of the final account, does not prevent action after that time by children of deceased to quiet title to their half interest in the land as to which the sale was void, where the purchaser at such sale acknowledged their title and held for them as tenant in common, and the action was against the mortgagee of such purchaser, who, when taking the mortgage, was informed of their title, and who purchased under foreclosure of the mortgage; they not being obliged to bring their action till he sought to gain possession under the title founded on the foreclosure.

4. Where an administrator's sale of lands to pay debts was void as to the half interest of decedent's children, and the purchaser acknowledged that they had a half interest, and before mortgaging the land told the mortgagee so, such children are not estopped by retention of money they received from the administrator's sale to maintain action to quiet title against the mortgagee purchasing under foreclosure of mortgage.

In bank. Appeal from superior court, San Joaquin county.

Action by John F. Campbell and others against Mary C. Drais, executrix of M. J. Drais, deceased, and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Nicol & Orr, W. B. Nutter, and Minor & Ashley, for appellants. Smith & Grant, for respondents.

McFARLAND, J. This is an action to quiet title to the undivided half of a certain piece of land described in the complaint. The plaintiffs are the children and heirs at law of John A. Campbell, deceased, who died May 21, 1873, seised in severalty of the whole of said tract of land, and it is conceded that the plaintiffs, as heirs of said decedent, are the owners of the undivided half of the land sued for, unless their title thereto has passed, either by virtue of a probate sale made in the administration of the estate of the decedent in 1874, or has been lost to them by the operation of the statute of limitations. Judgment in the lower court went for plaintiffs, and defendants appeal from the judgment and from an order denying their motion for a new trial.

Appellants claim title first as purchasers under the foreclosure of a mortgage made to M. J. Drais, now deceased, by one Church, and contend that Church had title through mesne conveyances by virtue of a probate sale of the property in 1874. We are satisfied, however, that the probate sale was invalid and void. The petition under which the sale was made was filed on the 17th day of January, 1874, and is as follows: "The petition of C. A. Campbell, administrator of the estate of said deceased, respectfully shows that heretofore, to wit, on the 14th day of October, 1873, petitioner filed his petition praying for an order of sale of certain real estate, and showing the necessity therefor; that, owing to a mistake in the inventory on file, the real property set forth in said petition did not belong to said estate; that therefore the order heretofore granted has become ineffectual; that a new inventory has been filed correctly describing the real estate belonging to said estate; that the facts which constitute the necessity for selling the real estate belonging to said estate still exists, and are as set forth in said former petition, to which reference is hereby made, and petitioner prays may be taken as a part hereof; that a hotel constitutes a portion of the improvements on the real estate belonging to said estate, which said hotel contains furniture for the use thereof; that said furniture is worth about two hundred and thirteen dollars and sixty cents. Wherefore petitioner prays that an order of sale be granted authorizing said administrator to sell said real estate and furniture at public sale, and for such further order as may be proper. [Signed by the attorney for the administrator, and verified by the latter.]" It appears that a former petition for the sale of the property had been filed October 14, 1873, but that on account of the supposed insufficient description of the property it had been abandoned. On the same day on which the second petition, above quoted, was filed, to wit, January 17, 1874, the order for the sale was made, and under this order the sale took place; and it is evident that the order for the sale made, under these circumstances, was invalid and void. Section 1537 of the Code of Civil Procedure provides that, to obtain an order for the sale of real property, a petition in writing must be made to the superior court, setting forth certain facts; and section 1538 provides that, if it appears to the court from the petition that it is necessary to sell the real estate, an order must be made directing all persons interested in the estate to appear before the court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary; and section 1539 provides that a copy of the order to show cause must be personally served on all persons interested in the estate, including the heirs, at least ten days before the time of hearing, or be published four successive weeks in such newspaper as the court shall direct. In the case at bar, no such notice to show cause was made, and no service of any kind was made upon the respondents herein, who at that time were all minors, the oldest of them being only about 12 years old. The respondents contend that the petition did not give jurisdiction because it contained no description of the property to be sold; but, if it could be held that a reference to various documents referred to in the petition might, under a very liberal construction, show a sufficient description of the property, still the absence of any order to show cause and of any service of the notice upon respondents are fatal to the validity of the sale. And this difficulty is not obviated by the fact that one Hall, who had been appointed attorney for minor heirs, did, on the date when said petition was made, file with the court a document of which the following is a copy: "Waiver of notice: The undersigned attorney, appointed to represent the minor heirs during the settlement of said estate, hereby waives notice of hearing of petition for sale of said real estate, and assents to an order of sale as prayed for in said petition, and for the reasons and causes therein stated." The attorney for minor heirs can represent them only in a proceeding which has been duly inaugurated and in which the court has already jurisdiction of the minors by such service of summons or notice as the Code provides. He cannot waive their rights, or by any of his acts invest the court with jurisdiction of their persons which it had not already acquired. Section 1718, which provides that, "at or before the hearing of petitions * * * for sales of real estate," the court may appoint some attorney to represent minors, evidently refers to some particular proceeding, and, taken in connection with other provisions of the Code, clearly contemplates a proceeding in which the court has already acquired jurisdiction of the minors. Such was the ruling of the court touching the appointment of a guardian ad litem in Gray v. Palmer, 9 Cal. 628, where it was said: "The court had no right to appoint a guardian ad litem until the infant was properly before the court;" and in Galpin v. Page, 18 Wall. 365, the court say that the record showed "that the district court never acquired jurisdiction over the person of Franklina C. Gray in one of the actions, and therefore had no more authority to appoint a guardian ad litem for her in that action than it had to appoint attorneys for the other defendants." These principles apply here; for, while probate proceedings are at least quasi proceedings in rem, yet, where the statute provides for the service of notice upon persons, the same rule applies as in ordinary civil actions. The probate court, therefore, had no jurisdiction to make the order of sale under which appellants claim, and the sale was invalid and void. The fact that in 1874 section 1718 provided that "the appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent" does not change the principle. This language implies that there must be notice to the parties and proof of the service of such notice, and merely means that after such service the appearance of the attorney, under certain circumstances, may be taken as sufficient proof of the fact of service. But in the case at bar it appears affirmatively that there was neither notice nor service, and that the attorney undertook to waive both.

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[1] Rehearing denied July 28, 1899.

The court below correctly held that the action was not barred by sections 318, 319, 320, and 1573 of the Code of Civil Procedure, or either of them. The sale under the probate order was made to one Hewitt, to whom in March, 1874, an administrator's deed was given, which purported to convey to Hewitt in severalty the whole of the tract of land of which the undivided half is involved in this action. Hewitt held and occupied the land for a few days, and on March 11, 1874, conveyed the same by deed in severalty to one Cross, who held and occupied the same until February, 1876, when he conveyed the land by deed purporting to convey the whole in severalty to one Church, who at that time entered into the possession of the land, and has been in possession ever since. While Cross was in possession he allowed the widow of John A. Campbell, deceased, to build a house upon a portion of the land, and to occupy it with her minor children, and in 1876 Church married the widow, and the children continued to live on the land with Church and their mother during and after their minority. They were raised and treated by Church substantially as if they had been his own children. Perhaps the evidence does not quite warrant the finding of the court that during all this time Church recognized the children as owning an undivided one-half, and held possession as a tenant in common with them. It is probable that for a period exceeding the statutory limitation of five years Church thought that he owned the land in severalty, and treated it as if he so owned it. During most of that time, however, the plaintiffs were minors. Some time between 1886 and 1890 Church told at least one of the plaintiffs that they (the children) had an interest in the property; and in 1890, and before the execution of the mortgage to Drais, under which appellants claim, he said to all the plaintiffs that they owned one-half. Moreover, before Drais took the mortgage in December, 1890, Church informed him that the children owned one-half, and called his attention to an abstract of title showing that fact; and, after considerable conversation between them upon the subject, Drais agreed to take the mortgage with the knowledge that, although it covered the whole title to the land, yet it probably would be good for only an undivided one-half. All the plaintiffs had attained their majority a little more than three years before the commencement of this action, and the final account of the administrator of the estate of Campbell, deceased, had been settled more than three years before the commencement of the action; and therefore appellants contend that the action is barred by section 1573 of the Code of Civil Procedure, which provides that no action shall be maintained for the recovery of an estate sold by an executor or administrator unless it be commenced within three years next after the settlement of the final account. But plaintiffs had no cause of action against Church, for he acknowledged their title and was holding for them as a tenant in common, and they could not have litigated their title in the foreclosure suit because they held by a paramount title, and not under the mortgagor. They were not, therefore, called upon to bring any action until the purchasers under the foreclosure judgment sought to gain possession under their title founded upon that judgment. The money which Hewitt paid for the land at the original administrator's sale was used partly to pay off debts of the estate, and there was a residue which was distributed, and a part of the money so distributed was received by the plaintiffs; and it is contended by appellants that this fact estops the plaintiffs from bringing this suit, and that, at all events, they cannot maintain the suit while retaining that money. Whether minor heirs, who are merely passive during the administration of an estate, and enter themselves into no contracts, are bound to restore money which comes to them upon a void sale is a question not necessary to be determined (see Hill v. Den, 54 Cal. 6), for this principle would not apply here. There is no reason why the money, under any view of the law, should be paid to these present appellants, and there are no elements of estoppel here, because Drais took his mortgage having knowledge of the true state of the title, or the means of acquiring it. If the affirmance of the judgment works any injustice to the appellants, we see no way, under the law, to prevent it. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; HARRISON, J.; GAROUTTE, J.; VAN DYKE, J.

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125 Cal. 266

SILVERIA v. IVERSON et al. (S. F. 1,153.)

(Supreme Court of California. June 30, 1899.)

MASTER'S LIABILITY—JUDGMENT—AMENDMENT.

1. It being the duty of the owners of a vessel, to one employed by them thereon to do any services that he might be called upon to do, to supply a good reefing pennant; and he, through their failure to do so, having been injured while reefing the sail as directed, they are liable, whether or not their failure was due to negligence.

2. Error cannot be predicated of the fact that judgment was first rendered against all of defendants, and afterwards amended by striking out the name of O., where it can be presumed, in support of the judgment, that O. was not served with summons, and did not appear; that, on motion of plaintiff, the action was dismissed as to him, and that plaintiff properly proceeded against the other defendants, as provided in Code Civ. Proc. § 414; and that O. was improperly included in the judgment by mistake or inadvertence of the clerk.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by William Silveria against Niels Iverson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Gunnison, Booth & Bartnett (H. W. Hutton, of counsel), for appellants. F. J. Castelhun, for respondent.

McFARLAND, J. Appeal by defendants from a judgment in favor of plaintiff. Defendants did not interpose any demurrer, but the main point which they now make for a reversal is that the complaint does not state facts sufficient to constitute a cause of action. It is averred in the complaint that plaintiff was employed by defendants, who were the owners of a certain coasting schooner, called the "Ocean Spray," to cook on said schooner, and to perform such other services as the captain of the vessel might call on him to perform; that "it was the duty of the defendants to provide said schooner with good, safe, and strong ropes, tackle, and sailing apparatus, but that the defendants, disregarding their duty in that behalf, provided and used an old, worn-out, rotten, and defective reefing pennant with which to reef the mainsail, of which they had notice"; that on a certain named day, "while plaintiff, in obedience to the orders of the captain of the said schooner, was assisting in reefing the mainsail in the usual and proper way, by pulling at the reefing pennant in the usual and proper way, the said reefing pennant broke"; that, when the pennant broke, plaintiff was upon the roof of the cabin, which was the usual and proper place for him to be when doing said work; and that "when the said reefing pennant broke, as above stated, plaintiff fell backwards from the roof of the cabin, a distance of about six feet, striking the deck with his right shoulder," whereby his shoulder was dislocated, and other injuries were done to him, which are specifically described.

Appellants assail the complaint mainly on the ground that it contains no express averment of negligence; that is, that the word "negligently," or some equivalent word or phrase, is not used in the complaint. Waiving the fact that the answer contains merely denials of the averments of the complaint, and that in support of the judgment it must be presumed that the case was tried as if the averments were sufficient, our opinion is that, at least in the absence of a special demurrer, the complaint states a sufficient cause of action. It is true that in certain cases, where the facts stated do not constitute a cause of action unless done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. But in the case at bar the facts alleged do themselves constitute a cause of action. From the averred relation of the parties, it was the duty of appellants, as averred, to supply a good reefing pennant; and not having done so, and by reason thereof the respondent having been injured, the appellants were liable for damages, whether the wrongful act was the result of negligence, or intention, or other cause. The facts alleged constitute a cause of action. The defect in the pennant is sufficiently stated, and it is sufficiently averred that this caused the injury to respondent.

2. There were four named defendants,—Iverson, Gerdau, and Lassen, who were served and appeared and answered, and Omundsen, who did not appear, and as to whom there is no evidence of service; and appellants contend that the judgment should be reversed because, as they say, it was first rendered against all four, and was afterwards amended by striking out the name of Omundsen. Counsel, to some extent, argue this point as if there were a bill of exceptions showing exactly what occurred with respect to this matter; but there is nothing before us except the judgment roll, which contains merely the pleadings, the verdict, and the judgment. The judgment has a reference to Omundsen, from which, perhaps, we may conclude that appellants are warranted in claiming that it was first rendered against all four of the defendants, and afterwards amended by striking out the name of Omundsen; but, granting this, it may be presumed, in support of the judgment, that Omundsen was not served with summons, and did not appear; that on motion of plaintiff the action was dismissed as to him, and that plaintiff properly proceeded against the other defendants, as provided in section 414, Code Civ. Proc.; and that Omundsen was improperly included in the judgment by mistake or inadvertence of the clerk. Under such circumstances, the judgment against Omundsen was a nullity on its face, and appellants were in no way prejudiced by the amendment. It was proper for the court to strike out the name of Omundsen, and, if it had not done so, this court, on appeal, would have ordered the amendment. Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

125 Cal. 261

WOOD v. JORDAN. (S. F. 1,588.)

(Supreme Court of California. June 30, 1899.)

JUDGMENTS—COLLATERAL ATTACK.

Judgment foreclosing the lien of a street assessment cannot be collaterally attacked, personal service of defendants in the action to foreclose having been had, and they having appeared and contested the action and the validity of the assessments, and having failed to appeal, the court having thus had jurisdiction over the person and subject-matter.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Abbie Rose Wood, administratrix of Joseph M. Wood, deceased, against James C. Jordan. Judgment for plaintiff. Defendant appealed. Affirmed.

Charles F. Hanlon, for appellant. J. C. Bates, for respondent.

HENSHAW, J. Joseph M. Wood in his lifetime commenced this action against James C. Jordan. Upon his death while the action was pending, his administratrix was substituted as plaintiff in his place. The action was to quiet title. Plaintiff claimed both by record title and by prescription. He was successful under his first claim, and unsuccessful as to the second. Defendant appeals from the judgment and from the order denying him a new trial.

Plaintiff's record title comes from the sale by the sheriff and his subsequent deed upon foreclosure of certain liens for street assessment upon the land in question. Defendant's title comes by mesne conveyance from the owner of the lands affected by the actions to foreclose the street assessment, the deeds having been made after judgments in the foreclosure suits. The attack upon plaintiff's title is based upon the contention that the judgments in the foreclosure suits were void because of asserted irregularities in the assessments which were the foundations of the actions. In the actions to foreclose the lien of the street assessments, personal service of the defendants was had. They appeared and contested the action and the validity of the assessments, were defeated, and failed to appeal. The court thus had jurisdiction over the person and over the subject-matter, and its decree was a finality. It is in the exercise of the taxing power that street assessment liens are imposed upon the land of the property owner. "Jurisdiction being obtained over the person and over the subject-matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be devested by being improperly or incorrectly employed. * * * The same rules apply to actions to recover delinquent taxes as in other cases in respect to collateral attacks. It cannot be shown to avoid the effect of such judgments that the taxes were previously paid. Neither will such judgment be in the least affected because it appears from the judgment roll that the assessment was illegal and void." Freem. Judgm. § 135. The conclusiveness of judgments, and their freedom from collateral attack, have been directly held to apply to judgments for the foreclosure of street assessments. Mayo v. Ah Loy, 32 Cal. 477; People v. Doe, 36 Cal. 220; Eitel v. Foote, 39 Cal. 439; Mayo v. Foley, 40 Cal. 281; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. 797. See, also, Hahn v. Kelly, 34 Cal. 391. The judgments which were the foundations of the sheriff's deeds in question were certainly not void, and, whatever may be the alleged errors, they may not be reviewed upon this collateral attack. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(125 Cal. 263)

WOOD v. JORDAN. (S. F. 1,087.)

(Supreme Court of California. June 30, 1899.)

DISMISSAL OF ACTION.

Code Civ. Proc. § 581, providing that an action may be dismissed by plaintiff, provided a counterclaim has not been made or affirmative relief sought by defendant, does not prevent such dismissal of action to quiet title, though the answer asserts title in defendant, denies plaintiff's right of possession, alleges an ouster by plaintiff, and prays for a decree establishing defendant's title and enjoining plaintiff from asserting any claim to the land or interfering with the possession.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Abbie R. Wood, administratrix of J. M. Wood, against James C. Jordan. From an order refusing to vacate the judgment of dismissal, defendant appeals. Affirmed.

Charles F. Hanlon, for appellant. J. C. Bates, for respondent.

PER CURIAM. An action was brought by the plaintiff to quiet his title to certain pieces of land in the city and county of San Francisco, plaintiff alleging that he was in possession. Upon his death his administratrix was substituted in his place. Defendant answered asserting title in himself, denying plaintiff's right of possession, alleging an ouster by plaintiff of defendant's possession, and concluding with a prayer for a decree establishing his title, and enjoining plaintiff from asserting any claim to the land, or interfering in any manner with the possession thereof. Thereafter plaintiff procured a dismissal of the action, and a judgment of dismissal was duly given. Defendant then moved to vacate the judgment of dismissal, and from the order of the court refusing so to do he prosecutes this appeal. He insists that by his answer he seeks affirmative relief, and that under section 581, subd. 1, Code Civ. Proc., it was erroneous for the court, under these circumstances, to dismiss the action. But this contention has been definitely settled against him in Moyle v. Porter, 51 Cal. 639. The order appealed from is affirmed.

(125 Cal. 264)

KNOWLES v. CROCKER ESTATE CO. et al. (S. F. 1,037.)[1]

(Supreme Court of California. June 30, 1899.)

FORCIBLE ENTRY—COMPLAINT—POSSESSION—DEMURRER FOR UNCERTAINTY.

1. Under Code Civ. Proc. § 1172, requiring plaintiff in action for forcible entry to prove that he was "peaceably in the actual possession at the time of the forcible entry," a complaint alleging that "plaintiff was in the peaceable and undisturbed possession" is defective, as not alleging actual possession, as distinguished from constructive possession.

2. Where a complaint in action for forcible entry, alleging that "plaintiff was in the peaceable and undisturbed possession" at the time of the entry, is defective, in not alleging actual possession, the defect is sufficiently taken advantage of by a special demurrer on the ground of uncertainty, in that it cannot be ascertained from the complaint "what was the character of the alleged possession of plaintiff of the property described."

Department 2. Appeal from superior court, San Mateo county.

Action by Frank S. Knowles against the Crocker Estate Company and others. Demurrer to complaint was overruled, and judgment rendered for plaintiff, and defendants appeal. Reversed.

Morrison, Foerster & Cope and George C. Ross, for appellants. B. B. Newman and E. F. Fitzgerald, for respondent.

PER CURIAM. Action founded on an alleged forcible entry upon real property, and also a forcible detainer thereof. In the first count of the complaint it is alleged, among other things, that on November 16, 1896, plaintiff was in the peaceable and undisturbed possession of certain described lands, and that while he was so in possession the defendants, with force, etc., entered thereon, and "in a forcible manner ejected plaintiff and put him out of said real property," and broke down his fences inclosing the same. In the second count of the complaint, plaintiff repeats by reference the allegations of the first, and further avers that since the said forcible entry the defendants, by force and menaces and threats of violence, have held, and yet hold, possession of the land aforesaid. Defendants demurred to each count of the complaint on the grounds that it does not state facts sufficient to constitute a cause of action, and for uncertainty, in that it cannot be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described." The court overruled the demurrer, and, upon the subsequent trial of the cause, rendered judgment in plaintiff's favor for restitution of the premises with treble damages.

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[1] Rehearing denied July 28, 1899.

The only question of moment made by defendants on appeal concerns the ruling of the court on the demurrer. They urge that the first count of the complaint was bad, for that it does not allege actual possession by the plaintiff at the time of the forcible entry. The statute requires that plaintiff shall prove, in actions of this nature, that he was "peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer." Code Civ. Proc. § 1172. And there is no doubt that in the proceeding for a forcible entry, as in the first cause of action of the complaint here, the plaintiff must show by his pleading that he was in actual possession of the property when it was invaded by the defendant, since it is intrusion upon actual possession, as distinguished from constructive, for which the statute was designed to afford a summary remedy. Cummins v. Scott, 23 Cal. 526; More v. Del Valle, 28 Cal. 170; Voll v. Hollis, 60 Cal. 573, 574; Ely v. Yore, 71 Cal. 130, 11 Pac. 868. This complaint is unquestionably a defective pleading. Whether it is so radically defective as to be open to successful attack upon general demurrer, or whether it may be said that, by way of argument and inference, it contains averments sufficient to pass a general demurrer, need not here be decided; for we think it beyond question that the ground of special demurrer was well taken, and the amendment to the complaint which must follow the sustaining of the special demurrer should relieve the pleading from the defect complained of under the general demurrer.

The ground of special demurrer, as above pointed out, was that the complaint was uncertain, in that it could not be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described." It may be conceded that the phrase "character of possession" is in itself one of doubtful import. Still, it is a sufficient specification of the ground of uncertainty, if it fairly directs the mind of the pleader to the vulnerable point in his complaint. The law requires that the possession shall be actual. This characteristic of plaintiff's possession is essential to his right to maintain such an action, and we think no pleader could justly say that such a specification was insufficient to put him upon notice that his complaint was assailed for insufficiency or uncertainty in this regard. The judgment is therefore reversed, and the cause remanded, with directions to the trial court to sustain the special demurrer to the complaint, with leave to plaintiff to amend.

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6 Cal. Unrep. 294

BRADBURY et al. v. McHENRY et al. (S. F. 803.)

(Supreme Court of California. July 1, 1899.)

REMARKS OF COURT—HARMLESS ERROR—CONTRACTS—EVIDENCE—MATERIALITY.

1. A remark made by the court, on rejecting evidence offered by plaintiffs, that he could see the dilemma plaintiffs were in, and wished to give them all the latitude possible, but did not see the materiality of the testimony offered, was not reversible error, as, in effect, telling the jury that plaintiffs had no case.

2. On an issue of implied contract of a landowner to pay for a well, evidence of the capacity of the well, and of the amount of stock on the place, and of the fact that crops were being raised where none were raised before, is immaterial.

3. Evidence that a tenant did not think he was liable to pay for the boring of a well on the premises is not admissible against the landlord to show that he was liable therefor.

4. In an action against a husband and wife to pay for boring a well on the wife's premises, which had been leased to a firm composed of the husband's brother and a third person, evidence as to whether the husband and his brother had ever been partners is immaterial.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Bradbury & Caylor against John McHenry and another. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

O'Brien, O'Brien & O'Brien, for appellants. John Flouroy, for respondents.

COOPER, C. This action was brought by plaintiffs to recover of defendants the sum of $2,034.45, alleged to be due upon an express contract for services rendered and material furnished in boring for defendants an artesian well. The facts as to the boring of the well and the value of the services and material were not controverted. The premises on which the well was bored belonged at all the times referred to in the complaint to the defendant Nellie McHenry, who is the wife of defendant John McHenry, but were leased to, and in the possession of, one James McHenry and Philip L. Wooster, partners under the name of Wooster & McHenry. James McHenry was a brother of defendant John McHenry. It was claimed by defendants that the well was bored at the request of, and under a contract with, the firm of Wooster & McHenry, and that defendants had nothing to do with the employment of plaintiffs in any manner. The question was as to whether plaintiffs' contract was with defendants, as contended by plaintiffs, or with the firm of Wooster & McHenry. It was established without contradiction that, prior to the commencement of the present suit, the plaintiffs commenced an action against the firm of Wooster & McHenry by filing a verified complaint, alleging that the amount now claimed was due from said firm of Wooster & McHenry upon an express contract. An affidavit for attachment was made in said last-named action by Bradbury, one of the present plaintiffs, in which he swore the amount was due and owing from Wooster & McHenry upon an express contract. After said last-named action was commenced against said Wooster & McHenry, they filed a petition in insolvency, and the plaintiffs dismissed the said action. The evidence on the part of the defendants in this case was to the effect that they made no contract with plaintiffs, did not employ them, and had nothing to do with having the well bored. The case was tried before a jury, and verdict for defendants. Judgment was thereupon rendered. Motion for a new trial made and denied, and this appeal is from the judgment and order. The instructions given to the jury are not in the record, and plaintiffs' counsel admit that there is sufficient evidence to sustain the verdict.

The contention here is that prejudicial error was committed by the court below in the rejection of testimony and in certain remarks made by the court in the presence of the jury. While the witness Wooster (a member of the firm of Wooster & McHenry) was being examined on behalf of plaintiffs, in rebuttal, he stated that he remembered the fact of going to the well about the time it was being completed, and there seeing a band of hogs, and the witness was asked by plaintiffs' counsel if the hogs were represented to him as belonging to the farm. The testimony was objected to as being incompetent, immaterial, and not in rebuttal. The court sustained the objection, and counsel for plaintiffs then made a statement of certain facts which he offered to prove by the witness, and, among other facts, "a general course of conduct on the part of James McHenry showing that James McHenry did not himself regard the firm of Wooster & McHenry as the parties liable to pay for the well." The court thought the evidence not in rebuttal or material, and in ruling upon the question said: "I can see the dilemma the plaintiffs are in. I wish to give them all the latitude I possibly can, but I don't see what figure this testimony would cut in the case." It is claimed that the above remark was highly prejudicial to the plaintiffs, and that it was the equivalent of telling the jury that the plaintiffs had no case. While it would have been better for the judge to have refrained from making the remark, we do not think it such error as would justify a reversal. It was not an opinion upon any question of fact or upon the credibility of any witness. It was in the nature of an explanation to plaintiffs' counsel as to why the court desired to be liberal towards them. It is presumed that the jury were fully and properly instructed as to the law of the case, and that they acted upon the instructions given them as applied to the facts. It would seem to us that to presume that this remark might have influenced the jury, and caused them to disregard the law, would be to attach an imaginary and unnecessary meaning to the remark, and, further, that it would reflect upon the jury as not being men of ordinary intelligence. The case of McMinn v. Whelan, 27 Cal. 320, cited by counsel, presents quite a different question. In that case the character of a witness for plaintiff was called in question during the trial by the defendant on cross-examination. The court, in overruling an objection to the cross-examination, said "that the witness was one of the most respectable women in the neighborhood." While this court held the remark to have been highly improper, it refused to reverse the case, because it did not depend in any material degree upon the testimony of the witness whose character was thus indorsed by the judge. If the court below should give an opinion as to the weight of evidence, or as to the character of either of the parties, or of a material witness, we would not hesitate to condemn such course, but in this case we cannot say that the remark injured the plaintiffs' cause before the jury.

It is claimed that the court erred in sustaining objections to many questions asked by plaintiffs' counsel for the purpose of showing that the well was a great benefit to defendants' land; its capacity in the way of furnishing water; that before it was placed there defendants could not raise a crop on the place. The court below, in ruling upon the admissibility of the evidence, said that the plaintiffs would be allowed to show that the defendants accepted the well and were using it, but that the evidence as to the capacity of the well, and the fact of crops being now raised where none were raised before, was immaterial, and not competent evidence to bind the defendants. We think the ruling correct. The complaint averred an express contract, and, conceding that evidence of an implied contract was admissible, the offered evidence was not competent. The capacity of the well placed upon the property of defendants by their lessees, and the benefit it might be to the property, are not facts tending to show an implied contract. If the value of the well was a fact in issue, then its character and capacity might tend to throw light upon such issue; but it seems to us that if the court had allowed evidence as to the number of hogs upon the ranch, the capacity of the well, and the effect it had upon crops, it would not even tend to show an implied contract on the part of these defendants.

We do not think the questions asked by plaintiffs' counsel of the witness Wooster were material or in rebuttal. They were asked for the purpose of showing that the witness, while a partner of James McHenry, understood that his firm, Wooster & McHenry, was not responsible for the boring of the well. To prove that some other party was not responsible would not tend to show that defendants were responsible.

It is argued by plaintiffs that the court erred in sustaining defendants' objection to plaintiffs' question to the witness Wooster. The witness was asked if the McHenry brothers had ever been in partnership. The question was objected to upon the ground that it was immaterial and not in rebuttal. The question was subject to both objections. It was not in rebuttal, as no witness had testified either way as to any partnership between the McHenry brothers, and, if there had been such testimony, the fact is wholly immaterial. It would not tend to prove a contract on the part of these defendants to pay for the well, as alleged in the complaint. Many other similar errors in rulings are assigned, but none of them require special notice. They all depend upon the principles and rulings herein discussed, and we find no error in the record of sufficient importance to justify a reversal of the case. The judgment and order should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(124 Cal. 546)

LAMPE v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 982.)[1]

(Supreme Court of California. July 1, 1899.)

In bank. Appeal from superior court, city and county of San Francisco.

Dissenting opinion. For opinion of majority, see 57 Pac. 461.

BEATTY, C. J. Having dissented from the order denying a rehearing of this case, I wish to state that my reason for so doing is that this opportunity for reviewing, and if possible reconciling, a series of apparently conflicting decisions upon a question of vital importance, should not be lost. This case, in my opinion, is in conflict with Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750, as that was in conflict with Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798. In the Corcoran Case, as in this case, it was held that the plaintiff had no right of action. In the Eachus Case it was held that he did have a right of action, and if, as I contend, the three cases are all governed by the same principle, it is time that the court should plainly declare what the rule is with respect to the right to damages in all cases, or what the distinction is between the two classes of cases, if there is a distinction.

It is held that the owner of a low lot, flooded with surface water by the grading of a street, is entitled to no compensation for the damage. At the same time it is held that the owner of a high lot, made difficult of access by lowering the surface of the street to bring it to the established grade, is entitled to damages. Why this difference? It is the established law of California that the owner of higher land has an easement for the natural discharge of surface water upon the lower land adjoining, and the right of access to one's land over a highway is but an easement. The two rights, although not identical, are of the same nature, and are equally entitled to be protected from unlawful invasion. Why is it, then, that a city may with impunity destroy one right by bringing a street to the established grade, when for infringing the other right by doing the same thing it must make compensation? This is a question which has not been answered thus far, but it is a question for which an answer ought to be found, if such opposite rules of decision are to prevail. The only substantial reason ever assigned for denying compensation to the owner of a low lot flooded with surface water by raising a street to the established grade is that he acquires his lot with knowledge that the city has power to establish a grade for its streets, to which the surface of the lots must be made to conform; and this reason applies with as much force to the lowering of the natural surface as to the raising of it, and to any consequential injury from either cause. If it is a good reason for denying damages to the owner of the low lot for flooding, it is equally conclusive against any allowance of damages to the owner of the high lot by making it inconvenient of access. Whatever the rule is, it ought to be the rule for every like case.

(125 Cal. 291)

BROWN v. McKAY. (S. F. 986.)[1]

(Supreme Court of California. July 1, 1899.)

ADVERSE POSSESSION—INTENT.

A father caused himself to be appointed guardian for his two minor sons, who had inherited from their mother an undivided two-thirds interest in one tract and an undivided half interest in another; being also their tenant in common. He managed the property until his death, and theretofore, when one son had come of age, he leased the latter tract to him. In his will he devised his one-third interest in the former tract to the sons. All parties had always been friendly. *Held*, that the father did not hold either tract adversely to the sons, beyond his own interest.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by James D. Brown, as assignee of the estate of Angus McKay, an insolvent debtor, and as assignee of said debtor for the benefit of his creditors, against Angus McKay. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

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[1] Rehearing denied June 30, 1899.

[1] Rehearing denied July 28, 1899.

Bartholomew Noyes and G. R. Lukens, for appellant. W. S. Goodfellow, for respondent.

GAROUTTE, J. This is an action of ejectment brought by the assignee in insolvency against the defendant, Angus McKay, who was also the insolvent debtor. The facts are these: Mrs. Mary A. McKay, wife of David McKay, died in 1859, leaving two sons,—this defendant, Angus McKay, and David McKay, Jr.; this defendant then being of the age of 5 years, and David being still younger. At the time of her death she was the owner of a piece of property in the city of San Francisco described in this record as the "Dupont Street Property," and she also possessed a community interest in the piece of property here designated as the "Davis Street Property." As heirs at law of their mother, an undivided one-third of the Dupont street property passed to each of the sons, and likewise an undivided one-fourth of the Davis street property. In 1883 defendant, Angus McKay, was adjudged an insolvent debtor, and his estate was administered upon, the debtor was discharged from his debts, and thereafter the then assignee died. No part of the real estate here mentioned was included in the assets of the insolvent's estate. In 1894 David McKay, the father, died, leaving a will. Upon his death it first came to the knowledge of the sons that, as heirs of their mother, they became the owners of the aforesaid interests in the two described tracts of land. Thereupon, pending the administration upon the father's estate, Angus McKay took out letters of administration upon his mother's estate; and this property, under such administration, was finally distributed to the sons in the proportions aforesaid. Thereafter this plaintiff was appointed assignee in the insolvency proceedings to succeed his dead predecessor, and now seeks by ejectment to recover the possession of defendant's interest in the land inherited by him from his mother. The only defense made to this action is the plea of the statute of limitations; defendant now claiming that his father, prior to his death, obtained title to the property here involved, by adverse possession. The trial court declared the facts in accordance with this claim, and rendered judgment for defendant. This appeal is taken from that judgment, and also from the order denying a motion for a new trial.

Upon a careful examination of the record, the court has arrived at the conclusion that the facts to support the claim of adverse possession in the father are too meager to accomplish that result. The case, in its facts, upon the question of adverse possession, is a peculiar one, viewed from various standpoints. It is peculiar in this: Defendant, Angus McKay, during the period dating from his mother's death (1859) to his father's death (1894),—the period in which the adverse possession must have been created,—never knew that he owned an interest in this real estate. Again, in this litigation he is relying upon an adverse possession against himself, created by his father. In other words, he is relying upon title in himself as the heir of his father, who, he claims, secured title to this property by adverse possession against him; and he makes such claim in face of the fact that he administered upon his mother's estate after his father's death, claiming throughout those proceedings that the property here involved was her property, and passed to him by reason of his heirship. But, however interesting these novelties may be, they are not determinative of the case, and we pass to the facts upon which the claim of adverse possession in the father is based.

Eo instante upon the mother's death, in 1859, the father and the sons became tenants in common of these two parcels of land. As has been stated, the defendant was then about 5 years of age, and his brother younger. In 1861 the father, David McKay, filed a petition in the probate court setting forth that his two sons held undivided interests in these two parcels of land as heirs of their mother, and asked to be appointed guardian of their estates. The court made the order of appointment, and the record of the proceeding here ends. The defendant became of age in 1875, and prior to that time there is not a particle of evidence tending to show any adverse claim to this property made by the father against his minor sons. He simply cared for the property, and that was all. He paid the taxes, he collected the rents, he insured the property, and he made the repairs. No one of these acts in any way or degree is inconsistent with his position as a tenant in common, especially in view of the fact that his minor sons were his cotenants. As substantially settling the question in favor of the title of the minors during their minority, the father's declaration in his petition for letters of guardianship may be cited. After the arrival of the defendant at years of majority, we find but a single additional circumstance tending in any way to support the theory of the defendant that the father's intentions towards his title were hostile, and this is but a trifle. During the years from 1877 to 1883 the father leased to the defendant the Davis street property at the monthly rental of $100 per month. This circumstance, conceding it material as to the Davis street property, is wholly immaterial as to the Dupont street property. Upon the other hand, taking all the facts of the case together, it is incredible that the father of these two boys, before or after their arrival at the age of majority, ever intended to gain title to this property from them by adverse possession. Hostile intent of the party in possession is all important in such a case, and we feel safe in saying there is no hostile intent manifested here. We have the express declaration of the father in 1861 that he had no such intent, and his conduct thereafter is entirely consistent with such declarations. During this whole period, extending up to the very day of his death, the relations of David McKay, Sr., with his boys, were of the most friendly character. This is shown by the fact that the defendant acted as his agent during his absence in the collection of rents; that the son David was appointed executor of his last will and testament; that the father advised and counseled with the defendant during his pecuniary embarrassments, and assisted him in the preparation of his petition in insolvency; that under his will, as evidenced by the decree of distribution, he devised in equal shares to his two sons his undivided one-third interest in the Dupont street property. These things show the friendly relations existing between the father and the sons, and the utter improbability that any intent ever existed in the mind of the father at any moment of time to supplant the title of his sons in these lands by a title of his own under a claim of adverse possession. As an additional consideration looking to this conclusion, it may be said that the father was half a millionaire, as shown by the inventory and appraisement of his estate, while the interest of the defendant in these two lots is appraised at the sum of $4,000. There is a further consideration which strongly impresses the court with the conclusion that McKay, Sr., never claimed title to the interest of his sons in this property. By the inventory and appraisement filed in his estate, his interest in the Dupont street lot is described as an undivided one-third thereof, and by the decree of distribution an undivided one-third of said Dupont street lot is distributed to the two sons in equal shares. For some reason, not understood by the court, the will of David McKay, Sr., is not in the record; but, in view of the inventory and appraisement and the decree of distribution, it is evident that David McKay, by his will, did not attempt to dispose of the entire Dupont street property, but only attempted to dispose of an undivided one-third interest therein. Such disposition of his property by his will is wholly inconsistent with a claim of title in him to the entire tract, and it is almost conclusive evidence that he never at any time made such claim. This being the status of the Dupont street lot, we safely assume that, if he made no claim of title in himself to that property, he likewise made no claim to the Davis street property. All presumptions of law, of fact, and of good morals are against an adverse holding in a case possessing the facts of this case; and, to overcome those presumptions, there must be a showing by the record of clear, direct, and unequivocal acts upon the part of the adverse holder indicating an intention to claim the property as his own. Such a case is not made out by this record. It may be further suggested that the case disclosed by the record is not one of conflicting evidence. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN DYKE, J.; HARRISON, J.

(125 Cal. 288)

GLUECK et al. v. SCHELD. (Sac. 472.)

(Supreme Court of California. July 1, 1899.)

NEGLIGENCE—FIREARMS.

1. While defendant was repairing a pistol, it was discharged, and an onlooker, standing 150 feet away, was killed. Defendant knew that the weapon was loaded, that it was being handled in a manner likely to discharge it, and that it was pointed in the general direction of the bystander. *Held*, that a finding of negligence was justified.

2. Defendant had been shooting at a target 135 feet away, and an onlooker stood 40 feet to one side of the target, in spite of a warning of danger. While defendant was repairing his pistol, it was accidentally discharged, and the bystander was killed. *Held*, that deceased was not guilty of contributory negligence.

Department 1. Appeal from superior court, Sacramento county.

Action by Johanna Glueck and others against Adolph P. Scheld. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

A. L. Hart and A. M. Johnson, for appellant. Isaac Joseph, T. J. Crowley, and F. C. Castelhun, for respondents.

GAROUTTE, J. The widow and children of Frederick Glueck, deceased, have brought this action against defendant to recover damages for his death, which occurred under the following state of facts: Defendant and a friend were firing at a target with pistols at a distance of about 135 feet, and near the home of Glueck. He was standing at a right angle from the target and defendant, and some 40 feet distant from the target, and 150 feet distant from defendant, observing the firing. Defendant's pistol became disarranged, and while holding it upon his knee, and in the act of repairing the defect, it was fired, and the ball struck and killed deceased, Glueck. The pistol was pointed in the general direction of Glueck at this time. The evidence is sufficient to indicate that fact, especially so when the sad results of the shot are considered. Upon this state of facts, were the jury justified in holding defendant pecuniarily liable? The true solution of this question is dependent upon the propositions, viz.: Was the defendant guilty of negligence, and, if so, was the deceased guilty of such contributory negligence as would release defendant from liability? Appellant's counsel contend with but little zeal that defendant was not guilty of negligence. A party who is engaged in manipulating a loaded pistol in the presence of other people should use great care in such manipulation; and the fact that this pistol was pointed in the general direction of the deceased, with knowledge of defendant that it was loaded, and with the further knowledge by him of the location of the deceased at that time, and in view of the further fact that it was being manipulated in a manner which was likely to cause it to be fired, are matters which, taken together, are amply sufficient to stamp the conduct of the defendant as negligent to a great degree. In the statement of the foregoing facts we give them in line with the verdict of the jury. Under the evidence, the jury were justified in finding these facts as we have summarized them, and upon such a finding they were authorized in saying that defendant did not exercise that care in handling his pistol which the law demands. Was the deceased guilty of contributory negligence? Much is said by defendant's counsel regarding the dangerous position occupied by deceased when shot, to the effect that he was but 40 feet from the target, and had been warned that his position was a dangerous one, and advised to change it. If deceased had been killed when defendant was firing at the target, by reason of a spent ball, or a poor aim, or a premature discharge of his pistol, these claims would have weight. But we do not see that they have anything to do with the case under existing circumstances. It would seem that the firing at the target is almost a false quantity. The deceased was not killed by reason of his proximity to the target; and thus his position of danger, if it was a dangerous one, did not contribute to the accident. Perchance before the firing at the target had been resumed he would have changed his position. In its simplest form the case seems to be that deceased was standing about 150 feet distant from defendant, who was manipulating a loaded pistol. At this time the pistol was accidentally discharged by reason of this manipulation, and deceased was killed by the shot. Under these circumstances, the jury were entirely justified in finding deceased was not guilty of negligence by reason of being at the point where killed. In other words, the jury had the right to say, from the evidence, that his position at the moment of time when he was killed was not in itself a dangerous one. The law of the case was properly presented to the jury. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

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128 Cal. 572

BARNHART v. EDWARDS et al. (Sac. 469.)

(Supreme Court of California. July 3, 1899.)

JUDGMENT — MODIFICATION—RESTITUTION — STAY—INTEREST—MORTGAGES—SALE.

1. Findings of fact were filed, and judgment was entered thereon, and afterwards, pursuant to the direction of the supreme court, the findings were corrected by reducing the amount of the recovery, and a new judgment was entered for the correct principal sum, with interest from date. *Held*, under Code Civ. Proc. § 1035, requiring the clerk to include in the judgment entered up by him any interest on the "decision" from the time it was made, that plaintiff was entitled to interest from the time the original findings were filed.

2. A foreclosure sale will not be set aside on a modification of the decree merely by reducing the amount of the recovery.

3. No property is lost in such case, within Code Civ. Proc. § 957, authorizing the appellate court, on modifying a judgment, to make restitution of property lost by the erroneous judgment.

4. An appeal from a judgment deprives it of all effect as the basis of any action of the court dependent thereon.

5. The court cannot stay a judgment by reason of anything that could have been considered before it was entered.

Department 1. Appeal from superior court, San Joaquin county.

Action by H. Barnhart against R. L. Edwards and others. From a judgment for plaintiff, and an order vacating a sale thereunder and staying execution thereof, plaintiff appeals. Reversed.

J. A. Louttit and Minor & Ashley, for appellant. P. J. Hazen and Nicol & Orr, for respondent.

HARRISON, J. 1. Upon the trial of this cause the court found that the plaintiff was entitled to judgment in his favor in the sum of $7,668.12, and that the same was a lien upon the lands described in the complaint, and directed a sale thereof. The findings of fact were filed March 16, 1895, and judgment thereon entered March 18, 1895. An appeal from the judgment was dismissed by this court March 6, 1896 (111 Cal. 428, 44 Pac. 160), and the remittitur thereon filed in the superior court April 22, 1896. Upon an appeal from the order denying a new trial, this court made an order, December 28, 1896, directing the superior court to deduct certain items from the amount which it found due to the plaintiff, with whatever interest had been allowed for those items, and to make a corresponding amendment of its conclusions of law, and added: "The order denying a new trial will thereupon be affirmed. Judgment will then be entered in accordance with the findings thus corrected." After receiving the remittitur containing this direction, the superior court, upon motion of the respondent herein, made an order, September 13, 1897, correcting its finding of fact by deducting therefrom the sum of $2,109.43,—the amount of said items and interest thereon,—and amended its conclusion of law to read as follows, viz.: "That plaintiff is entitled to judgment against defendant R. L. Edwards, as administrator of the estate of E. C. Vancil, deceased, in the sum of $5,558.69; that said sum is a valid, existing lien upon the lands and premises in plaintiff's complaint described, and is secured by the mortgage mentioned in said complaint." On the same day the court caused to be entered a "corrected judgment and decree," reciting therein that, having "corrected its findings and amended its conclusions of law" as directed by this court, it "proceeds to enter judgment in accordance with the findings as thus corrected," and thereupon ordered and decreed a sale of the mortgaged premises, and that out of the proceeds of said sale the sheriff pay to the plaintiff the sum of $5,558.69, "the amount now due for principal and interest upon the said debt and mortgage in the complaint and findings mentioned, with interest thereon at the rate of seven per cent. per annum from the date of this decree." From the judgment thus entered an appeal was taken by the plaintiff September 15, 1897. The direction of this court for the entry of judgment in accordance with the findings as corrected had reference to the ultimate act to be performed by the superior court, but did not prescribe the judgment which it should enter. The form of the judgment, including its various provisions, was left to the judgment of that court, to be exercised with due regard to preserving and protecting the rights of the several parties thereto under appropriate and established principles of equity. If any change in the relation of the parties to the judgment or to the property involved therein had supervened pending the appeal, and was brought to the notice of the court, it was proper for it to adapt its judgment to such change, so far as would be consistent with the rights of others and with recognized rules of procedure. Section 1035, Code Civ. Proc., requires the clerk to include in the judgment entered up by him "any interest on the verdict or decision of the court from the time it was rendered or made." The "decision" of the superior court in the present case was made March 16, 1895, the day on which it filed its findings of fact. There was no subsequent trial of the issues before the court, nor did it make or file any new findings of fact. Its action in correcting its original findings was not its "decision" upon the issues, but was an act performed under the direction of this court, and the correction of the findings, as well as the judgment to be entered thereon, would relate to the time when the findings were originally filed. Under the findings as thus corrected, there was due to the plaintiff March 16, 1895, upon the obligations secured by the mortgage, the sum of $5,558.69; and he was entitled to receive this amount, with interest thereon from that date at the rate of 7 per cent. per annum. See Clark v. Dunnam, 46 Cal. 205. The recital in the judgment appealed from that the sum of $5,558.69 is "now due" upon the obligation—i. e. September 3, 1897, the date of its entry—is not in accordance with the findings, and the direction that the plaintiff shall receive interest on that sum from that date only is in contravention of the provisions of section 1035, Code Civ. Proc. The provisions of this section create a right to such interest in the party in whose favor the decision is made, and he is not to be deprived of that right because the court formulates the judgment to be entered by the clerk, instead of leaving it to the action of the clerk alone.

2. Upon the above-named appeal from the judgment of March 18, 1895, the appellant gave no undertaking to stay proceedings, and on December 14, 1895, the plaintiff caused the mortgaged lands to be sold in accordance with the judgment, and in June, 1896, after the time for redemption had expired, received a deed of conveyance therefor from the sheriff. October 13, 1897, the superior court made an order, upon the motion of the respondent herein,—to whom, prior to the commencement of the action, the original mortgagor had conveyed the lands subject to the mortgage,—vacating and setting aside the sale by the sheriff, and directing that he be restored to the possession of the premises so sold, and, further, that the plaintiff within 10 days thereafter account for the rents, issues, and profits received by him during the possession of the premises, the same to be applied in and credited to the judgment in his favor, and that until such accounting was had the execution of the judgment should be stayed. From this order the plaintiff has also appealed. No argument has been made or authority cited in support of the latter portion of this order, and we are not aware of any principle of law by which it can be sustained. The judgment under which the sale was made had never been vacated or set aside, and the dismissal of the appeal therefrom had the effect to affirm the judgment. Code Civ. Proc. § 955. The direction by this court, upon the appeal from the order denying a new trial, to deduct certain items from the amount found due to the plaintiff, rendered it incumbent upon the superior court to make its judgment correspond with such correction, and the further direction for the entry of judgment in accordance with such correction had the same effect. This was evidently the understanding of the respondent, since he stated in his notice of motion for an order modifying the judgment that by the judgment of this court the judgment of the superior court was "modified and directed to be modified." This court made no order setting aside or reversing the judgment appealed from, but its order was limited to a modification of the judgment in accordance with certain specific directions. The rule is well settled in this state that upon the reversal of a judgment a sale to the plaintiff of the defendant's property for the satisfaction of the judgment in whole or in part will be set aside. The reason for this rule is that, as the plaintiff's claim to have the property sold depends upon the judgment, the reversal of the judgment destroys this claim, and takes away all right to retain the defendant's property. The reason for the rule ceases, however, when a judgment directing the sale of specific property, as in the case of the foreclosure of a mortgage to satisfy a lien thereon, is after-

wards modified on appeal by merely reducing the amount of the lien, without changing that portion which directs a sale of the property. In such a case, unless the defendant tenders to the plaintiff the amount which the judgment, as modified, declares he is entitled to receive from the sale of the lands, together with the costs incurred upon the original sale, it should be made to appear that there was some unfairness in the sale, or that the property would upon a resale bring a larger amount than at the first sale, before he could claim a right to have the sale set aside. Freem. Ex'ns, § 347; Jesup v. Bank, 15 Wis. 604. Section 957, Code Civ. Proc., authorizes the appellate court, upon its modification of a judgment, to make restitution of all property "lost" by the erroneous judgment, "so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment." But, if the judgment directing a sale of property to satisfy a lien is modified by merely reducing the amount of the lien, it cannot be said from that fact alone that the appellant has "lost" any property, so as to authorize the sale to be set aside. See Yndart v. Den (Cal.) 57 Pac. 761.

The superior court was not authorized to make the order appealed from by reason of its action in causing the judgment of September, 1897, to be entered. The plaintiff had appealed from that judgment, and from the order directing its entry, prior to the making of this order, and thereby deprived the judgment of all effect as the basis of any action of the court dependent thereon. Moreover, the court would not have been authorized to stay the enforcement of this judgment upon a motion of the respondent by reason of anything that had occurred prior to its entry, and which could have been considered by the court before it was entered. The action of the court in entering the judgment of September 3, 1897, and its order of October 13, 1897, are reversed. The order for the correction of the findings is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(125 Cal. 296)

COOPER v. GORDON. (S. F. 1,030.)[1]

(Supreme Court of California. July 3, 1899.)

DISMISSAL—WANT OF PROSECUTION—STIPULATION—APPEARANCE—ESTOPPEL.

1. An action commenced in April, 1883, in which summons was never issued, was dismissed in 1896, under Code Civ. Proc. § 581, subd. 7, authorizing dismissal on failure to make appearance within three years. On motion to vacate such judgment, it appeared that defendant had entered into a written stipulation that plaintiff could enter judgment at any time, and was granted a stay of execution on certain payments being made. This stipulation was thereafter renewed, with due credits allowed therein for payments made. *Held*, that the stipulation was sufficient appearance on the part of defendant to render judgment of dismissal unauthorized.

2. Where a stipulation, in an action in which defendant was not served, provides for entry of judgment by plaintiff whenever he might choose so to do for a certain amount, defendant is estopped from urging that plaintiff has declined to prosecute the action with due diligence, so as to authorize dismissal, after the lapse of three years, as limited by Code Civ. Proc. § 581.

3. Though a stipulation which has not been filed does not bind the party, when it is filed it becomes binding, and may then be used to show that a party has violated it, and as a basis of relief to the person who has been injured by trusting to it.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Archibald Cooper against Charles W. Gordon. Judgment for defendant. From an order vacating the same, he appeals. Affirmed.

Thomas W. Nowlin, for appellant. A. H. Carpenter, for respondent.

TEMPLE, J. This action was commenced on the 5th day of April, 1883, and summons was issued on the same day. The summons, so far as it appears, was never served on any of the defendants, and no return thereof was ever made or filed. The suit was to foreclose a chattel mortgage on a printing press and other contents of a printing office, given to secure an indebtedness of defendant Gordon, according to the terms of a promissory note, which is set out in the complaint. As to the other defendants, the complaint merely avers that they have, or claim to have, some interest in the property. So far as the records of the court disclosed, nothing further was done in the case until the 18th day of March, 1896, when, on motion of Thomas W. Nowlin, attorney, who appeared specially for the purpose, the suit was dismissed "pursuant to subdivision 7 of section 581 of the Code of Civil Procedure." As nearly 13 years had elapsed since the taking out of summons, and nothing further appeared to have been done in the case, the order was eminently proper.

On the 1st day of May, 1896, one J. H. Harper, in the name of plaintiff and as his assignee, moved to vacate the order and judgment of dismissal on the ground that it was obtained by fraud and deceit, and through mistake, inadvertence, and excusable neglect on the part of plaintiff. On the hearing it was shown that on April 6, 1883, one day after suit was commenced, plaintiff and defendant entered into a written stipulation to the effect that plaintiff could enter judgment at any time in the action for a stipulated amount, but was to grant a stay of execution upon certain payments being made by Gordon; also that on the 26th day of March, 1885, Gordon again, in writing, stipulated with one George M. Wood, to whom the claim of plaintiff had been assigned, that he (Wood) could have judgment entered at any time for a sum stated. A stay of execution was also stipulated. On the 13th day of September, 1893, another stipulation was made in writing by Gordon and J. H. Harper, which recites that Harper had become the assignee of plaintiff, and stipulates that Harper may take judgment in the action at any time. The amount due is also stipulated, and also certain payments to be made, and a rate of interest less than that called for in the note. Defendant Gordon appeared in response to the motion, and read his own affidavit, which, however, contains nothing of consequence. The motion was granted, and the judgment was vacated on the ground that the stipulations referred to constitute an appearance in the action. The learned judge stated in an opinion included in the order vacating the judgment: "Section 581, Code Civ. Proc., does not require an appearance to be filed within three years. It merely requires an appearance to be 'made' within three years." He considered the stipulation that plaintiff could take judgment equivalent to notice of appearance, and said that notice differs from an answer or a demurrer because a pleading did not become such until filed, while the statute provided that the appearance is complete when plaintiff is notified, although the notice is not filed. And yet, if judgment is entered, the judgment roll must show that summons was served or that defendant has appeared. If appearance was only by notice to plaintiff, as provided in section 1014 of the Code of Civil Procedure, proof of that fact must be found in the judgment roll. Appearance provided in section 1014 is primarily for the purpose of entitling the defendant to notice of subsequent proceedings, where notice must be given, and for that purpose written notice served on plaintiff is sufficient; but the appearance of defendant is not thereby made in court. The Code is not altogether clear upon this subject. Section 406 provides that, "at any time within the year after complaint is filed, the defendant may in writing, or by appearing and answering, waive the issuing of summons." Apparently this is a declaration that the issuance and service of the summons can be waived in no other mode, and in section 416 it is enacted that the voluntary appearance of a defendant is equivalent to the service of summons. But in section 581, subd. 7, it is provided, apparently, that such appearance may be at any time within three years. But suppose a defendant were to appear and answer four years after the complaint was filed, and were then to demand a trial, objecting to a dismissal, although no summons had been issued and no previous appearance made; could the court then properly dismiss the action, against the protest of all parties? I think not. Section 581 is absolute in its terms, explicit, and comprehensive, but such result could not have been contemplated. It was to relieve defendants from the assertion of stale demands. Mostly, no doubt, it was aimed against those who asserted title to real estate merely to be bought off, and who were in the habit of commencing suits solely to prevent the statute of limitations from running. But even in such a case, where the defendant comes in and files an answer and demands a trial before the suit has been dismissed, I do not understand that the court must nevertheless dismiss the action without a trial. On the other hand, I think it would be error to do so. Nor is this absolutely inconsistent with the terms of the statute, which seems to give three years in which the court cannot dismiss, though no appearance has been made; after that, and until voluntary appearance has been made, the action may be dismissed as provided. But, if the parties consent, it is a case pending of which the court has jurisdiction, and there is no excuse for not trying it. The stipulation is, in effect, an answer admitting all the allegations of the complaint, with the statement that defendant has no defense. Had it been in words so stated, and the document had been filed, there could have been no question. A stipulation that defendant may take judgment is intended to be in lieu of such an answer.

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[1] Rehearing denied July 28, 1899.

But the stipulation was not filed within the three years, nor at any time before the case was actually dismissed. It was not filed until motion was made to set aside the judgment of dismissal on the ground that the stipulations themselves excused the neglect of the plaintiff to file them. If such neglect can be excused, they certainly do. Each stipulation leaves it to the plaintiff to apply for judgment whenever he might choose to do so, and each was given in consideration of favors granted defendant. He procured further time to pay his debt, with a reduction of the rate of interest and the use of the printing outfit in the meantime. In the last stipulation signed September 13, 1893, more than 10 years after the suit was commenced, it is recited that, "by consent of each and all of the above-named persons, judgment has not been rendered therein, but said action is still pending, in which the said Harper, as the assignee of said plaintiff, may and can, by reason of the stipulations heretofore made by said defendant, take judgment of foreclosure against said Gordon, and sell said property, at any time." Defendant is certainly estopped by this stipulation from urging the objection that the plaintiff has neglected to prosecute the action with due diligence. And it is also a consent to the entry of the appearance of the defendant and the entry of judgment after the lapse of the three years limited by law. Without such consent, it could not be done; but, as already said, where defendant expressly consents to the delay, I see no objection to it. It was not intended to limit the right of the parties so to stipulate. Parties may expressly waive most of the provisions designed for their benefit, and I see no reason why this should constitute an exception.

But it is said that stipulations that are not filed do not bind the parties. That is true, but when filed they do bind the parties, and may then be used to show that a party has violated his stipulation, and as the basis of relief to the person who has been injured by trusting to it. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. The genuineness of the signatures to the stipulations are not denied, and are admitted for the purpose of the motion. We must presume that before entering judgment the court will require proper proof to be made both upon that matter and as to the amount for which plaintiff is entitled to judgment. The order is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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124 Cal. 553

In re JAMES' ESTATE. (S. F. 1,467.)

(Supreme Court of California. July 5, 1899.)

Opinion modified. For former opinion, see 57 Pac. 578.

PER CURIAM. The opinion heretofore rendered in this case is modified to the following effect: The sentence, "The trial court admitted in evidence the declarations of Mrs. Milen and Mr. and Mrs. Dickman, made after the death of Dr. James, to the butcher, the baker, and the coal dealer, to the effect that Laura was engaged to be married to the doctor at the time of his death," is changed so as to read, "The trial court admitted in evidence the declarations of Mrs. Milen and Mr. and Mrs. Dickman, made after the death of Dr. James, to the butcher, the baker, and the coal dealer, not in the presence of Laura Milen, to the effect that Laura was engaged to be married to the doctor at the time of his death." The sentence reading, "There is not the slightest evidence in the record of a conspiracy between these parties, and the admission of the evidence upon that ground cannot be justified," is hereby modified so as to read, "There is not sufficient evidence in the record of a conspiracy between these parties to justify the admission of the evidence upon that ground."

(125 Cal. 280)

WILSON v. NUGENT. (S. F. 1,002.)[1]

(Supreme Court of California. July 6, 1899.)

MECHANIC'S LIEN—PAYMENT WITHOUT SUIT—NOTICE—MATERIALS FURNISHED UNDER EXPRESS CONTRACT—HAULING MATERIAL—USE IN CONSTRUCTION.

1. Where one who has retained 25 per cent. of the contract price for the repair of a building, after he has knowledge of the appointment of an assignee for the benefit of the contractor's creditors, and a demand made by him for the money retained, without any order of court or any judgment as to the validity of alleged liens, pays them, he pays them at his own risk, and, if they are not valid liens, he will be liable to the assignee for the amount paid.

2. Under Code Civ. Proc. § 1187, requiring that the notice of lien shall contain a statement of the terms, time given, and conditions of the contract under which materials were furnished, a statement in a notice that claimant was to receive the reasonable market value thereof when they were furnished, at a fixed price, is untrue, and no lien therefor is acquired.

3. One who is employed to haul slate to a building on which a roof is being repaired, and deliver it to the contractor, is not entitled to a mechanic's lien.

4. In an action to enforce a mechanic's lien for material furnished to a contractor, unless the court finds that the material furnished was furnished to be used, and was used, in the construction of the building, a judgment for the claimant cannot be sustained.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Daniel Wilson, assignee of Jefferson D. De Gear, insolvent, against Dennie F. Nugent. From an order denying a new trial, and a judgment for defendant, plaintiff appeals. Reversed.

Walter H. Linforth, for appellant. Peri E. Allen (T. M. Osmont, of counsel), for respondent.

PER CURIAM. Action to recover $836. Judgment for defendant. Motion for new trial denied. This appeal is by the plaintiff from the judgment and order. On May 16, 1895, one De Gear entered into a written contract with defendant to roof St. Rose's Church for $3,344. The contract was in the usual form, and provided that 25 per cent., being the final payment, should be retained by defendant for 35 days after the completion of the contract. March 7, 1896, the contract was completed, and defendant made all the payments as he had agreed to do, except the 25 per cent. ($836), which he retained, under the terms of the contract, for the payment of any claims that might be valid liens against said building. On March 28, 1896, seven mechanics' liens were filed against said church, aggregating about the amount still in the hands of defendant. On April 11, 1896, said De Gear filed a petition in insolvency. The plaintiff was in due course elected assignee of said insolvent, and on April 24, 1896, an assignment of all the estate of said De Gear was made to plaintiff. After the said plaintiff had qualified as assignee, and prior to June 3, 1896, he notified defendant in writing of his election and qualification as assignee, and of his claim to the $836, and forbade its payment to any one else, other than plaintiff. On June 3, 1896, after defendant had knowledge of all these facts and of the claim of plaintiff to said money, and without any order of court, or any judgment as to the validity of any of said alleged liens, he paid them all, amounting with costs to more than the $836. It was admitted at the trial that, unless the defendant was released from liability to plaintiff by reason of the payment of the said alleged liens, the $836 was due and unpaid from the defendant to the plaintiff. At the time of the qualification of the plaintiff as assignee, the defendant was indebted to plaintiff as such assignee and legal representative of De Gear in said sum of $836, unless there were valid and existing liens against said fund or against the property of defendant; and, in order to satisfy which, defendant, in law, had the right to use said fund. Defendant did not owe the alleged lien claimants, as he had made no contract with them. The provision of the statute authorizing the owner to retain the 25 per cent. in order to pay off and discharge liens was designed both for the protection of the owner and of laborers, material men, and holders of valid liens. Subcontractors, laborers, and material men may look to the contractor alone, or, if they have any doubt as to his solvency, they may avail themselves of the statutory provisions as to filing and recording liens. If such liens are filed, the owner has the right to retain the amount in his hands for his own protection for the purpose of paying off and discharging such liens as may be valid, and to charge the amount so paid to the contractor. The defendant knew, at the time of paying this fund to the alleged lienholders, of the claim of plaintiff. While he had the right to use the fund in accordance with law to protect his property from valid liens, he could not himself pass upon their validity, except at his own peril. He could easily have protected himself by depositing the money in court, and let the court determine the validity of the liens and the rights of plaintiff. Lumber Co. v. Tolhurst, 99 Cal. 635, 34 Pac. 438. The findings are attacked on the ground of insufficiency of evidence to support them, and it becomes necessary to examine the evidence as to the validity of the liens. The statute requires that the notice of lien shall contain a statement of the terms, time given, and conditions of the contract. Code Civ. Proc. § 1187. This statement must not only be made, but it must be true. The notices of liens of Farnsworth & Ruggles, $44.81; James Young, $34.70; Pacific Metal Works, $271.90; Schrader & Lutge, $23.45; Thomas Alderson, $289.27; Dunham, Carrigan & Hayden Company, $84.27,—each stated, as a part of the terms, time given, and conditions of the contract, that claimant was to receive the reasonable market value of the materials so furnished. The uncontradicted evidence shows that the materials were furnished in each case to De Gear at a fixed price. This was fatal to the liens. The proof showed the notices of lien in each case to be untrue. In Reed v. Norton, 90 Cal. 590, 26 Pac. 767, and 27 Pac. 426, decided by this court in bank, it was held that where the notice of lien stated that the claimant was to be paid for the labor done and furnished at what it was reasonably worth, and the evidence showed that claimant had an express contract, the variance was fatal, and claimant could not recover. So in Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195, the complaint alleged that the work was to be done at an agreed price, but the evidence showed no agreed price, and the variance was held to be fatal. It was there said: "The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true." In the late case of Mill Co. v. Hege, 119 Cal. 377, 51 Pac. 556, it was held that a different rule applies to a variance between the pleading and proof, and a variance between the notice of lien and proof; and, in case the proof shows that the contract set forth in the notice of lien is untrue, it is fatal to the lien. It is said in the opinion: "The right to enforce a mechanic's lien depends upon a compliance with the requirements of the statute. Unless the notice of the lien which is filed with the county recorder contains the statements required by section 1187 of the Code of Civil Procedure, the claimant is not entitled to his lien. This section requires the claim of a material man to contain a statement of his demand, after deducting all just credits and offsets, and also a statement of the terms, time given, and conditions of his contract. The provision that the claim must contain these statements means that the statements thus contained must be correct and in accordance with the facts. If they are not correctly stated, the right to a lien is lost." Applying the rule as laid down in the foregoing cases, the said liens must fall. The burden was upon defendant to show that the said liens were valid and enforceable liens upon the premises. The proof showed a contract in each case that, in law, created no lien under the notice given. The proof did not show that Farnsworth & Ruggles had any lien. They did not perform labor upon, or furnish material to be used on, the building. Their services consisted of hauling slate to the building and delivering it to the contractor. This did not bring them within the terms of the statute. Adams v. Burbank, 103 Cal. 651, 37 Pac. 640.

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[1] Rehearing denied August 5, 1899.

Another fatal objection to the judgment in this case is that the court nowhere finds that the materials furnished by the said lien claimants were furnished to be used, and that they were used in the building and construction of the said church. Silvester v. Mine Co., 80 Cal. 510, 22 Pac. 217; John A. Roebling Sons Co. v. Bear Val. Irr. Co., 99 Cal. 488, 34 Pac. 80. It is claimed by defendant that before the filing of his petition in insolvency said De Gear requested him to pay, and he did agree to pay, the claim of said alleged lienholders. Even if this kind of an unperformed agreement constitutes a defense, we do not think the evidence supports the contention. De Gear says that he told defendant that there were certain claims against the building that he was unable to meet, and that he desired they should be paid. Defendant testified that he paid them because he supposed they were correct, to avoid a lawsuit, and because he considered them just; that De Gear told him all these liens had to be paid;

that the reason he did not pay them at once is because he was afraid he would have to pay them twice; that by general information he satisfied himself that the liens were valid, and then paid them. We think this evidence shows that defendant acted upon his own judgment in paying the claims, and that he believed they were valid liens against the building. He had no right, however, to set up his opinion as to the legality of the liens, after knowing that plaintiff claimed the right to contest them, without taking the chances on the correctness of that opinion. Plaintiff clearly had the right to claim that the liens were invalid, and, if their invalidity should be established, to claim the fund as the representative of the general creditors of De Gear. The judgment and order are reversed.

(125 Cal. 302)

In re RATHGEB'S ESTATE. (S. F. 1,471.)[1]

(Supreme Court of California. July 5, 1899.)

EXECUTOR—PROCEEDINGS TO REMOVE—FAILURE TO INVENTORY PROPERTY—GIFT—FINDING.

1. In a proceeding to remove an executor from office for failure to inventory property belonging to the estate, evidence on his part that he claimed the property as his own because his testator gave it to him, and he obtained possession of it from testator's tenant under a written order for its delivery, is not sufficient to prove a gift of it to him.

2. Where one acquires possession of personal property by permission of the owner, he will be presumed to hold it as a bailee, and limitations will not run against the owner until he has notice that the bailee claims the same adversely.

3. Under Code Civ. Proc. § 1437, which provides that if an executor has committed or is about to commit a fraud on an estate his letters must be revoked by the superior court, one who, without sufficient reason, asserts title to the property of the estate, and refuses to inventory it as the property of the estate, may be removed from office.

4. The finding by a judge of the superior court in a summary proceeding to remove an executor from office on the ground that he has failed to inventory property of the estate, where he claims title thereto by reason of an alleged gift thereof by the testator, which is adverse to such claim, is not conclusive as to his title to the property in a suit against him by his successor to recover the property.

5. Code Civ. Proc. § 1436, provides that the superior court shall, on credible information that an executor has committed or is about to commit a fraud on the estate, suspend him. Section 1437 provides that notice of suspension shall be served on the executor, and that he shall be cited to show cause why his letters should not be revoked. Section 1438 provides that at the hearing any person interested may appear, and file his allegations in writing, showing that the executor should be removed, to which the executor may demur or answer. The court, pursuant to a sworn statement, suspended an executor, and issued a citation to show cause why his letters should not be revoked. To this statement he made answer, claiming the property as his own. *Held*, that a proper issue was made, and that proof of facts justifying his suspension would warrant a revocation of his letters.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Proceedings in the matter of the estate of John Rathgeb, deceased, commenced by Jules J. Agostini and another against their co-executor, Albert Guttinger, to remove him from office. From an order revoking his letters the latter appealed. Affirmed.

Otto Tum Suden (F. J. Solinsky, of counsel), for appellant. A. Caminetti and Geo. E. De Golia, for respondents.

BRITT, C. John Rathgeb, a resident of the county of Alameda, died July 26, 1897, leaving a will, whereby he appointed Jules J. Agostini, Frank Bernasconi, and Albert Guttinger his executors. The will was duly admitted to probate on August 30, 1897, and letters testamentary were issued to said persons named as executors. On December 7th next following, said Agostini and Bernasconi filed with the court their verified petition charging that Guttinger has concealed moneys, goods, and chattels belonging to the estate of said testator, and has failed to account to the estate for property, both real and personal, in his possession, which belongs to said estate, and that he omitted to include in the inventory and appraisement of the estate previously filed certain real and personal property of the testator situated in the county of Calaveras, and that he has possession of such property, and refuses to deliver it to the executors. They prayed that Guttinger be cited before the court to be examined on oath as to the matters charged, and for such order as the court should deem proper. The court made an order reciting the substance of said petition, and directing that Guttinger appear on December 27, 1897, to be examined touching the said charges. It made a further order containing like recitals as the other, and reciting, in addition, that it appeared from credible information that Guttinger has committed or is about to commit a fraud on the estate, and has long neglected his duty as an executor, and directed that his powers as such be suspended until further investigation by the court; also that he show cause at the time and place appointed for his examination as above stated why the said letters testamentary issued to him should not be revoked. Service of copies of said orders and of said petition having been duly made on Guttinger, and he having been cited as required by the court, he filed answers denying the charges of his co-executors, averring that all the property of which he is possessed is his own, and that he is not bound to include it in any inventory of said estate, and denying that he had omitted any duty he owed to the estate, or that he had committed any fraud thereon, or that he is about to commit such. At the hearing Guttinger was examined, and the testimony of other witnesses was taken, and sundry documentary evidence was introduced. The court found the charges against Guttinger to be sustained, and ordered that his said letters be revoked; also that the other executors institute proper actions against him to recover the property of the estate in his possession. From the order revoking his letters he has appealed.

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[1] Rehearing denied July 24, 1899.

The statutory provisions under which the said proceedings were taken are, in substance, so far as necessary to be stated, as follows: Whenever the judge of the superior court has reason to believe from his own knowledge, or from credible information, that any executor has wasted or embezzled the property of the estate, or is about to do so, or has committed or is about to commit a fraud upon the estate, or has wrongfully neglected the estate, he must suspend the powers of such executor until the matter is investigated. Code Civ. Proc. § 1436. Notice of such suspension must be given to the executor, and he must be cited to show cause why his letters should not be revoked. If he fails to appear in obedience to the citation, or if, appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked. Id. § 1437. "At the hearing any person interested in the estate may appear and file his allegations in writing, showing that the executor * * * should be removed; to which the executor * * * may demur or answer, as hereinbefore provided." Id. § 1438. The court below found, among other things, that a certain ranch and mine, and also a quantity of personal property, situated in the county of Calaveras, and in the possession of Guttinger, belongs to the estate of the testator, and ought to be included in the inventory thereof, and that Guttinger has neglected to perform his duty as executor in failing and refusing to return and inventory such property as part of the estate. The appellant maintains that these findings are not sustained by the evidence. It appears that the whole value of the property, as listed and appraised in the inventory actually filed, is a little more than $6,600, while the value of said Calaveras county property in the possession of Guttinger is $150,000. There is no dispute that it was all at one time owned by Rathgeb; but Guttinger, who is the nephew of Rathgeb, claims that the same was given to him by Rathgeb in his lifetime, and in support of his contention he produced at the hearing a deed of date January 23, 1893, purporting to be an absolute conveyance from Rathgeb to him of the said real property, under which, as he testified, he took possession of the described premises about January 24, 1894, and ever since has held the same. There was no personal property described in the deed, and the record does not show specifically of what the Calaveras county personalty consisted. A particular description thereof was omitted from the transcript on appeal,—possibly for the sake of brevity. It appears, however, to have been chattels on and about both the ranch and mine, and used in connection therewith. In January, 1894, Guttinger got possession of the personalty from one Holland, who had been Rathgeb's tenant of the ranch, in virtue of a written order for the possession thereof, signed by Rathgeb, and directed to Holland. He testified: "I claim this personal property because my uncle gave it to me, and I claim title to it. * * * I have no other title to the personal property except the order to Holland." There was other evidence on which the respondents claim, as we understand their position, that the ranch and mine described in the deed of January 23, 1893, were conveyed to Guttinger in trust merely, and subject to the dispositions of the grantor's will. We do not find it necessary to decide whether this view of that conveyance, which was adopted by the trial court, is correct. Although Guttinger stated, in a general way, that his uncle gave him the personal property, yet he testified to no word or act of Rathgeb sufficient to constitute a gift thereof. The order on Holland for possession of the same, which he said was his only title, did not show a gift. It is also to be observed, in considering the statement of Guttinger, that the court below was the judge of his credibility. His testimony in some material particulars was confused, and to some extent contradictory of itself. While this may well have been the result of innocent lapse of memory, or want of skill in our language (he being a Swiss), yet, on appeal, we are unable to say that the remark of the trial judge, in announcing his decision, that Guttinger's testimony had not been "at all satisfactory," is not warranted by the record.

It is contended that the statute of limitations as to said personal property had run in favor of Guttinger before the death of Rathgeb. Waiving other considerations on this point, it is sufficient to say that no defense under the statute was proved, for, although Guttinger may have had possession of the chattels for more than three years before his uncle's death, it is shown that he came into possession permissively. It is therefore to be presumed that he held them as Rathgeb's bailee, and it does not appear that his claim to hold the same adversely to his uncle was ever brought to the knowledge of the latter.

A further argument advanced is that his position antagonistic to the estate in respect to the property is no ground for his amotion from the office of executor. In re Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532, is cited to sustain this contention. It was held in that case that letters testamentary cannot be refused to the executor named in a will on the ground that he claims as his own property which legatees under the will insist belongs to the estate. The court there dealt with the statute prescribing the grounds for refusing letters upon application therefor (section 1350, Code Civ. Proc.), and held that the courts have no right to add to the disqualifications imposed by the legislature in such cases. The case here is different, for, as the court said in Re Bauquier's Estate: "The executor may always be removed after appointment, unless he discharges the duties of his trust faithfully and as directed by law." Necessarily, therefore, the court has power to determine, for the purposes of an inquiry into that question, whether the executor has refused wrongfully to inventory or otherwise account for property of the estate in his possession, and to remove him if he persists in such conduct; else the necessary steps required by law in the course of administration might be indefinitely delayed or prevented by his mere assertion of title to the property in himself. See Deck's Estate v. Gherke, 6 Cal. 666. In our opinion, the evidence was sufficient to justify the decision that Guttinger wrongfully refused to return and inventory the Calaveras county personalty as part of the estate of Rathgeb, and without sufficient reason asserted ownership thereof in himself. This was a clear neglect of his duty as executor, and was statutory ground for his removal. It is perhaps proper to say that neither the decision here nor that of the court below can estop Guttinger in a suit against him to recover any of said property for the estate. The superior court in this summary proceeding is not competent to decide finally upon the question of title.

It is also contended that no proper issues were made or tried touching the liability of Guttinger to be removed. This contention seems to rest mainly on the circumstance that no formal statement of charges was filed except the petition of December 7, 1897, presented by his co-executors. The objection is not well taken. The petition of December 7, 1893, contained charges upon which the court, under the authority of sections 1436, 1437, Code Civ. Proc., suspended Guttinger's powers, and cited him to appear and show cause why his letters should not be revoked. Said section 1437 evidently contemplates that the charges which, if believed by the court, may be ground for suspending the representative, shall also, if proved upon a hearing, be ground for removing him, and we see no sufficient reason to say that when they are formulated in a sworn statement prior to issuing a citation to show cause they must afterwards be reiterated in a separate document. Compare In re Kelley's Estate, 122 Cal. 379, 382, 55 Pac. 136. The provisions of section 1438, allowing any person interested in the estate to appear at the hearing, and file charges against the representative, cannot be construed as requiring charges previously made to be filed anew, for the section further declares that the executor or administrator may demur or answer to allegations filed at the hearing "as hereinbefore provided,"—apparently referring to proceedings already on foot to compel him to show cause, and in which he has, or may have, made answer.

Some minor questions of procedure are raised. We have inquisitively examined them all, and find no prejudicial error. The order appealed from should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(125 Cal. 309)

STAACKE v. BELL et al. (S. F. 1,106.)[1]

(Supreme Court of California. July 6, 1899.)

JUDGMENT — CONFORMITY TO COMPLAINT — COURTS—JURISDICTION—VENUE—QUIETING TITLE—LIENS—TRUSTS—PERPETUITIES.

1. A trustee individually sued, among others, one who was plaintiff in another suit concerning the trust property; praying leave to renew a mortgage privately executed by him, as an individual, on the trust estate, the new mortgage "and the judgment herein not to in any way affect the rights of the parties to said" other action, "but leaving said rights to be determined in said action, subject always to" said mortgage, or any mortgage "that may be authorized by the judgment herein," and praying also for general relief. *Held*, under Code Civ. Proc. § 580, providing that where there is no answer the relief granted plaintiff cannot exceed that demanded in the complaint, that a decree adjudging the mortgage a first charge on the lands, pursuant to the prayer in the mortgagee's answer, was erroneous as to the defendant, who was plaintiff in the other suit, where he defaulted, and the answer was not served on him.

2. On a question of jurisdiction of the lower court, the supreme court is not confined to the prayer for relief, but it may look to the decree to determine the purpose of the action.

3. Under Const. art. 6, § 5, providing that all actions "quieting title to or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate" is situated, a court of the county in which suit is instituted cannot declare a mortgage executed by a trustee on lands in another county a prior lien, at the instance of the trustee and the mortgagee.

4. A trust deed given to secure a debt is not void because it creates a trust, in violation of the statute of perpetuities.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by George Staacke against John S. Bell and others. From a decree for plaintiff, John S. Bell appeals. Reversed.

Crittenden & Van Wyck, for appellant. Sidney M. Smith, for respondent. Fisher Ames and others, for nonappealing defendants.

CHIPMAN, C. The action is brought in the superior court of the city and county of San Francisco, and the complaint alleges that on February 1, 1892, plaintiff executed and delivered to defendant San Francisco Savings Union his promissory note, due February 1, 1893, for $60,000, to secure payment of which plaintiff executed a conveyance to defendants Henry C. Campbell and Thaddeus B. Kent of certain lands in Santa Barbara county. This conveyance is set out in the complaint, and is an ordinary deed of trust. The complaint then alleges that on

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[1] Rehearing denied August 5, 1899.

March 8, 1893, "the defendant John S. Bell commenced an action against plaintiff and the defendant John W. C. Maxwell in the superior court * * * in and for the county of Santa Barbara, which action is * * * undetermined; * * * that by the pleadings in said action it is claimed by all the parties thereto that this plaintiff holds said land in trust; that on the 16th day of October, 1892, said Thomas Bell died in the said city and county of San Francisco, leaving a last will, a copy whereof is * * * made part hereof." Thomas Bell is not previously mentioned in the complaint, but appears in the title of the cause as deceased. There is no explanation in the complaint for making the heirs or executors of Thomas Bell parties to the action. The complaint then avers the appointment of plaintiff and defendant John W. C. Maxwell as executors of the will of said Thomas Bell; that the principal of the note and some interest are still due; that the San Francisco Union "is willing to renew said note and security, or to extend the time for the payment of said note, if plaintiff can procure proper authority to make such renewal or extension, but otherwise demands immediate payment of said note, and intends, in default thereof, to cause said lands to be sold by the trustees, Campbell and Kent, to satisfy said indebtedness; that said lands are of much greater value than the amount of said indebtedness, if sold in parcels, and at a time when there is a demand for such property, but at present the market for such property is depressed; and * * * that, if said property should be sold at this time by said trustees, it would probably realize but little, if any, more than sufficient to pay said indebtedness." There is nothing in the complaint to show the nature of the trust referred to in the action pending in Santa Barbara county, or when it arose. The prayer is for the judgment of the court "authorizing and directing plaintiff to execute a new note in place of the note above mentioned, or a renewal of the note above set forth, and a deed of trust to secure the same,—such new note or renewal note and deed of trust, and the judgment herein, not to in any way affect the rights of the parties to said action pending in Santa Barbara county, but leaving said rights to be determined in said action, subject always to the deed of trust aforesaid, or any deed of trust that may be authorized by the judgment herein,"—and for general relief. Trustees Campbell and Kent and the Savings Union filed separate answers, in which they set up many facts additional to those found in the complaint, and prayed for relief different from, and in excess of, that asked by the complaint. The decree adjudges that the deed of trust mentioned in the complaint "is, and shall remain, prior and superior to any claim, charge, or lien to or on said lands of the defendants John S. Bell [naming the other defendants except Campbell, Kent, and Savings Union], or any of them; that the said note and deed of trust were executed with full knowledge and consent of Thomas Bell; that, subject to said deed of trust, the plaintiff holds the legal title to said lands * * * in trust for the defendant John S. Bell and the other defendants [naming them] as their interests may be determined in the suit now pending" in the superior court of Santa Barbara county, referred to in the complaint. It is also adjudged and ordered that plaintiff, "on his own behalf and as trustee as aforesaid, be, and he is hereby, authorized and directed to execute an instrument in writing renewing said note, and extending the time for the payment of the principal thereof, in words and figures following." Then follows a prescribed form of instrument to be executed by the parties. Appellant and the executors of Thomas Bell made default. The other defendants answered. Plaintiff had judgment, from which defendant John S. Bell appeals on the judgment roll alone. The answers to the complaint were not served upon him. The grounds of the appeal are: (1) The relief granted is in excess of that demanded in the complaint; (2) want of jurisdiction; and (3) insufficiency of the complaint.

1. Where there is no answer, the relief granted plaintiff "cannot exceed that which shall have been demanded in his complaint." Code Civ. Proc. § 580. It is improper to grant relief other and different from that prayed for in the complaint. Mudge v. Steinhart, 78 Cal. 34, 20 Pac. 147; Loan Co. v. Hall, 110 Cal. 492, 42 Pac. 962. Nor can the general prayer enlarge the power of the court to grant relief not prayed for against a defaulting defendant. In the case here the court did not decree a renewal of the deed of trust, and that part of the prayer may be put aside. As we read the prayer of the complaint, so far as appellant is concerned the judgment was not to affect his rights in the action pending in Santa Barbara county. The language is, "not to in any way affect the rights of the parties to said action pending in Santa Barbara county, but leaving said rights to be determined in said action." It is true the prayer also says, "subject always to the deed of trust aforesaid, or any deed of trust that may be authorized by the judgment herein." Whether or not this latter clause was intended as a limitation of the clause preceding it, we think it clear enough that the complaint notified appellant that plaintiff intended to ask a decree, not as trustee of anybody, but individually, as he had executed the note and deed of trust, authorizing him to renew the note and that the decree should be so drawn as "not to in any way affect the rights of the parties to said action pending in Santa Barbara county." Of course, the Savings Union would not consent, and did not consent, unless the renewal could be made so as to preserve its rights as they then stood, but nevertheless

we think appellant had the right to make default on the assumption that his rights also in the Santa Barbara action would not be affected. The decree, however, goes far beyond the prayer, and grants the relief prayed for by the Savings Union and trustees Campbell and Kent in their answers, which were not served upon appellant, and of the nature and contents of which he had no notice. Appellant could rest secure under section 580, Code Civ. Proc., and the allegations of the complaint that the judgment was "not to in any way affect the rights of the parties" in the action pending in Santa Barbara county. The decree as to appellant was in excess of the relief demanded in the complaint, in adjudging that the deed of trust given by plaintiff is a first charge upon the lands; that plaintiff holds the lands in trust for appellant, subject to said deed of trust; that the instrument to be executed by plaintiff should be executed by him as trustee of appellant, and should recite that, when the deed of trust was executed by plaintiff, he (plaintiff) "was by the San Francisco Savings Union believed to be the owner in fee, in his own right, of the lands described in the deed of trust," and also in directing that plaintiff should, as trustee of appellant, execute a renewal contract. These matters seem to have found their way into the decree from allegations in the answers referred to, and evidence submitted in support thereof; and, whether or not they were proper to be litigated in the action, it is clear to our minds that the complaint did not inform defendants of any such issues, and appellant is not bound by the judgment as to them.

2. As the judgment must be reversed, and as a decree equally comprehensive with the purpose disclosed by the answers may be sought upon a second trial of the action, it seems necessary to dispose of the question of jurisdiction. The constitution (section 5, art. 6) provides "that all actions * * * quieting title to or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate * * * affected by said action * * * is situated." The constitution does not prohibit the trial elsewhere, if the action is commenced in the proper county, notwithstanding the provisions of section 392, Code Civ. Proc. Hancock v. Burton, 61 Cal. 70; Duffy v. Duffy, 104 Cal. 602, 38 Pac. 443. But, if the action falls within any of the classes enumerated in the constitution, it must be commenced in the county in which the real estate affected by the action is situated. The only question here, then, is, does the relief asked by the complaint and answers have the effect to quiet the title of the Savings Union, or is it for the enforcement of its lien? We may look to the decree to determine the real purpose of the action, and are not confined to the phraseology of the prayer for relief. Fritts v. Camp, 94 Cal. 394, 29 Pac. 867; Pacific Yacht Club v. Sausalito Bay Water Co., 98 Cal. 489, 33 Pac. 322. Conceding, but not deciding, that the superior court of San Francisco could direct the plaintiff to execute a new note and trust deed, so as "not in any way to affect the rights of the parties" in the Santa Barbara action, as is asked in the complaint, it could not adjudge that the original trust deed is a first charge on the Santa Barbara lands, or that it was a valid conveyance, and thus prevent a person having title to that land from claiming the right to have his title litigated and its validity determined in the county where the land is situated. Trustees may, in proper cases, apply to any court of the state, of general jurisdiction, for directions as to the conveyance of the trust estate; but trustees, equally with other persons, are bound by the provisions of the constitution; and if they seek a decree quieting their own title to real estate, or that of some other person, or for the enforcement of any lien upon real estate, they must commence the action in the county where the land is situated. Respondent claims that the action is one to administer a trust, and to authorize the trustee to do certain things for the preservation of the trust, and therefore does not come within the counstitutional inhibition. In support of the contention, we are cited to More v. Superior Court, 64 Cal. 345, 28 Pac. 117; Le Breton v. Superior Court, 66 Cal. 27, 4 Pac. 777; and other cases. The first of these cases involved the removal of certain trustees, and the appointment of others in their stead, and the appointment of a receiver to take, hold, and protect the property pending the action. The second involved a proceeding to enforce a trust on personal and real property. No attempt was made in either of the cases to have adjudged the superiority of any title under the trust deed. In the case here the decree apparently goes to the extent of adjudicating the priority of the title under the trust deed over the claims and title of appellant, and, it may be, of others. The decree is one, in its effect, to determine title to land, and practically to quiet title to lands, if, indeed, it is not also, in effect, to enforce a lien thereon by compelling the conveyance of a title declared to be prior to all other claims. Such a decree we do not think could be entered, except in an action commenced in a court where the land is situated.

Without discussing the sufficiency of the complaint, which seems unnecessary, we may remark that the trust deed is not void because it creates a trust, in violation of the statute against perpetuities. Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813; Camp v. Land, 122 Cal. 167, 54 Pac. 839. It is advised that the judgment should be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

(125 Cal. 270)

THOMPSON et al. v. CITY OF LOS ANGELES. (L. A. 598.)

(Supreme Court of California. July 8, 1899.)

NEW TRIAL—SPECIFICATIONS OF ERRORS—APPEAL—REVIEW.

1. Where the statement of a case specifies no particulars in which the evidence is insufficient to support the findings, nor any errors in the rulings at the trial, a new trial will not be granted, under Code Civ. Proc. § 659, subd. 3, providing, "If no such specifications be made, the statement shall be disregarded on the hearing of the motion."

2. Where a motion for a new trial is made after judgment upon a statement of the case, and no appeal is taken from the judgment, errors upon the face of the judgment roll cannot be considered on appeal from an order denying the motion.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by M. B. Thompson and another against the city of Los Angeles. From an order denying a new trial, after judgment for defendant, plaintiffs appeal. Affirmed.

Walter F. Haas, for appellants. Will E. Dunn, for respondent.

HAYNES, C. This action is, in form, to quiet title to a narrow strip of land fronting on Soto street, in the city of Los Angeles; the plaintiffs' right to recover depending upon the true location of the line of the street, and the defendant's contention being that the strip of land in controversy is a part of said street. Findings and judgment were for the defendant, and plaintiffs appeal from an order denying their motion for a new trial.

The notice of said motion specified as the grounds thereof: (1) That the evidence is insufficient to justify the findings; (2) that the decision is against law; and (3) on account of errors in law occurring at the trial, and excepted to by defendant, and that the motion would be made upon a statement of the case. The statement, however, specifies no particulars in which it is claimed the evidence is insufficient to justify the findings, nor are any errors of law occurring at the trial specified. Section 659, subd. 3, Code Civ. Proc., provides, "If no such specifications be made, the statement shall be disregarded on the hearing of the motion." The findings therefore stand unquestioned, and the correctness of the rulings and proceedings upon the trial unchallenged.

Appellants, in their brief, say that the ground for a new trial more particularly relied upon for a reversal is that "said decision is against law," and proceed to discuss the evidence as though its sufficiency or insufficiency was the sole question to be considered. But since, in the absence of specifications, we are obliged to conclude that the findings are justified by the evidence, and that no errors of law occurred upon the trial, if "the decision is against law" it must be for some reason appearing only in the judgment roll,—as, for example, a failure to find upon some material issue, or that wrong conclusions of law have been drawn from the findings. There is no appeal from the judgment, however; and, upon appeal from an order denying a new trial, errors upon the face of the judgment roll cannot be considered. In re Westerfeld's Estate, 96 Cal. 113, 30 Pac. 1104; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Brison v. Brison, 90 Cal. 323, 27 Pac. 186. Besides, counsel for appellant does not in his brief suggest any error of law appearing upon the judgment roll. I advise that the order appealed from be affirmed.

We concur: BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(125 Cal. 285)

In re PEARSONS' ESTATE. (S. F. 1,397.)[1]

(Supreme Court of California. July 6, 1899.)

WILLS—DESIGNATION OF LEGATEE.

An institution the primary purpose of which is to take such girls, not under 14 years of age, as choose to go to it, and train them for special vocations in life, is not an orphan asylum, within the terms of a bequest to the orphan asylums of San Francisco.

Department 2. Appeal from superior court, city and county of San Francisco.

Application by the St. Francis Technical School and Elizabeth Malone for a share in the distribution of the estate of Hiram A. Pearsons. From a decree refusing the application, the applicants appeal. Affirmed.

Garret W. McEnerney, for appellants. Joseph Hutchinson, Sullivan & Sullivan, and Naphthaly, Friedenrich & Ackerman, and others, for respondents.

McFARLAND, J. This is an appeal by the St. Francis Technical School, and Elizabeth Malone, superioress thereof, from a decree of final distribution, and also from a decree settling the final account of the executor. The deceased, Pearsons, left a will, in which he provided, among other things, that certain specific property should be sold, and "the proceeds of such sale be equally distributed among the orphan asylums of the city and county of San Francisco. And the said asylums I request to be designated by the judge of the probate court." There were a large number of applicants for distributive shares of this fund, each claiming to be an orphan asylum within the meaning of the said clause in the will. On December 20, 1894, the court made a decree by which the claims of some of the applicants were allowed and those of others denied. An appeal was taken from that decree to this court, and the decree was reversed, and the opinion of this court on that appeal quite fully sets forth the principles upon which the court below should be governed upon another hearing of the case. See In re Pearsons' Estate, 113 Cal. 577, 45 Pac. 849. After the going down of the remittitur, the matter was heard again by the superior court, and a decree was rendered, in which six of the applicants were declared to be within the terms of the will, and entitled to a distributive share of the fund. The applications of all the others were rejected, and among them was that of the St. Francis Technical School, which now appeals from the decree. The appellant concedes that the six applicants were properly held to be orphan asylums, and to be entitled to shares of the fund. But it claims that the court erred in holding that it was not an orphan asylum, within the meaning of the will, and not entitled to any share of the fund.

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[1] Rehearing denied August 5, 1899.

The court below was right in deciding against the claim of the appellant. It was not an orphan asylum, within the principles declared at the former appeal. On that appeal it was held that "the prominent idea of an asylum is that it is a place of safety, a place of refuge, a retreat, a sanctuary" for indigent and dependent orphans who have no home elsewhere, and to afford them a home, with protection, support, etc., during the period of their dependency. The appellant here is not within this definition. Its primary and main purpose is to take such girls as choose to go to it, and who are 14 years old or more,—when their period of dependency is mostly over,—and to give them such special training as will fit them for certain vocations in life. The work of the girls contributes to their support. The primary and principal purpose of the appellant is not that of an asylum, as above described, but of a school. It is in fact what its name (although the name would not be controlling) indicates,—a "technical school." Hospitals, reformatories, directories, and schools, although dealing with orphans, are clearly distinguishable from orphan asylums. Similar reasons which induced the court on the former appeal to reject the claims of the Boys' & Girls' Aid Society and the Girls' Directory Orphan Asylum to be beneficiaries under the will, lead necessarily to the rejection of the claim of appellant. The case of Wilson v. Squire, 1 Younge & C. Ch. 654,—the only authority cited by appellant,—is not in point. The bequest in that case was to the governors and trustees of the London Orphan Society on the City Road. It was not to a class. There was only one beneficiary named, and the task of the court was merely to determine who that single beneficiary was. Moreover, the word "asylum" did not appear in the will. The words used were "orphan society"; and, of course, there could be many kinds of societies connected in various ways with orphans which would not be asylums. The judgment and decrees appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

125 Cal. 364

BURK et al. v. ARCATA & M. R. R. CO.

(S. F. 1,121.)

(Supreme Court of California. July 14, 1899.)

DEATH—NOMINAL DAMAGES—ABSENCE OF PECUNIARY LOSS.

In an action for damages for the death of plaintiff's brother, only nominal damages can be recovered where it does not appear that plaintiff derived, or could reasonably expect to derive, pecuniary benefit from deceased, nor that deceased was accumulating, or was likely to accumulate, any estate, so that plaintiff, as his heir, would suffer pecuniary loss.

Department 2. Appeal from superior court, Humboldt county.

Action by Henry C. Burk and others against the Arcata & Mad River Railroad Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Buck & Cutler and Chamberlain & Wheeler, for appellant. Frank McGowan and Mahan & Mahan, for respondents.

TEMPLE, J. This is an appeal from a judgment and from an order refusing a new trial. The suit was brought by a sister and two brothers of George W. Burk to recover damages for his death, which was caused by the negligence of the defendant. The plaintiffs are all adults, and the deceased, at the time of his death, was 34 years old. It was admitted that he was in good health, a competent and reliable locomotive engineer, in the receipt of monthly wages in the sum of $75, and was well inured to his work. He had never been married, and was boarding with one of his brothers immediately before the accident, and was on friendly terms with plaintiffs. Plaintiffs recovered judgment for $1,500. The defendant contends that there was no evidence which tended to show any damage whatever, and therefore plaintiffs were entitled to nominal damages only. An instruction to that effect was asked and refused. This presents the only question on the motion for a new trial or on the appeal.

The instructions actually given to the jury by the court on the subject of damages are not complained of. Instruction 27 contains a full and correct statement of the general rule. It is as follows: "I charge you that damages can only be given for the actual pecuniary injury or loss suffered by the parties complaining; in other words, in a case such as the present, should you find that plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the plaintiffs have sustained, or will sustain, by the death of said George W. Burk. And in this regard I charge you that no damages can be given to plaintiffs for the grief or sorrow, or pain of mind, or injury to their feelings, or for loss of society of deceased, or for his pain or suffering, or for the loss of his comfort or protection. The law simply measures the injury complained of by the loss it has caused or will cause in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence, but you must determine this question solely by the evidence introduced before you. If you are not able to determine from the evidence that the plaintiffs have suffered a pecuniary injury or loss in the death of George W. Burk, it becomes your duty to return a verdict for defendant. And in passing upon the extent of the pecuniary injury or loss sustained by the plaintiffs you must be governed solely by the evidence introduced. You must not indulge in conjectures or speculations not supported by the evidence." The defendant requested an instruction as follows, which was refused: "There is no evidence in the case tending to prove whether George W. Burk was in the habit of saving his wages, or whether he was in the habit of spending all his earnings, or whether he ever contributed towards the support of or to the plaintiffs, or either of them, or whether plaintiffs ever had any reasonable expectation of receiving aid from him. Therefore, if you find a verdict in favor of the plaintiffs, you must limit the amount of damages to a merely nominal sum." The condition of the evidence was undoubtedly as recited in the proposed instruction, there being no evidence whatever upon the subject except as I have stated. Respondent contends for the rule laid down in Railroad Co. v. Barron, 5 Wall. 106, where it was said that the relatives for whose benefit the suit was brought need not have had a legal claim upon the deceased, and that they can recover what it is reasonably probable they would have received from the deceased had he not been killed. But this, if admitted, still leaves the question unanswered, does the evidence show that it was reasonably probable that they would have received anything from deceased if he had not been killed? Ordinarily, it would be admitted these mere possibilities of benefits—for they are really nothing more than that—would not be a proper basis for the estimate of damages. It is recognized that there may be no evidence of actual damage, and that the loss is problematical. It is contended that the legislature intended that some damage should be allowed, and in some states it is left to the jury to estimate the pecuniary value of the life upon vague surmise of possible advantage. The statutes in the different states, though varying greatly, follow, generally, Lord Campbell's act (9 & 10 Vict. c. 93). In that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuation of the right which the injured man had for the injury, for the loss to his heirs did not accrue until he died. Under our statute the injured person might survive long enough to sue, and recover damages, or to settle with the wrongdoer, and then, by his death, a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called "survival statutes." Here it has been ruled, as the fact evidently is, that the statutes create an entirely new cause of action. Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303. And the jury were instructed in this case that damages can only be given "for the actual pecuniary injury or loss suffered by the parties complaining."

It has been said that Lord Campbell's act was intended to be penal. It had been found that persons causing death by negligence could not be convicted of manslaughter, and it was thought that in the interests of the public some punishment should be meted out to them. Had it been expressly made punitive, much trouble would have been avoided. The English courts held that only pecuniary loss could be recovered, and that a plaintiff must show actual loss, or he has no cause of action. In this country the ruling is nearly unanimous that the statute gives a cause of action, and, if no damages are proven, nominal damages only can be recovered. Unless the mere fact that plaintiffs were, at the time of his death, the heirs of deceased, tends to show pecuniary damage, they have shown none. In Railroad Co. v. Barron, supra, it is said that it is presumed that the property of the deceased would have gone at his death as directed by law, and, if he had survived, he would have added something to his estate which his next of kin would have inherited, and the equivalent, as estimated by the jury, may be given his representative. This ruling has been followed often in the federal courts and by many state courts. The decision is criticised in Railroad Co. v. Galway, 6 App. D. C. 143. It is shown to be opposed to reason and the trend of the decisions, and a misconception of the Illinois statute as afterwards construed in Railway Co. v. Swett, 45 Ill. 197, by the supreme court of Illinois. In these cases the jury have been permitted to indulge in mere conjecture, that they may find some damage under the statute. It is said the fact that a right to sue is given implies that damages may be recovered, although no rights of plaintiffs have been violated. Confessedly, plaintiffs had no legal claim on deceased for anything, and he owed no duty to them to accumulate an estate, and leave it to them. Let us consider upon what a sea of uncertainty the jury must embark. (1) Would the deceased have had the health to work and accumulate, and would he have done so? He never has saved anything, and it does not appear that he could. (2) May he not have married, and have had children of his own, who would inherit? (3) Might he not by will have disinherited the plaintiffs. And (4) might he not have outlived them? The majority of men die without much property. Whether the deceased would have succeeded in accumulating, and, if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities is not, according to settled rules and maxims of the law, proper ground for the award of damages. I see no reason why this class of cases should constitute an exception. If it was intended to punish for wrongdoing, the law could be understood. But the courts hold, and it is made the law of this case by the instructions, which were not excepted to, that plaintiffs can recover only the number of dollars they have lost by the death of George W. Burk. Unless they lost a probable increase to their inheritance from their brother, I see no evidence which tends to prove that they lost anything. This question was not at issue and was not discussed in Harrison v. Railway Co., 116 Cal. 156, 47 Pac. 1019. The rule was conceded. The suit could have been maintained by the administrator for the benefit of the estate. The heirs would not take the money as heirs; that is, they would not take by succession, but as the beneficiaries of the statute. The deceased was not entitled to the damages, nor was the right of action in him. The loss for which recovery may be had is the loss to survivors by his death. This would have been the same had he died from natural causes. Since punitive damages cannot be recovered, the wrongfulness of that act cuts no figure further than to bring the case within the statute. The act causing the death must be willful or negligent. There is no reason why, in the estimate of damages, the ordinary rules of law should be departed from. The intention is always to give such damages as, under the circumstances of the case, are just. These words in the statute cannot change the rule unless they are interpreted to mean that the discretion of the jury shall be uncontrolled. It has not been so decided. The statutes upon this subject seem to be framed upon the idea that the heirs will always constitute the family of the deceased. In some states they are so limited. We can easily understand that a life may be of great pecuniary value to such persons. Collateral heirs, at all events, must prove probable loss, or their recovery will be limited to nominal damages. The judgment and order are reversed, and the cause remanded.

We concur: GAROUTTE, J.; McFARLAND, J.

(125 Cal. 325)

PEOPLE v. WINTERS. (Cr. 492.)

(Supreme Court of California. July 10, 1899.)

HOMICIDE—MURDER—TRIAL—INSTRUCTIONS—REASONABLE DOUBT—CREDIBILITY OF WITNESS—ALIBI — CONTINUANCE — EVIDENCE — HEARSAY—TRIAL—ADMISSION OF EVIDENCE —ERROR NOT PREJUDICIAL.

1. Where an instruction on the law of reasonable doubt contains a full statement of the law, a statement in the instruction in form, "You are instructed that the doubt which acquits a defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned, and no other," is not objectionable.

2. An instruction that, "You understand, of course, that a witness ascertained or appearing to be willfully false in one part of his testimony as to the truth or falsity of a given proposition of fact is to be distrusted in other parts," is good.

3. An instruction on the question of alibi that such a defense is as legitimate, if proved, as any other defense, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give him the benefit of the doubt; in other words, he is not bound to prove an alibi beyond a reasonable doubt, it being sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged,—is correct.

4. An instruction that defendant has offered himself as a witness in his own behalf, and that the jury are not permitted to disregard or reject his testimony simply on the ground that he is accused and on trial on a criminal charge, is properly refused, as instructing on the credibility of testimony.

5. Where the affidavits of defendant for a continuance fail to disclose any diligence to secure the attendance of the witnesses, and there is nothing to indicate that their attendance could have been procured at a subsequent day, the showing for continuance is inadequate.

6. Declarations of defendant's confederate, made subsequent to the killing with which defendant is charged, and not in the presence of defendant, are hearsay, and inadmissible.

7. Where declarations made by defendant's confederate are purely hearsay, but in no way prejudicial to defendant, error in admitting such evidence is no ground for a new trial.

Beatty, C. J., and Temple and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, San Mateo county.

Harry Winters was convicted of the crime of murder, and appeals. Affirmed.

Nagle & Nagle, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. The defendant has been convicted of the crime of murder, and the death penalty adjudged. Upon appeal he complains of various errors of law committed by the trial court. A very full instruction upon the law of "reasonable doubt" was given to the jury, and in that instruction it was said: "You are instructed that the doubt which acquits a defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned, and no other." Inasmuch as the instruction contained a full and sound statement of the law bearing upon the matter of reasonable doubt, there can be no valid objection to the foregoing language used by the court. Neither is the instruction susceptible to the objection that it is argumentative in form. The following instruction was given: "You understand, of course, that a witness ascertained or appearing to be willfully false in one part of his testimony as to the truth or falsity of a given proposition of fact is to be distrusted in other parts." While this instruction is somewhat out of the ordinary form bearing upon the subject-matter covered by it, still we find no substantial objection to it.

Upon the question of alibi the court said to the jury: "Such a defense is as proper and legitimate, if proved, as any other defense, and all the evidence bearing upon that point, if any, should be considered by you; and if, in view of all the evidence, you have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defendant the benefit of the doubt. In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point, if any, raises a reasonable doubt in your minds of his presence at the time and place of the commission of the crime charged." Taken as a whole, this instruction is correct. In substance, it states the law. There are a few expressions contained therein which could well have been omitted; as, for instance, strictly speaking, the matter of alibi is not a matter of defense. Again, the jury were told: "That such a defense is as proper and legitimate, if proved, as any other defense." The words "if proved," standing alone, would be seriously misleading, for an alibi in no sense, in order to be successfully invoked, need be "proved," as that word is ordinarily used. See People v. Roberts, 122 Cal. 377, 55 Pac. 137. But it is perfectly evident from the context, taking the entire instruction together, that the court, in using those words, simply intended them to mean a sufficient degree of proof to raise a reasonable doubt in the minds of the jury. We find many courts and law writers referring to an alibi as matter of defense, and also stating that it must be proved by defendant. We doubt the strict legal propriety of using either one of these expressions in those jurisdictions where it is held that an alibi is sufficiently established when a reasonable doubt is raised in the minds of the jurors as to the presence of the defendant at the scene of the crime. Yet these terms are used and held unobjectionable in all those instructions where the jury are clearly and fully told that a reasonable doubt in their minds as to the presence of the defendant at the scene of the homicide entitles him to an acquittal. In all those cases the word "proved" is held to mean the production of sufficient evidence to raise a reasonable doubt. We find these terms used in that standard work the American and English Encyclopædia of Law (volume 2, 2d Ed., p. 56), where it is said: "The true doctrine seems to be that, where the state has established a prima facie case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt of the guilt of the accused." An abundance of authority is there cited where the law is stated to the same effect. See, also, State v. Thornton (S. D.) 73 N. W. 196, in which case the whole question is exhaustively discussed, and a similar instruction to that here given approved. Again we say we do not indorse the statement, "An alibi, if proved, is a good defense," as a strictly correct statement of a proposition of law. Yet, in view of the fact that in the same instruction, and almost in the same line of the instruction, we find the court telling the jury that, if a reasonable doubt is raised in their minds from the evidence as to the presence of the defendant at the scene of the homicide, then such doubt entitled him to an acquittal, it cannot be possible that the jury misunderstood the law. In this same instruction it is also said: "In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal." This statement is eminently true as a proposition of law, but not necessary to be stated in view of the other portions of the instruction. Yet, being given, it could well have been supplemented by the additional statement that not even a preponderance of evidence was necessary to sustain a claim of alibi. This, in effect, was stated when the charge declared in terms that, if a reasonable doubt was raised in the minds of the jurors from the evidence as to the defendant's presence at the scene of the homicide, then he was entitled to the benefit of such doubt and an acquittal. That portion of the instruction referring to the defendant being "in some other place when the crime was committed" we believe is clearly correct. The instruction offered by defendant, and which was refused, upon the question of identity, was properly refused. It did not contain a statement of a principle of law, but an argument based upon facts. The instruction offered by defendant, and refused, bearing upon the question of alibi, was properly refused. It omits the all-important qualification that the doubt must be a reasonable doubt. This court has repeatedly held such instructions fatally defective.

Complaint is made by reason of the court's refusal to give the following instruction: "The defendant has offered himself as a witness, and has taken the stand as such in his own behalf. This is his legal right, and you are not permitted, under the law, to discredit or reject his testimony simply on the ground that he is accused and on trial on a criminal charge." We have repeatedly cautioned trial courts upon the inadvisibility of giving instructions to the jury tending to discredit the testimony of the defendant. A long line of modern cases to this effect may be found in the state reports. Such instructions rest upon the border line of error, as trespassing upon the constitutional rights of the jurors in weighing and testing the credibility of witnesses. As has been often said, that class of instructions will be limited within the strictest lines. In this case we are now asked for a reversal of the judgment because an instruction in behalf of defendant incorporating this principle of law has been refused. We are clear that it was properly refused. The credit to be given the testimony of every witness—the defendant and all other witnesses—is a matter for the jury alone; a matter with which the court has nothing to do. It is a matter of fact, not a matter of law.

Defendant's showing for a continuance is wholly inadequate. It is not disclosed by his affidavits that he had used any diligence to secure the attendance of the two witnesses to which reference is made, and whose presence he desired; and there is nothing whatever to indicate that their attendance could have been procured at a subsequent day if a continuance had been granted.

It is claimed that the defendant and one Raymond entered into a conspiracy to burglarize in the nighttime the Grand Hotel, situated in the village of Baden, near the city of San Francisco, and that while so engaged the alarm was given, the proprietors and others appeared upon the scene, and in the disturbance ensuing one Andrews, a boarder at the hotel, was killed by the defendant's confederate, Raymond. The robbers escaped, and one Herve, a policeman, arrested Raymond a few hours later, traveling upon the highway. At that time Raymond had in his possession a pistol, which had been recently discharged, and possessed four empty chambers. Defendant's confederate had fired four shots from a pistol at the time of the murder. This pistol was one which defendant had secured from a shopkeeper some weeks prior to the killing. The witness, moreover, testified to a conversation had with Raymond, at the time of his arrest, as to his identity, from whence he came, where he was going, and his business, etc. The witness Burke, a policeman, who received Raymond from the hands of Herve at the jail, also testified to a conversation had with Raymond at that time. These conversations were of the same general import. All of this evidence was admitted under objections of defendant, which objections were to the effect that it was hearsay; that defendant was not present at the time, and could not be bound by it; and that, even conceding the existence of a conspiracy between defendant and Raymond, at this time it was a thing of the past. To a large measure these objections of defendant to the admissibility of this evidence were eminently sound. People v. Oldham, 111 Cal. 648, 44 Pac. 312; People v. Opie (Cal.) 55 Pac. 989. It was well to identify the pistol found upon Raymond as the pistol formerly purchased by the defendant, Winters. Such evidence had a direct tendency to connect Winters with the commission of the offense. But declarations of Raymond, made subsequent to the killing, not in the presence of the defendant, were the purest hearsay, and clearly inadmissible. Yet, upon a careful examination of those declarations, we find nothing therein stated which in any way was prejudicial to defendant. His name was not mentioned. Nothing whatever was said by Raymond which, even by implication, connected him with the crime. Indeed, Raymond said nothing in any way implicating himself. The error committed by the trial court, therefore, in the admission of this evidence, was purely abstract, and furnished no ground for a new trial.

The remaining points urged by defendant possess no merit. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; McFARLAND, J.; VAN DYKE, J.

HENSHAW, J. (dissenting). I am of opinion that the court erred, not only in the instruction which it gave upon the subject of alibi, but as well in the instruction asked by defendant which it refused to give. The defendant's whole case rested upon an alibi. If the law upon this subject was improperly placed before the jury, the injury which thereby resulted to defendant certainly entitles him to a new trial. The defendant asked the court to charge the jury as follows: "An alibi simply means that the accused was at another place at the time of the commission of the crime, and therefore could not have committed it; and I instruct you that this defense is as legitimate and proper as any other defense. All the evidence bearing upon this defense should be carefully considered by you. If the testimony on this subject, considered with all the other evidence in the case, is sufficient to raise a doubt in your mind as to the guilt of the defendant, you should acquit him. The accused is not required to prove the defense of an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient if the evidence upon that point raises a doubt of his presence at the time and place of the commission of the crime charged, and, if it has done so, he is entitled to an acquittal. The attempt of the accused to prove an alibi does not shift the burden of proof from the state, but the state is bound to prove his presence beyond a reasonable doubt." As applied to the facts in this case, the foregoing instruction is unimpeachable in its law, unless it be said that the failure to qualify "a doubt" by the adjective "reasonable" justified the court in refusing to give it. But I think the court was not justified, for the instructions are to be construed together, and elsewhere the court had in precise language told the jury "that the doubt which acquits a defendant on a trial on a charge of crime must be a reasonable doubt in the sense mentioned, and no other." But, if it shall be said that the court was justified in refusing to give the offered instruction for the indicated reason, it will be found even more difficult to uphold the instruction which the court actually did give. That instruction is as follows: "One of the defenses interposed by the defendant in this case is what is known in law as an alibi. An alibi in law simply means that the defendant was not there; or, to state it more definitely, a defendant who sets up an alibi shows such a state of facts surrounding his whereabouts as to the particular time the crime was committed as would make it practically improbable or impossible for him to have committed the offense charged. The court instructs you that such a defense is as proper and legitimate, if proved, as any other defense, and all the evidence bearing upon that point, if any, should be considered by you; and if, in view of all the evidence, you have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defendant the benefit of the doubt. In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point, if any, raises a reasonable doubt in your minds of his presence at the time and place of the commission of the crime charged." By this instruction the jury is first charged that a defendant who "sets up an alibi" is to show such a state of facts touching his whereabouts at the time of the commission of the crime as would make it "practically improbable or impossible" for him to have committed it. Such is not the law. One who is alibi is elsewhere than at the place of the crime at the time of its commission. A defendant who rests his defense upon an alibi is not required by his evidence to make it "practically improbable or impossible" for him to have committed the offense. It is necessary for him only to introduce evidence sufficient to create in the minds of the jurors a reasonable doubt whether or not he was at the scene of the crime at the time of its commission. The vice of the instruction lies in informing the jury that the defendant must prove that he was elsewhere, so as to make it practically improbable or impossible for him to have committed the crime. This error is emphasized in the succeeding sentence, where the court informs the jury that the defense of alibi "is as proper and legitimate, if proved, as any other defense." In People v. Roberts, 122 Cal. 377, 55 Pac. 137, a new trial was ordered for an error of the court in instructing the jury, upon the question of alibi, that, "when satisfactorily proven, it is a good defense in law." Herein is a clear declaration that it is incumbent upon the defendant to prove his presence alibi. Again, the court declares that, if the jury had "any reasonable doubt as to whether the defendant was in some other place when the crime was committed," the defendant should receive the benefit of the doubt, but here there is an entire misconception of the point to which the reasonable doubt should be directed. If a man charged with the commission of a crime in San Francisco should offer evidence under an alibi that he was in New York, the jury might entertain a reasonable doubt whether or not he was in New York, or, more than that, they might positively believe that he was not in New York, but, before they could convict him, they should be satisfied beyond a reasonable doubt that he was in San Francisco; or if,—phrasing it otherwise,—from all the evidence, they did entertain a reasonable doubt whether or not he was in San Francisco at the time of the commission of the crime, the prosecution would have failed to establish their case with the certainty required, and the defendant would be entitled to an acquittal. This proposition is declared in the last sentence of the instruction, but the instruction itself is conflicting and contradictory in its declarations, for the jury were as justified in believing from it that the defendant must prove that he was elsewhere as they were in believing that the law required only that the defendant's evidence should create in their minds a reasonable doubt. It needs no citation of authority to the point that contradictory and conflicting instructions upon the same point are prejudicially erroneous, and for this reason I think the defendant is entitled to a new trial.

Still further, the instruction "that the witness ascertained or appearing to be willfully false in one part of his testimony as to the truth or falsity of a given proposition of fact is to be distrusted in other parts" is erroneous and misleading. It is not the "appearance" of giving false testimony, it is the belief that false testimony has been given, which invokes and excites distrust and caution. Moreover, as given, the instruction omits the very important element that the willfully false testimony must be given upon a material matter. People v. Plyler, 121 Cal. 160, 53 Pac. 553.

We concur: BEATTY, C. J.; TEMPLE, J.

125 Cal. 320

BANK OF WOODLAND v. OBERHAUS et al. (Sac. 404.)

(Supreme Court of California. July 10, 1899.)

ACKNOWLEDGMENT—NATURE OF ACT—QUALIFICATION OF NOTARY—HOMESTEAD.

1. The act of a notary in taking an acknowledgment to a conveyance is not judicial in its nature.

2. A cashier of a bank, who is not a stockholder, and is employed on a fixed salary, and whatever fees he receives as a notary are his individually, is not disqualified to take an acknowledgment to a mortgage given to the bank.

3. Under Civ. Code, § 1241, making homesteads subject to sale under judgments obtained on debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record, a homestead is so subject, although the mortgagors made the premises their home, and resided thereon, prior to the execution of the mortgage.

Department 1. Appeal from superior court, Yolo county.

Suit by the Bank of Woodland against William Oberhaus and Fredrica Oberhaus. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. W. Thomas, for appellants. Craig & Hawkins, for respondent.

VAN DYKE, J. The main contention on the part of the appellants is that the mortgages are invalid on the ground that the acknowledgments, having been taken before the cashier of the plaintiff bank, are void. The court finds that C. F. Thomas, the notary who took the acknowledgments of said mortgages, was the cashier of the plaintiff bank, but that he was not a stockholder in said bank, nor a director thereof, but an appointee of the board of directors, and employed by them as such cashier upon a fixed and definite salary. The evidence fully supports this finding, and further shows that he had no interest in the property or income of the bank, that his services were neither increased nor diminished by its gains or losses, and that his business as notary was distinct and independent of his duties as cashier of the bank, and whatever fees he received or collected as notary were his individually, and did not go to the bank. In some of the states it has been held that a notary, in taking an acknowledgment, acts judicially; in others, that he acts ministerially. Elliott v. Peirsol, 1 Pet. 328, was a case that went up from Kentucky, where the clerk was authorized by statute to take and certify the acknowledgments of deeds, and the court there say, "We are of opinion he acted ministerially, not judicially, in the matter," and held that, after his certificate passed from his hands, he had no power of correcting it. This court, in Bours v. Zachariah, 11 Cal. 295, after quoting from that case, say: "Where is the difference between the clerk's power ceasing on his recording the deed and certificate, and the notary's power ceasing after recording by the clerk? * * * The whole reasoning of the court in the section quoted is direct to show that the notary could have no such authority; for all the evils which are so well stated would follow as well from permitting alterations of the record to be made by amendments of the notary as of the clerk." There are some decisions to the effect that where the acknowledgment is a necessary part of the execution of the instrument, as in some cases in reference to the acknowledgment of a married woman, then the officer acts judicially in taking the acknowledgment. When these mortgages were executed, however, it required no separate acknowledgment on the part of the wife. But in this state it would seem that a notary public does not exercise judicial functions. The constitution prescribes where the judicial power of the state is lodged, and what courts and officers exercise judicial power, and notary publics are not included therein. Const. art. 6. Upon principle, it would seem that the act of a notary in taking the acknowledgment of a conveyance is not judicial in its nature. For judicial acts the officer is not liable either for ignorance or negligence, but only for corrupt and intentional misconduct in the discharge of his official duties. On the other hand, ministerial officers are pecuniarily liable for negligence, regardless of intentions,—whether good or bad. It has been held in this state that a notary public and his bondsmen are liable for damages caused by negligence in taking the acknowledgment of a conveyance or mortgage. Fogarty v. Finlay, 10 Cal. 239; Heidt v. Minor, 89 Cal. 115, 26 Pac. 627. In People v. Bush, 40 Cal. 344, the court distinguishes between ministerial and judicial duties, saying: "A judicial officer may be required by law to discharge other than judicial duties. He may by authority of law perform ministerial acts, but, when performed, they do not become judicial acts because they are performed by a judicial officer. This becomes apparent on a moment's consideration. A county judge is authorized, among other things, to take the acknowledgment of a deed, and to solemnize a marriage. No one will contend that in performing those acts he exercises judicial functions." It has been held that notaries public, where attorneys or agents of parties, were not for that reason disqualified in taking acknowledgments or protesting bills, where they were not pecuniarily interested in the transaction. Horbach v. Tyrrell (Neb.) 67 N. W. 485; Penn v. Garvin, 56 Ark. 511, 20 S. W. 410; Moreland's Assignee v. Bank (Ky.) 30 S. W. 19, 637; Bank v. Rivers, 36 Fla. 575, 18 South. 850. We think the notary in this case was not disqualified from taking the acknowledgments of the mortgages in question.

It is further contended by the appellants that the homestead antedated the execution of the mortgage, from the fact that the defendants made the premises their home and resided thereon. Since the Codes, there can be no legal homestead merely from residence, without selection. "The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this title provided." Civ. Code, § 1237. The mortgages in suit were acknowledged, respectively, August 26, 1892, and November 7, 1893, and recorded of those dates. Suit was brought for their foreclosure, and lis pendens filed and recorded October 19, 1895. Although the parties resided on the premises in question a number of years before the execution of the mortgages, the declaration of the homestead was not filed until November 4, 1895. "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * * (4) On debts secured by mortgages upon the premises executed and recorded before the declaration of homestead was filed for record." Civ. Code, § 1241. The judgment and order denying a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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125 Cal. 342

PEOPLE v. WATSON. (Cr. 517.)

(Supreme Court of California. July 12, 1899.)

ASSAULT WITH INTENT TO MURDER—INSTRUCTION—DEGREES OF OFFENSE.

In a prosecution for assault with intent to murder, where, under the information and evidence, the defendant could have been convicted of an assault likely to produce great bodily injury, it was error to charge that he could only be convicted of assault with intent to commit murder, or of a simple assault.

Department 1. Appeal from superior court, Contra Costa county.

John Watson was convicted of assault with intent to commit murder, and he appeals. Reversed.

A. B. McKenzie, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. The defendant has been found guilty of an assault with intent to commit murder. He now claims that the evidence is insufficient to support the verdict. There is evidence in the record which tends to show that the defendant, Watson, when somewhat under the influence of liquor, seized a boy about 15 years of age, tied him by the neck to his (Watson's) horse's tail, using the hair of the horse's tail for that purpose, then mounted his horse, and, with his pistol in his hand and threats to kill issuing from his mouth, rode about one-quarter of a mile, leading the boy. This journey was also interspersed by incidents such as defendant's firing his pistol. It further appears that this reckless deed was done by reason of the feeling of hatred held by defendant against the boy's elder brother. The question as to the intent with which these acts were done by defendant was a pure question of fact, to be determined from all the circumstances of the case; and from those circumstances the jury could well declare that the intent of defendant was to kill and murder this 15-year old boy. It is said in People v. Landman, 103 Cal. 580, 37 Pac. 518: "Of course, under these circumstances, a person's intent cannot be proven by direct and positive evidence, yet it is none the less a question of fact, to be proven like any other fact in the case, and all the circumstances surrounding the assault furnish the rule upon which its proper solution depends." The court instructed the jury as follows: "The law provides that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense. (2) Under the information in this case, the defendant can be convicted of either assault to murder, or of an assault, as the evidence may establish. (3) Gentlemen, the form of your verdict must be either: (1) 'We, the jury, find the defendant not guilty;' or (2) 'We, the jury, find the defendant guilty as charged;' or (3) 'We, the jury, find the defendant guilty of assault.'" Section 245 of the Penal Code provides: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. Under the evidence and the allegations of the information, it is clear that this defendant could well have been convicted of the crime defined by this section of the Penal Code. If the jury believed the defendant committed the acts indicated by the evidence, and also believed that there was no intent in his mind at the time to kill and murder the boy, they could well have found a verdict against him of making an assault by means and force likely to produce great bodily injury; yet, by the instructions of the court just quoted, the jury, in effect, were told that they could not find such a verdict. They were informed that the defendant could be convicted of an assault with intent to murder, or a simple assault. "Expressio unius est exclusio alterius." This construction of these instructions is doubly emphasized when we find the court telling the jury that the verdict must be in one of the following forms, and, upon examining those forms, we find no form of verdict authorized under the section of the Penal Code already quoted.

This defendant's position upon the matter under discussion is much stronger than we find in those cases where the court fails to instruct at all upon the question. In some of those cases it has been held that the defendant should have asked for an instruction directed to the particular point. But in the present case the giving of the instructions we have quoted is, in substance, the equivalent of a refusal to give an instruction authorizing the jury to find a verdict of guilty against defendant, under the aforesaid section of the Penal Code, provided the evidence justified it. In many cases we have held the judge justified in refusing instructions bearing upon lower grades of crime included in the charge laid by the information. These cases have arisen where, under the evidence, it was entirely plain no such crime was committed. In the present case we are unable to say that the evidence does not disclose the character of assault described in section 245.

The conclusion at which we have arrived is in no degree conflicting with the cases of People v. Arnold, 116 Cal. 687, 48 Pac. 803; People v. Scott, 93 Cal. 516, 29 Pac. 123; People v. Barney, 114 Cal. 558, 47 Pac. 41; and People v. Guidice, 73 Cal. 226, 15 Pac. 44. In all of those cases the court gave no instruction whatever bearing upon the question, while in this case the court, for all the practical purposes of the trial, did give an instruction which was wrong in law. Again, in all those cases the evidence did not justify an instruction as to the particular grade of crime included in the information. Here the evidence does justify such an instruction. An additional reason is given in some of those cases showing why there was no error committed by the trial court. That reason is to the effect that no instruction by defendant was asked bearing upon the point involved. The trial judge, of his own motion, should inform the jury in every case as to all the particular crimes involved in the information which the evidence to any extent tends to support. Such is a most commendable practice; but here we are not concerned in that matter, for we have a case much stronger than one where the court did not act at all. It is not a case of nonaction, but erroneous action. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VAN DYKE, J.

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6 Cal. Unrep. 299

WILLIAMS et al. v. BERGIN et al.

(S. F. 1,027.)

(Supreme Court of California. July 12, 1899.)

MUNICIPAL IMPROVEMENTS—APPEAL FROM ASSESSMENT—PETITION.

Under St. 1885, p. 156, § 11, providing that an appeal from an assessment shall be taken to the board of supervisors "within 30 days after the day of the warrant," the petition on appeal must show that a warrant was in fact issued, and the order of the board of supervisors that a warrant be set aside is insufficient to supply the deficiency.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Leo C. Williams and others against Thomas I. Bergin and others. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

J. C. Bates, for appellants. Thomas I. Bergin, for respondents.

HENSHAW, J. This is an action to foreclose the lien of a street assessment. Defendants interposed a demurrer, both general and special. The demurrer was sustained, and, plaintiffs declining to amend, judgment was entered against them. From this judgment they appeal.

The suit was upon a second assessment ordered by the board of supervisors after a successful appeal by the plaintiffs from the first assessment. The board of supervisors acts judicially in hearing and determining such an appeal. Its jurisdiction is limited, and the mode prescribed by the statute for acquiring jurisdiction must be strictly followed. Not only this, but, when reliance is had upon the judgment of such a tribunal as the foundation for an asserted right, it must be shown by proper averment that the tribunal had jurisdiction to render the judgment in question. Williams v. Bergin, 108 Cal. 169, 41 Pac. 287. By the statute the time of appeal is limited upon the date of the warrant. The party aggrieved shall appeal "within thirty days after the date of the warrant." Street Law (St. 1885, p. 156) § 11. We might be willing to hold that an appeal from an assessment taken before the date of the warrant would be within the requirements of this provision, construing it merely as fixing a time after which an appeal could not be taken. But, in any event, it must be made to appear that a warrant was in fact issued, and this the complaint under consideration fails to do. The averment is that the plaintiffs and contractors, "feeling aggrieved by an act and determination of the superintendent of streets in relation to an assessment made and issued by said superintendent of streets May 6, 1892, for the sums due for said work so contracted for and performed, * * * appealed to the board of supervisors of the said city and county from said assessment; briefly stating in said notice their objections, in writing, * * * and filing the same with the clerk of said board on the 14th day of May, 1892." Then follow averments of notice of the posting and of the hearing, and the resolution or order of the board of supervisors is set forth in extenso. By that order it was resolved "that the assessment, warrant, and diagram made and issued by the superintendent of streets * * * be, and is hereby, set aside, and the superintendent of streets is hereby directed to make and issue a new assessment, warrant, and diagram, correcting the error made in the former assessment hereby set aside." But this order of the board of supervisors that a warrant be set aside does not amount even to an argumentative or inferential declaration in the complaint that such a warrant was ever issued. As the law has seen fit to make the right of appeal and its time depend upon the date of the warrant, the supervisors would not acquire jurisdiction to hear an appeal taken in a case in which no warrant had in fact been issued. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(6 Cal. Unrep. 301)

CALIFORNIA MORTG. & SAV. BANK v. HAMPTON. (L. A. 567.)

(Supreme Court of California. July 11, 1899.)

DEEDS—CONSTRUCTION BY ACTS OF PARTIES—QUIETING TITLE—JUDGMENT—ANSWER.

1. Defendant conveyed part of a tract of land, and a fence was constructed by him and a subsequent grantee so as to include the land described in the conveyance and an additional piece belonging to him, and the land was subsequently conveyed to plaintiff by a description following the line of the fence. Defendant claimed that after the fence was constructed he discovered that it included too much land, and so notified the owner, but took no steps to have it moved, and allowed it to remain for 20 years, and in conveying an adjoining piece had it surveyed, and used a description corresponding to the line of the fence. *Held*, in an action to quiet title to the additional piece on the ground that it should have been included in the original conveyance by defendant, that the subsequent acts of the parties had established plaintiff's title.

2. Where, for 23 years previous to an action to quiet title, defendant had maintained a dam across a stream at a point where it intersected the line between his land and the land in controversy, thereby backing the water over a part of the land involved so as to divert it into his ditch, and in the action, while alleging title to the land, he fails to allege a right to flow it, merely alleging riparian rights in the stream, he cannot complain that the judgment declaring that he had no interest in the land, but allowing him to maintain the dam, does not also give him the right to divert the water, and flow plaintiff's land.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by California Mortgage & Savings Bank against George W. Hampton and Julia H. Hampton. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Spencer, for appellants. Venable & Goodchild, for respondent.

CHIPMAN, C. Action to quiet title. Plaintiff had judgment, from which, and from an order denying motion for a new trial, defendants appeal.

It appears that in 1876 defendants were the owners of the S. ½ of the S. E. ¼ of section 22, township 30 S., range 12 E., situated in San Luis Obispo county. They in that year conveyed to one Andrews, by metes and bounds, a portion of said land by the description given in the answer, to which defendants disclaim ownership. In 1877 Andrews conveyed this piece of land by the same description to one Breed, and he, in 1887, conveyed the land by the same description to one Dutton, and he, in 1897, by the same description, conveyed it to plaintiff, and 10 days thereafter conveyed by quitclaim to plaintiff by the description given in the complaint. This latter description coincides exactly with the tract as it was fenced by Breed, a part of which fence was built by defendants, and which remains to-day the same as when built in 1877. The fenced tract is known as the "Dutton Place." A map attached to the original transcript shows this description by a black line, which follows around the tract as the fence is built; and by a dotted line the land described in the answer is shown when run according to the courses and distances, but disregarding the calls or stations. The map also shows a piece of land formerly owned by defendants, part of the original tract, lying east of the Dutton place, which defendants conveyed to one Preston in 1894. This deed is in evidence, and its calls, so far as they describe the line dividing the Dutton place from defendants' land sold to Preston, coincide with the line of fence built in 1877, and it is in evidence that Hampton assisted in making this Preston survey; and the surveyor, Story, testified that he had no recollection that Hampton told him that he owned any land within the Dutton fence. Dutton testified that he had been in possession of the tract as fenced since 1882, and bought it in 1887, and that no one but himself ever claimed to own it since that time; and he did not admit ownership in anybody else at any time. Hampton testified that he told Breed that he (Breed) had some of his (Hampton's) land inclosed, and he also testified that he so told Dutton, but this latter statement is disputed by Dutton. Hampton also testified that the fence is now where it was built originally in 1887; that he built about 12 or 13 chains of the line, commencing on the south side of his land, and Breed built the balance, and that the fence inclosed about three-quarters of an acre too much because Breed commenced building the line on the second course two chains further south than it should be; that he found this out by measuring the first line with a tape soon after the fence was built, and that he told Breed of it at the time. It seems, however, that he took no steps to have the fence moved, and allowed it to remain for 20 years, and until after Dutton bought; and when he sold the piece of land contiguous to the Dutton place on the east he had it surveyed, and the description which he caused to put in the deed to Preston corresponded with the line of fence, and was a recognition of the correctness of its location. The real controversy centers upon the question whether the first call in the Andrews deed for a line, "north 18.20 chains to post 2," was wrong, and should have been 16.25 chains, as the fence gives it. Aside from the conduct of the parties interested in recognizing the line to be 16.25 chains, as the fence shows it should be, the third call of the Andrews deed, which is 4 chains running north, added to the 16.25 chains, makes 20.25 chains, which nearly corresponds with the actual width (20 chains) of Hampton's entire tract. But if we add 4 chains to 18.20, as the Andrews deed called for in the first line, we have 22.20 chains, or 2 chains north of Hampton's north line. It is, of course, possible that the third line was too long and the first line right; and the second call, which runs to the creek, points that way. It seems, however, that all the calls are to posts, and these monuments would govern, if ascertained, rather than the distance or length given for the line; and, as the fence was built shortly after the Andrews deed was made, it is altogether probable that the fence was built to these established posts as corners and known monuments. At any rate, the subsequent conduct of the parties, we think, should be taken to remove any doubt there may be as to the real fact. It may be added that counsel for respondent state—what is not disputed—that a computation of the acreage according the fence boundaries makes within the fraction of $^{1}/_{100}$ of an acre of the acreage called for in the Andrews deed (25.70), while, if first line in the Andrews deed is taken as correct, and the third as 2 chains too long, the acreage would be 25.01, or about $^{70}/_{100}$ of an acre less than the deed calls for.

2. The court found that "defendants have no interest in said parcel of land * * * except only that they have the right to maintain a dam across the Stenner creek where the same intersects the east line of said parcel of land, in such manner that the west end of said dam may be (as at present) within said parcel of land." The only evidence as to any claim to the water of this creek was given by Mr. Hampton, upon cross-examination, when called as a witness for plaintiff. He testified: "There is about three-quarters of an acre of land in dispute here, caused by Breed's fence, on the second line from the starting point according to Story's map, being two chains further south than it should be. My water dam backs the water over about one-eighth of this three-quarters of an acre to get it in my ditch, and has done so every year for the past twenty-three years. No one has ever objected to my use of the water until this suit was commenced." The judgment reads: "And the defendants are hereby perpetually debarred from asserting any claim whatever in or to said land, or in or to the waters flowing in Stenner creek on said land, adverse to plaintiff, with the proviso that defendants have the right to maintain a dam across Stenner creek where the same intersects the east line of said parcel of land in such manner that the west end of said dam

may be (as at present) within said parcel of land." Appellants complain that this is giving a stone where bread was asked, for the right to erect the dam is of no value if there be no right given to divert the water of the creek thereby as they had been doing for 23 years. Plaintiff claimed the right, as riparian owner, to the water of this creek flowing through its land. Defendants, in their answer, claimed an interest in the water as riparian owners only. Defendants could not have any greater relief than they claimed, and they made no claim as appropriators; indeed, the answer prays for no relief whatever. The evidence is certainly very meager as to defendants' right to the water, and there is none at all as to plaintiff's. As owners of the soil, both plaintiff and defendants were riparian proprietors. The judgment is that defendants shall assert no claim "to the waters flowing in Stenner creek on said land (i. e. plaintiff's land) adverse to plaintiff." We do not understand this to interfere with defendants' rights as riparian proprietors. They have the right adjudged in their favor to erect the dam as heretofore, which seems to be all and more than they asked. If they had desired the further right to flow the lands of plaintiff,—to have an easement to back the water over plaintiff's land,—they should have so alleged in their answer in some appropriate manner. We cannot see that the judgment restrains defendants from using water on their own land as riparian proprietors. It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MEMORANDUM DECISIONS.

CITY AND COUNTY OF SAN FRANCISCO v. BRODERICK, Auditor. (S. F. 1,519.) (Supreme Court of California. June 21, 1899.) In bank. Appeal from superior court, city and county of San Francisco. Action by the city and county of San Francisco against William Broderick, as auditor of said city and county, to restrain him from auditing and allowing the salary demand of Harry Piper, as chief deputy, in the office of the county clerk of the city and county of San Francisco. There was a judgment for petitioner, and defendant appeals. Affirmed. Geo. D. Collins, for appellant. H. T. Cresswell and W. I. Brobeck, for respondent.

PER CURIAM. This is an action to restrain the auditor of the city and county of San Francisco from auditing and allowing the salary demand of Harry Piper, as chief deputy in the office of the county clerk of the city and county of San Francisco. The auditor's demurrer was overruled, and, he declining to answer, the prayer of the petitioner was granted. The office here in question was created by an act of the legislature approved February 14, 1891. St. 1891, p. 5. For the reasons given in City and County of San Francisco v. Broderick (S. F. No. 1,436, this day decided) 57 Pac. 887, the judgment appealed from is affirmed.

In re COURT COM'RS. (Supreme Court of California. May 12, 1899.) In bank. Order appointing commissioners pursuant to the act of February 17, 1899.

PER CURIAM. Pursuant to the provisions of an act of the legislature of February 17, 1899, entitled "An act to provide for the appointment by the supreme court of five commissioners of the supreme court, to appoint a secretary, and appropriate money therefor," it is this day ordered that N. P. Chipman, John Haynes, E. W. Britt, Wheaton A. Gray, and J. A. Cooper be, and they are hereby, appointed commissioners of this court; and it is further ordered that D. B. Woolf be, and he is hereby, appointed secretary for such commissioners.

DAWSON v. HILL. (S. F. 1,561.) (Supreme Court of California. June 9, 1899.) Department 1. Appeal from superior court, Monterey county. Action by Charles B. Dawson against W. J. Hill. There was a judgment for plaintiff, and defendant appeals. Affirmed. S. F. Geil and C. F. Lacey, for appellant. Renison & Jones, for respondent.

PER CURIAM. In this case the same questions are involved as in People v. Hill (S. F. No. 1,596, recently decided in department 2 of this court) 57 Pac. 669. Upon the authority of that case, the judgment herein is affirmed.

McMULLIN v. McMULLIN. (S. F. 887.) (Supreme Court of California. May 15, 1899.) Department 1. Appeal from superior court, city and county of San Francisco. Action for divorce by Virginia McMullin against Thurlow McMullin. From an order for temporary alimony and expenses of the action, defendant appeals. Affirmed. Lloyd & Wood and Rodgers & Paterson, for appellant. Chas. S. Wheeler and Garber, Boalt & Bishop, for respondent.

PER CURIAM. There was an appeal by defendant in this case from an order requiring him to pay the plaintiff certain sums of money for temporary alimony and expenses of the action. The record upon which the appeal is submitted contains no evidence that the order was improvidently made, and it is therefore affirmed.

SWEENEY v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 1,339.)[1] (Supreme Court of California. May 3, 1899.) Department 1. Appeal from superior court, city and county of San Francisco. Action by Lorenzo H. Sweeney against the city and county of San Francisco. From a judgment for defendant and certain orders, plaintiff appeals. Affirmed. S. W. & E. B. Holladay, L. D. McKisick, and Chandler & Holladay, for appellant. Harry T. Cresswell, City & Co. Atty., and Gaillard Stoney, Asst. Atty., for respondent.

PER CURIAM. This case concerns the title to a parcel of land included within the limits of the square called "Lafayette Park," in the city and county of San Francisco. All the questions presented on the appeal are involved, also, in the case of Holladay v. Said City and County (S. F. 1,298, this day decided) 57 Pac. 146, and, for the reasons stated in the opinion there rendered, the judgment and orders appealed from in this case are affirmed.

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[1] Rehearing denied June 2, 1899.

CALIFORNIA REPORTER

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58 PACIFIC REPORTER

6 Cal. Unrep. 307

ASHTON v. GOLDEN GATE LUMBER CO.

(S. F. 954.)

(Supreme Court of California. July 19, 1899.)

LANDLORD AND TENANT—ESTOPPEL TO DENY LANDLORD'S TITLE—PRESUMPTION OF TITLE.

1. Where plaintiff had such title under a deed of trust as enabled him to execute a valid lease for a term not exceeding the life of the beneficiary named therein, and defendant entered under said lease, and has never been disturbed in possession, and no one except plaintiff has claimed any right to the rents, he cannot deny plaintiff's title in an action to recover the rents accruing after the death of the beneficiary, though such title ceased on the death of such beneficiary.

2. Under Code Civ. Proc. § 1962, subd. 4, providing what presumptions shall be deemed conclusive, declaring that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation, the conclusive presumption of the landlord's title having attached, it continues until in some mode recognized by the law it may be rebutted.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles Ashton, trustee, against the Golden Gate Lumber Company, to recover rent. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Reversed.

Craig & Meredith, Evans & Meredith, and Lester H. Jacobs, for appellant. Chas. S. Wheeler and Bishop & Wheeler, for respondent.

HAYNES, C. Action to recover rent. Findings and judgment were for the defendant, a corporation, and plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The complaint set out an indenture of lease, executed by the parties hereto in January, 1892, whereby the plaintiff leased to the defendant a parcel of ground 275 feet by 137.6, being part of 50-vara block No. 99, in the city of San Francisco, for the term of 15 years, at a specified rental, payable monthly, and alleged possession taken by defendant thereunder, which possession has been ever since continued, and that the rent for certain months in the year 1895 had not been paid. For a first defense the defendant denied each and every allegation of the complaint. For a second defense it was alleged that on October 19, 1887, Solomon Heydenfeldt, being the owner in fee simple of said premises, executed and delivered to the plaintiff a deed, conveying to him the said leased premises, in trust: "First, to take and hold possession of said land, and to rent and lease the same to as great extent as I could or might do before the execution of these presents." The second, third, fourth, and fifth items provided, in substance, that the trustee should collect the rents, pay the taxes, etc., and, after retaining 5 per cent. of the rents as compensation, to pay, so far as the rents were sufficient, for the boarding, lodging, washing, office rent, and clothing of the party of the third part (Solomon Heydenfeldt, Jr.), and any surplus also to be paid to him. "Sixth. Upon the death of the party of the third part, leaving children, the trust shall end, and the property be conveyed to such children. If he shall die, leaving no children, then to convey the same to the party of the first part, or, in case of his death, to his right heirs." This defense further alleged that said deed of trust constituted plaintiff's only title; that said indenture of lease was entered into during the lifetime of said Solomon Heydenfeldt, Jr., who afterwards died on the —— day of ——, 1894; that at the time of his death said Solomon Heydenfeldt, the grantor in said deed of trust, was dead; that said trust estate granted to the plaintiff ceased and determined upon the death of Solomon Heydenfeldt, Jr.; that plaintiff was thereby devested of all title to said premises, and of all title to or interest in said indenture of lease, and had no longer any right, power, or authority to collect the rents, issues, or profits of said premises; and that the rents sought to be recovered herein all accrued since he was devested of his title by the death of Solomon Heydenfeldt, Jr. The third defense alleged the making of the said trust deed and lease; the death of the grantor, and the said beneficiary; that the plaintiff was authorized to lease said premises for a term not exceeding the life of Solomon Heydenfeldt, Jr.; that said lease determined at his death; and that since that time defendant has not occupied said premises as the tenant or lessee of the plaintiff, but by and with the consent of the owners thereof. The defendant also filed a cross complaint, setting out the same facts, and alleging that the plaintiff claims, adversely to the defendant, that said lease has not terminated, but is still in full force; that said claim is without right; and that plaintiff has no just claim whatever,—and prayed that said adverse claim be determined, and for a decree that said lease ended and ceased with the life of Solomon Heydenfeldt, Jr., and that defendant is under no obligation to pay rent to the plaintiff. Demurrers interposed by plaintiff to the second and third defenses, and the cross complaint, were overruled, and plaintiff answered said cross complaint.

The court found that the lease was executed as alleged; that defendant entered under it, and has ever since remained in possession, and has not been ousted therefrom, or restored or surrendered the same to plaintiff; that plaintiff has performed all the conditions on his part; that the rent for the time mentioned in the complaint has not been paid, though demanded; that Heydenfeldt was the owner of the premises at the date of the execution of said deed of trust; that plaintiff's only title was as trustee under said deed; that he had no other power or authority to lease said premises or collect the rents than that given by said deed; that Solomon Heydenfeldt, Sr., died in September, 1890, and that Solomon Heydenfeldt, Jr., died in 1894, unmarried, and without children; that plaintiff's trust estate ceased upon his death; that plaintiff was thereby devested of all title to said lands, and of all right to collect said rents; that defendant has not since occupied the premises as tenant or lessee of the plaintiff; and that no person has objected to the occupancy thereof by the defendant. It was further found "that no person has made any claim, prior to the commencement of this action, to the possession or for the rental thereof, or any claim at all concerning said premises against defendant adversely to the plaintiff," and "that, as a matter of fact, said Ashton has made no conveyance of said premises to any person or at all." The finding touching defendant's cross complaint was in accordance with its allegations. As conclusions of law the court found that plaintiff was not entitled to recover in this action, and also "that defendant is entitled to a decree adjudging the matters and things set forth in the decree signed by the court contemporaneously herewith, and to be filed herewith, which said decree counsel have stipulated and agreed may for all purposes be considered part of these conclusions of law." Said decree gives a construction of the trust deed, and the powers and rights of the trustee thereunder, in accordance with the contentions of defendant that it is under no obligation to the plaintiff to pay rent, or perform any obligation of said lease, and concludes as follows: "And it is further ordered, adjudged, and decreed that the plaintiff, Charles Ashton, trustee, and any and all persons claiming under or through him as such trustee, or under or through him as the lessor in said lease set forth in plaintiff's complaint, or under any of the covenants in said lease, be, and they hereby are, restrained and forever enjoined from asserting such claims, and each and all of them, against said defendant." Several exceptions were taken by the plaintiff during the trial, and his motion for a new trial was based upon these, and upon certain specifications of the insufficiency of the evidence to justify the findings. The questions involved in this appeal, however, are radical, and may be discussed without special reference to the exceptions or specifications, further than to say they are sufficient to authorize such discussion.

It is conceded by respondent that Ashton had such title and authority under the deed of trust as enabled him to execute the lease, and that it was valid for a term not exceeding the life of Solomon Heydenfeldt, Jr.; that defendant entered under said lease; that it has never been evicted, or its possession disturbed; and that no one, except the plaintiff, has ever claimed any right to receive or collect any rent or other compensation for defendant's use and occupation of the premises, the possession of which it received from the plaintiff under said lease. But it is claimed that, Solomon Heydenfeldt, Jr., having died, plaintiff's estate and title, and his right and authority to collect the rents, thereupon ceased, and that the defendant may plead such expiration of plaintiff's title as a bar to his action to recover the rents accruing after the death of the life beneficiary. No general proposition of law is better sustained by the authorities, or has a firmer foundation in a wise public policy, than that a tenant who has received possession from his landlord is not permitted to deny the title of his lessor while the relation thus created subsists; but, as against the tenant, the title of the landlord is conclusively presumed to be perfect and valid. Respondent, however, contends that this proposition is limited or qualified by section 1962, subd. 4, of the Code of Civil Procedure. This section provides: "The following presumptions, and no others, are deemed conclusive: * * * (4) A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." That is, as to the tenant, the presumption that the landlord had title at the commencement of the relation is conclusive. After that time the presumption that the landlord has title continues, but it is not conclusive. But how, and to what extent may it be rebutted? The burden of showing that the landlord's title has ceased is upon the tenant. The conclusive presumption declared by the Code having attached, it must continue until in some mode and under circumstances recognized by the law it may be rebutted; otherwise, the tenant may accept a lease and enter into possession to-day, and to-morrow repudiate the lessor's title, and hold possession in hostility to a title which the day before was conclusively presumed to be valid and beyond the power of the tenant to deny.

It is contended by respondent, however, that Ashton's title was terminated by the death of Solomon Heydenfeldt, Jr., and that by the same event the lease was terminated, and, as the rent sued for accrued after the termination of the lease, the trustee could not maintain an action therefor. But if it be conceded that, as between Ashton, as trustee, and the right heirs of Solomon Heydenfeldt, the remainder-men, the trustee's title had ceased, it does not follow that the tenant, who was put in possession by the trustee under a lease for a term of years, could plead such determination of his landlord's title in an action for rent. The termination of the landlord's title, so long as the tenant remains in the undisturbed and unquestioned possession of the leasehold, no claim or demand for rent or compensation having been made by the successor in interest of the lessor, or by any person other than the lessor under whom he entered, is a matter of no concern to the tenant, and constitutes no defense to this action. If respondent's contention is sound, a tenant, having received possession from his landlord, may refuse to pay rent, though not disturbed in his possession by threat or otherwise, and even without asserting title in himself, and without surrendering possession, may, when sued for rent, litigate his landlord's title, and have it declared void, invalid, or worthless, and his right to remain in possession without accountability for rent quieted by a solemn decree of the court. Respondent has in no way connected itself with the title or right of the heirs of plaintiff's grantor, or with any other owner, real or assumed, claiming in hostility to the plaintiff. Even if it had attorned to the heirs of Heydenfeldt, Sr., it would have availed nothing, since "the attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction." Civ. Code, § 1948; Thompson v. Pioche, 44 Cal. 508, 515. "A tenant cannot justify his attornment to a third party by merely showing that such party has recovered judgment against him for the possession of the premises. He must go further, and show that his landlord was notified of the pendency of the action, and had an opportunity to defend; otherwise, the landlord is neither bound nor estopped by the judgment." Douglas v. Fulda, 45 Cal. 592. In Schilling v. Holmes, 23 Cal. 227, 230, after speaking of the duty of the tenant, who has been dispossessed by a stranger, to take legal proceedings to recover possession, that he may discharge his duty of surrendering possession to his landlord, the court said: "But, until the tenant has performed this duty of restoring full and complete possession to his landlord, he still remains liable to the latter for rent. His liability to pay the rent is not discharged by an eviction, unless under a title superior to his landlord's, or by some agency of the landlord." In Ghirardelli v. Greene, 56 Cal. 629, it is said: "The real questions in issue were the making of the lease, the entry under it, and rent due. If the defendants entered under a lease, they could not dispute the title of their landlord. If they did not enter under a lease, he could not recover in this action, because he based his right to recover upon such a lease. Therefore the defendant's allegation of title in somebody else raised an immaterial issue, and that allegation might have been stricken out or disregarded altogether." In Reynolds v. Lewis, 59 Cal. 20, it was said: "Lewis appears to have occupied the land with the permission of Reynolds, and he cannot avoid the payment of the value of its use and occupation to Reynolds, on the ground that the latter had no right to lease the land to him."

The cases cited by respondent to the proposition "that a tenant may always show, if he can, that his landlord no longer holds title," remain to be noticed. McDevitt v. Sullivan, 8 Cal. 593, 596, is not in point. It was contended by the plaintiff in that case that Sullivan was estopped to deny McDevitt's title. But the court said: "Sullivan did not obtain possession under McDevitt, and he is not estopped from showing that the attornment to McDevitt was made under a mistake of fact." That case was, therefore, within a recognized exception to the general rule. Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, has no application to any question in this case. There the property was leased for a term of years, and afterwards the whole of the property covered by the lease was condemned and paid for by the city for street purposes, and it was held that the whole of the title, both of the landlord and tenant, was extinguished, and the tenant thereby relieved from the payment of rent, and that the tenant could plead such extinguishment in bar of an action for rent accruing thereafter. In Lamson v. Clarkson, 113 Mass. 348, the plaintiff had an estate in the premises for the life of Lancy, and leased to defendant for one year, rent payable monthly. Lancy died during the term, and this action was for rent accruing after his death. Drake owned the reversion, and served notice on the tenant not to pay rent to Lamson. Defendant knew of Lancy's death, and of Drake's claim to title. The defendant refused to pay to either until he could ascertain where the title was. This suit was brought by Lamson, the lessor, after the term expired. A judgment for the plaintiff was reversed.

The distinction between these cases and the one at bar is too clear to require elaboration, and no others are cited to this point by respondent. In Bigelow, Estop. (5th Ed.) 511, it is said: "But, permissive possession being the ground of the modern estoppel, it is clear that the estoppel will prevail so long as such possession continues, though the contract of lease was void. And the authorities upon this point are numerous." See Bailey v. Kilburn, 10 Metc. (Mass.) 176; Miller v. Lang, 99 Mass. 13; Morrison v. Bassett, 26 Minn. 235, 2 N. W. 851; Nims v. Sherman, 43 Mich. 45, 4 N. W. 434; Doe dem. Bullen v. Mills, 2 Adol. & E., 17; Fleming v. Gooding, 10 Bing. 549. In Nims v. Sherman, supra, Mr. Justice Cooley, speaking for the court, said: "One who is a tenant in fact, it is justly held, shall not dispute the title under which he has obtained possession, even though he has since acquired a better title; but, when he has surrendered the possession obtained by means of the tenancy, he may at once turn about and try titles with his late landlord." The foregoing principles are directly sustained in Palmtag v. Doutrick, 59 Cal. 154 (a case of bailment), and Jeffers v. Easton, 113 Cal. 345, 45 Pac. 680. In both of these cases the rule stated by Wilde, J. (6 Rob. Prac. 364), is quoted, thus: "If the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor without rendering himself liable to the other party, he may yield the possession, and take a new lease under him, or he may abandon the possession, and, in either case, he will thereafter not be liable to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster."

Eliminating from the findings of fact those expressions which are mere conclusions of law, they require a judgment for the plaintiff as prayed for, and I therefore advise that the judgment and order appealed from be reversed, with directions to the court below to enter judgment for the plaintiff as prayed for.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to the court below to enter judgment for the plaintiff as prayed for.

125 Cal. 334

NOLAN et al. v. McDUFFIE. (L. A. 496.)

(Supreme Court of California. July 11, 1899.)

VENUE—AFFIDAVIT OF MERITS—SUSPENSION OF CASE BY MOTION FOR CHANGE OF VENUE.

1. An affidavit to the effect that defendant has fully and fairly stated the case to his attorneys, and is advised by them and believes that he has a valid defense on the merits, is a sufficient affidavit of merits to support a motion for a change of venue.

2. While a motion for a change of venue is pending, the court has no power to pass on a demurrer to the complaint.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by M. J. Nolan and C. A. Smith against M. B. McDuffie. From an order denying a motion for change of venue, defendant appeals. Reversed.

C. A. Stark, Richards & Carrier, and Hatch, Miller & Brown, for appellant. W. R. Bacon, for respondents.

CHIPMAN, C. Action brought in Los Angeles county to recover commissions on sale of real property by plaintiffs as agents of defendant. Complaint was filed May 24, 1897. The matter is here on appeal from an order denying defendant's motion for change of place of trial to Santa Barbara county. The proceedings, as they appear from the transcript, were as follows: On June 15, 1897, defendant made an affidavit of merits, and on the same day signed a demand, directed to plaintiffs' attorneys, that the place of trial be changed; and on the same day defendant's attorneys signed a notice, directed to plaintiffs' attorneys, stating that defendant would on June 30, 1897, at 10 o'clock a. m., or as soon thereafter as counsel could be heard, move for a change of the place of trial, and that the motion would be heard "upon affidavits, copies of which are herewith served upon you, and upon the demand to change the place of trial, and the papers on file in the case," etc. Defendant also on the same day served upon plaintiffs' attorneys a general demurrer to the complaint. These papers were all duly served on plaintiffs' counsel and filed. "On the 28th day of June, 1897, said demurrer came on regularly to be heard on the law and motion calendar of said court, and the same, being called for argument, was answered 'Ready' by plaintiffs' counsel, the defendant not being present nor consenting to the hearing; and the court, having no knowledge of demand for change of place of trial, took up said demurrer and complaint, and passed upon the same, sustaining said demurrer, on said 28th day of June, 1897." It appears, also, that on the 30th day of June, 1897, the hearing of defendant's demand for change of place of trial "came on for hearing before said court, and the court, being of the opinion that the affidavit of merits was insufficient, granted defendant leave to amend the same; and the further hearing of the matter was continued until July 14, 1897, at which time the defendant filed the following amended affidavit of merits." Then follows this affidavit. It appears that the matter came on for hearing again on July 14, 1897, the day fixed by the court, when defendant's motion was denied on the grounds (1) that the first affidavit of merits was insufficient, but in what respect is not shown; and (2) "that the demurrer heretofore filed in said cause by said defendant had been passed on by the court and sustained, and the application for a change of venue came too late." Defendant appeals from the order denying his motion. Respondents have filed no brief.

The affidavit first served stated as follows: "I reside in the county of Santa Barbara, state of California, and have so resided for more than five years last past. I further say that I have fully and fairly stated the case in this cause to [naming his attorneys], and after such statement I am by them and each of them advised, and verily believe, that I have a good and substantial defense on the merits to the said action." This affidavit was sufficient. Watkins v. Degener, 63 Cal. 500; Buell v. Dodge, Id. 553. The motion to change the place of trial was pending when the demurrer was passed upon, of which plaintiffs' counsel had notice. The absence of defendant's counsel on law day when the demurrer was called did not authorize the court to hear the demurrer. It was the duty of the court to hear and determine the motion before it could hear or determine the demurrer, and, if the defendant had been found to be entitled to have his motion granted, it was the right of defendant to have all other judicial action in the cause determined in the superior court of his own county. The court had no power to act upon the demurrer when it did (Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209), and its order in that regard is a nullity. I advise that the order denying defendant's motion be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying defendant's motion is reversed

125 Cal. 337

MENDOCINO COUNTY v. JOHNSON et al.

(S. F. 1,154.)

(Supreme Court of California. July 11, 1899.)

TAX COLLECTOR—ACTION BY COUNTY AGAINST BONDSMEN — DUTIES OF AUDITOR AND TREASURER — EVIDENCE — AMENDMENT OF COMPLAINT.

1. In an action against the bondsmen of a tax collector, proof that at the end of his term he was in default makes a prima facie case, and the burden of showing payment is on the defendants.

2. In an action against the bondsmen of a tax collector to recover money not paid in by the collector, evidence offered to show that the money was actually paid was excluded by the court because no evidence was offered to show that the payment was in compliance with County Government Act 1891, § 115 (St. 1891, p. 323), requiring that all payments must be authorized by the auditor before the treasurer can receive them. *Held*, that the evidence should have been admitted, as tending to show that the county had received the benefit of the money, and that there was no actual default.

3. In an action against bondsmen for the default of a tax collector, the complaint alleged that certain amounts had been collected, and certain amounts paid in, leaving a deficiency. Defendants offered evidence of other payments, not accounted for in the complaint. *Held*, that it was error to exclude this evidence on the ground that by amending the complaint the plaintiff could add the amount to both sides of the account, and still leave the same deficiency.

Department 2. Appeal from superior court, Mendocino county.

Action on a tax collector's bond by the county of Mendocino against J. R. Johnson and others. From a judgment for plaintiff, defendants appeal. Reversed.

R. McGarvey and J. A. Cooper, for appellants. Geo. A. Sturtevant, J. Q. White, and J. D. Pemberton, for respondent.

HENSHAW, J. This is an action brought by the county of Mendocino against J. R. Johnson, formerly its tax collector, and against the sureties upon his official bond, to recover the sum of $3,000, moneys which it is alleged were collected by the tax collector and not accounted for by him in accordance with law. The cause was tried by a jury, which rendered a verdict for plaintiff in the sum of $2,886.80. From the judgment which followed, and from the order denying defendants a new trial, they prosecute these appeals.

The complaint alleged that the defendant Johnson, as tax collector, on and after the 1st day of October, 1894, and before the 7th day of January, 1895, collected and received the sum of $132,884.69, which he should have paid into the treasury of the county on or before the 7th day of January, 1895, "but that he did not pay prior to the 7th day of January, 1895, and has not since, of the moneys aforesaid paid into the treasury of said county, any other or greater sum than $129,897.69. Plaintiff's case rested mainly upon the testimony of the county treasurer, who said that upon the 18th day of December Mr. Handy, the deputy tax collector, had demanded of him a receipt for $3,000, which he asserted he had paid into the treasury upon the 11th day of December preceding; and Handy stated, according to the testimony of the county treasurer: "I came in, and you were out of your office. I set it down on the floor. I went out, and then went to my office to get more money, and forgot to come back." He testified further that Handy had said that he obtained the money from Mr. Redemeyer's bank upon that day, and that Redemeyer had accompanied him when he left the money. The treasurer then asked Mr. Redemeyer if Handy had obtained the money from him, and Mr. Redemeyer answered, "Yes; I come with him." Under these circumstances the treasurer says he gave to the tax collector a receipt for $3,000 more than was paid him. He also in January and in February made his sworn statements, as required by law, to the effect that this $3,000 had actually been paid in and was in his possession. He further testified that his books showed that he had not received the $3,000, and that in a subsequent conversation with Mr. Redemeyer (the banker with whom the tax collector seems to have deposited funds awaiting the time of his settlement with the treasurer) the latter informed him that he was mistaken when he said that he had accompanied Handy upon the 11th; that Handy had drawn $3,000 from the bank upon the 11th, but that he had not accompanied Handy, and did not know what disposition Handy had made of the money.

1. The treasurer's examination was carried over the payments made to him by the tax collector in October, November, and December, 1894. He also swore that he had received nothing from the tax collector in the year 1895, up to and including the 7th day of January. Plaintiff, it will be remembered, charged the tax collector with the receipt of the sum of $132,000, and then alleged that of this sum he had not prior to the 7th day of January, and had not since that date, paid in any other or greater amount than the sum of $129,000. The 7th day of January, 1895, was the date of the expiration of the tax collector's term. It was the date when by law he was required to make his settlement with the auditor and treasurer, but, if he failed to make his settlement upon that date, and did thereafter pay in full all of the moneys due from him to the county, the particular cause of action charged upon here would not lie. It was therefore essential for the plaintiff to aver defendant's default and failure to pay the money, and it was equally essential to follow the averment by proof, for issue was joined upon this question. But the averment was supported by sufficient evidence when it was shown that the tax collector did not pay over all of the moneys due to the county upon the 7th day of January. The tax collector's default was then shown, and the burden of proof thereupon shifted to him to prove payment. The defense of payment may be made under the general issue, but the burden of proof is on the defendant. Frisch v. Caler, 21 Cal. 71; Wetmore v. City of San Francisco, 44 Cal. 294; 2 Greenl. Ev. (Lewis' Ed.) § 516. The verdict is therefore supported by the evidence.

2. When the deputy tax collector was called to the witness stand by the defendants in their effort to prove by him that he had actually paid the $3,000 into the treasury, and that the treasurer's receipt therefor was not secured by fraud or misrepresentation, but was a valid recognition of the payment thus actually made, it was objected upon behalf of the plaintiff that the forms of payment prescribed by the county government act of 1891 were not followed, and that, therefore, the evidence was inadmissible. Those forms are established by section 115 of the county government act of 1891 (St. 1891, p. 323), and by section 71 of the same act (Id. p. 316). It is made the duty of the auditor to examine and settle the accounts of all persons indebted to the county and holding moneys payable into the county treasury, and thereafter, upon the presentation and filing of the treasurer's receipt for such money, the auditor shall give to such person his discharge, and charge the treasurer with the amount named in the receipt. The treasurer is forbidden to receive any money into the treasury unless accompanied by the certificate of the auditor. After discussion the court ruled in the following language: "You want to show from this witness that he paid three thousand dollars into that treasury on the 11th of December, without any authority on the part of the treasurer to receive it. The evident object of that provision is to throw a safeguard around the public funds. The objection is sustained to this. I have no doubt about it. I sustain the objection. I sustain the objection, unless you say that you expect to follow the testimony up by showing that he has complied with section 115 of the county government act; that he first went to the auditor, and that the auditor examined the account, and that he settled it; and that he gave a certificate to the tax collector authorizing him to deposit those three thousand dollars in the treasury." A payment to the treasurer in a mode other than that expressly provided by law would not exonerate the tax collector or his bondsmen from an action at the instance of the county, unless further proof were made that the county actually received the money. In other words, the tax collector, or any other debtor of the county, is entitled to his acquittance from the county only when he has complied with the forms of law governing his payments into the treasury. If he sees fit to adopt an unauthorized mode of payment, he will be exonerated when he can make it appear, not only that he has paid the money, but that the county has received it. The mere deposit with the treasurer would not be proof sufficient thus to exonerate him. It would be in the nature of an individual deposit made at the party's private risk. But, nevertheless, if the tax collector could show that he had in fact paid the money to the treasurer and that the county had obtained the benefit of it, then, notwithstanding the irregularity no loss of funds would have resulted, and neither the tax collector nor his bondsmen could be properly charged in an action such as this for peculation or misappropriation. Therefore, although the offered evidence of the irregular payment would not have been sufficient of itself to exonerate the defendants, it was a step in that direction; and it was error upon the part of the court to refuse to accept the evidence without proof first made of a compliance with the terms of the county government act, since that proof, from the loose methods seemingly employed by the treasurer and auditor, as well as the tax collector, could never be made at all, not only as to the $3,000 here in question, but perhaps also as to the whole $132,000 charged upon.

3. The court excluded evidence of four payments aggregating $3,361.23 made by the tax collector to the treasurer, as shown by the treasurer's receipts. The respondent adopts the decision of the judge in denying the motion for a new trial, and therein it is conceded that the rejected evidence was competent evidence, which should have been admitted; but it is said that defendants were not injured by it because "plaintiff, by amendment, would simply charge him with all that he showed was paid in as tax collector over the amount

alleged, and credit him accordingly, still leaving the error of three thousand dollars on the 18th to be accounted for by him." If the evidence was competent,—and it seems to have been,—it should have been admitted; nor can its rejection be justified upon the ground that the plaintiff might thereafter have amended its complaint.

We think that what has been said renders unnecessary a consideration of other matters urged by appellants; and for the foregoing reasons the judgment and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

(125 Cal. 345)

BAYLEY v. EMPLOYERS' LIABILITY ASSUR. CORP. OF LONDON, ENGLAND, Limited. (S. F. 857.)[1]

(Supreme Court of California. July 12, 1899.)

INSURANCE — ACCIDENT POLICY — WAIVER— KNOWLEDGE OF OFFICERS AND AGENTS.

The omission by an applicant for an accident insurance policy to state in his written application that he had received compensation for previous accidents, as required by said application, will not avoid such policy, when the officers of the insurance company knew, when the application was made, that he had received indemnity from it and other companies for such accidents.

In bank. Affirmed.

For opinion in department, see 56 Pac. 638.

Van Ness & Redman, for appellant. Chickering, Thomas & Gregory, for respondent.

VAN DYKE, J. This is an action on a policy of accident insurance. The case was tried with a jury in the court below, and the verdict and judgment went for the plaintiff. The appeal is taken from the judgment and order denying a new trial. The assured, George B. Bayley, was killed by an accident, and the plaintiff, his widow, is the person in whose favor the policy ran. There are two questions presented by the appellant: First, that the assured represented, in his written application for the policy, that he had never proposed and been declined insurance by an accident insurance company, and that this was not true; second, that he represented in said application that he had never received compensation for any accident, whereas he had in November, 1892, and also in the year 1886, received compensation on account of injuries he had sustained by previous accidents.

The first defense is eliminated from consideration here by the fact that the verdict of the jury was against the defendant, and the evidence bearing upon that defense was materially conflicting, and hence the verdict cannot be disturbed.

As to the second defense: In the application the fifteenth statement is as follows: "I have never received compensation for any accident except as herein stated (names of companies or associations with amount of compensation); and there was no statement as to any compensation being received. It was shown, however, that the deceased had been paid for an accident in 1892, and also in 1886. But at the time of the application for the policy in question the defendant company and its officers knew that the assured, Bayley, had received payments in 1892, not only from its own company, but from three others. Mr. Okell, the general manager of the defendant on this coast, testified: "I understood that other payments had been made to him. Q. Did you ever notify the company, or any of the officials of your company, outside of your own agency here in San Francisco, that such payments had been made? A. No, it was not necessary." And he further testified: "I knew in November, 1892, that Bayley had been paid by other companies weekly indemnity claims under accident policies held by him. I knew that other companies had paid him, but I did not remember the names of the companies. * * * I knew Mr. Bayley in his lifetime. I had a conversation with him at or about the time that the policy issued in this case was applied for, in regard to the issuance of it. He came into my private office, and asked me if I would be willing to issue a twenty thousand dollar policy to him, and, knowing no reason why I should not, I said I would. I should think it was a few days before the issuance of the policy." Mr. Thompson, the clerk and cashier of the general manager here, was asked: "I will ask you why it is that if, as cashier of the company at that time, you knew that Bayley had received compensation from the Employers' Liability Company, you did not change or correct the statement, 'I have never received compensation for any accident except as herein stated.' A. Seeing the loss had been paid by our own company, and the new application written in the same, there was no necessity of making that note on it as to the payment of our own loss." In Menk v. Insurance Co., 76 Cal. 53, 14 Pac. 837, and 18 Pac. 117, in the opinion in bank, it is said: "If the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered; otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." Kruger v. Insurance Co., 72 Cal. 91, 13 Pac. 156. In Bacon on Benefit Societies and Life Insurance (volume 2, par. 427) it is said: "And if, when the insurance company issues a policy, it knows that certain answers in the application are falsely answered, it waives the right to object by such issue;" and the text is fully sustained by authorities.

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[1] Rehearing denied August 11, 1899.

But it is contended that, although the company may be deemed to have waived any mention of the payments made in 1892, of which it had knowledge, still it was necessary for Bayley to insert the payment made to the Travelers' Company in 1886. It will be seen from the form of the application, dates and different times compensation had been made were not required; only "names of companies or associations, with amount of compensation." But the defendant already knew that the Travelers' Company had paid Bayley, and therefore it was not necessary to again mention that company; and, as the dates of payment were not required, it would have been a literal compliance with the form to have added the small amount received in 1886 to the much larger sum, paid in 1892, which latter, as already shown, was waived. The weekly indemnities paid for loss of over nine weeks' time in 1892 were in consequence of severe injuries received by Bayley while descending from the summit of Mt. Tacoma or Rainier. The companies, other than the defendant, paying weekly indemnities for such loss of time, were the Pacific Mutual, Travelers', and Pacific Surety Company. Mr. Okell, general agent of defendant, having knowledge of these facts, says he knew of no reason why he should not insure Bayley for $20,000. Bayley, it seems, had a personal interview with the general agent, and talked matters over with him about issuing the policy, and the company's clerk, Thompson, prepared the application, filling out the blanks, but omitting entirely any mention of prior payments or compensation, although he was well aware such had been made. It is therefore reasonable to suppose Bayley considered the fifteenth paragraph as waived. Neither party to a contract of insurance is bound to communicate information of matters of which the other waives communication, except in answer to inquiries. Civ. Code, § 2564. This case is distinguishable from Insurance Co. v. Nichols (Tex. Civ. App.) 24 S. W. 910, relied upon by the appellant. In that case the insured, in response to a question answered, "None other," which was incorrect. In this case there was no answer or response, and the reason why there was none is apparent. The term "compensation," in the fifteenth subdivision of the application, is, in this connection, in a measure ambiguous and uncertain as to its meaning. An inspection of the policy and application will show that, when payment for loss of time is spoken of, the word "indemnity" is used, and not used where payments are made for loss of life, limb, or eye. The policy pays for several different contingencies: (1) For death, the principal sum; (2) for the loss of two hands, two feet, one entire hand, or one entire foot, or permanent loss of sight of both eyes, principal sum; (3) for loss of one hand or one foot, one-half principal sum; (4) $100 per week so long as insured is wholly disabled from prosecuting any business pertaining to his occupation. In reference to the fourth payment the term "indemnity" is used entirely. Thus, in the policy and indorsement thereon we find: "All sums paid as weekly indemnity * * * shall by so much diminish the said principal in case of claim for said principal." "If the insured is injured in any occupation or exposure classed by this corporation as more hazardous than herein given, his insurance and weekly indemnity shall be," etc. "No claim for weekly indemnity in excess of the money value of the insured time shall be valid." "The total risk taken by this corporation is ——— dollars for loss of life, and ——— dollars weekly indemnity." And the application contains the following: "The amount of insurance against accidental death or permanent total disablement hereby applied for is twenty thousand dollars. The amount of insurance against permanent partial disablement hereby applied for is $10,000. The amount of weekly indemnity for total disabling injuries hereby applied for is $100,000." Further down in the application we find statements as follows: "I have no other accident insurance covering weekly indemnity except as herein stated" (names of companies or associations, and amount of weekly indemnity in each), and there is inserted "Ætna, $10,000." Then comes the subdivision under consideration, already quoted. It would appear from the foregoing that the word "indemnity," and not "compensation," refers to weekly payments. There seems also to be a distinction in the proof of claim whether it is for a weekly indemnity, or loss, as of life, or limb, or sight. Although "compensation," in the popular sense, may be broad enough to include "indemnity," still, if the terms are used by the parties entering into the contract in a special or technical sense, they are to be so understood. Civ. Code, § 1644. "Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor; but, where there is no imperfection or ambiguity in the language, it must be construed, like any other contract, according to the intention of the parties." Rankin v. Insurance Co., 89 Cal. 203, 26 Pac. 872. "It is a general rule that, when a stipulation or exception to a policy of insurance emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured; and, when underwriters have left their design doubtful by using obscure language, the construction to be adopted is the one most unfavorable to them." Merrick v. Insurance Co., 54 Pa. St. 277. "It [the policy of an accident company] insures either indemnity for injury by payment of a special weekly allowance during the time the insured is disabled by the injury, or compensation for death by payment of a fixed sum if the insured dies in consequence of the accident. These two forms of insurance are used separately, or in a joint policy covering both indemnity and compensation." 7 Am. Law Rev. p. 587. The defense urged in this case is purely technical, and does not go to the merits. The judgment and order denying a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

125 Cal. 353

HOLLAND v. McDADE et al. (S. F. 1,123.)

(Supreme Court of California. July 14, 1899.)

APPEAL FROM ORDER DENYING NEW TRIAL—STAY OF EXECUTION—BOND—HARMLESS ERROR—OVERRULING DEMURRER TO COMPLAINT FOR UNCERTAINTY.

1. Under Code Civ. Proc. § 942, providing that, if the appeal be from a judgment or order directing the payment of money, it does not stay its execution, unless a bond be executed in double the amount named in the judgment or order, an appellant, on appeal from an order denying his motion for a new trial, may give a bond in double the amount of the judgment, and thereby stay its execution.

2. Error in overruling a demurrer to a complaint for uncertainty must have been prejudicial to defendant, and not a mere abstract error, in order to justify a reversal of judgment.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Patrick Holland against J. J. McDade and another for damages claimed to have resulted from defendant McDade's refusal, as sheriff of the city and county of San Francisco, to release certain property of plaintiff from execution, and also in publishing notice of sale thereof under said execution. There was a judgment for plaintiff, and defendant McDade appeals. Affirmed.

Sullivan & Sullivan, for appellant. T. J. Crowley and T. M. Osmont, for respondent.

GAROUTTE, J. This appeal is from the judgment, without a bill of exceptions, and the questions involved arise upon the face of the complaint. The action is one against McDade, former sheriff of the city and county of San Francisco, for damages claimed to have resulted from his refusal to release certain property of plaintiff from execution, and also in publishing notice of sale thereof under said execution. This execution was issued and levied upon a money judgment in the case of Curry against Holland. Holland's motion for a new trial in that case was denied, whereupon he appealed from the order denying the motion, and, without appealing from the judgment, gave a bond upon appeal in double the amount of the judgment, for the purpose of staying its execution. The acts of the sheriff of which complaint is made in the present action were done after this purported stay bond was filed.

The important question presented by the appeal is, may an appellant, upon appeal from an order denying his motion for a new trial, give a bond in double the amount of the judgment, and thereby stay its execution? If he may do so, authority for it must be found in section 942 of the Code of Civil Procedure, where it is provided: "If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order." By inspection of the foregoing provision of the law, it would seem that very liberal rules of construction must be invoked in order to justify the giving of a stay bond upon an appeal from an order denying a motion for a new trial. At the same time, it was so directly decided in the comparatively early case of Fulton v. Hanna, 40 Cal. 278. The conclusion there declared is based upon the following reason: "Although an appeal from an order denying a motion for a new trial is in a different and distinct line of proceeding from a direct appeal from a judgment, still a reversal on appeal from the order denying a motion for a new trial, and remanding the cause for retrial, as effectually vacates the judgment as upon a direct appeal therefrom." The reason here given has force, and the only answer that can be made to its conclusiveness, if there be an answer, is that the statute does not expressly so provide. Yet the rule laid down in the case cited is a most wholesome one, for an appeal from a judgment which is absolutely beyond attack is an idle and useless proceeding. Indeed, such an appeal would be frivolous, and render the appellant liable in damages for bringing that character of appeal before this court. It serves but to incumber the records, and gives unnecessary labor to both lawyers and courts. It certainly should not be held that an appeal of that character must be taken for the single purpose of securing an opportunity to file a stay bond, unless the statute clearly forbids any other course.

The question here involved has never been squarely presented since the case of Fulton v. Hanna. In McCallion v. Society, 83 Cal., 572, 23 Pac. 799, that case is cited, and the court said, "It is not doubted that a stay undertaking can be so drawn as to effect a stay on appeal from an order denying a new trial." In Tompkins v. Montgomery, 116 Cal. 123, 47 Pac. 1007, citing Fulton v. Hanna, it was said, "The right of the appellant to have the execution stayed pending the appeal from an order denying a new trial is not impaired by the fact that the appeal from the judgment is dismissed." And in that case this court allowed a stay bond to be filed here upon an appeal from an order denying a motion for a new trial. Tompkins v. Montgomery seems to be in full support of Fulton v. Hanna; for, if the stay bond may be filed in this court upon an appeal from such an order, it must be allowable in the trial court. In that case there was an appeal from the judgment, as well as from the order denying the motion for a new trial, and an unsuccessful attempt was made to give a stay bond in the trial court. The appeal from the judgment was dismissed by this court. Hence there was nothing before this court in the form of an appeal from the judgment at the time the stay bond was allowed to be filed. There is some general language found in the case of Carit v. Williams, 67 Cal. 580, 8 Pac. 93, opposed to the doctrine declared in Fulton v. Hanna, but in their facts the two cases are widely dissimilar. In that case the appeal was from an order made after judgment, refusing to set aside an execution. This execution may have been set aside for a hundred different causes occurring supplemental to the judgment. Hence a reversal of that order would not necessarily set aside the judgment; yet such would be the inevitable effect upon a judgment, of a reversal of the order, in the case of an appeal from the order denying the motion for a new trial. For this reason Carit v. Williams clearly falls without the doctrine laid down in Fulton v. Hanna. Again, in Reay v. Butler, 118 Cal. 113, 50 Pac. 375, a case cited by appellant, it was held that a stay bond could not be given upon an appeal from an order refusing to strike out a cost bill. In that case the order was not one made directing the payment of money. Neither could the reversal of the order upon appeal have resulted in vacating and setting aside the judgment. It must be observed, therefore, that these cases are not opposed to Fulton v. Hanna.

Upon broad principles of construction, it has been decided that a single appeal bond of $300 is sufficient upon an appeal from the judgment and from the order denying the motion for a new trial. This shows in what close connection the two appeals are recognized and treated by the court. An appeal from the order denying the motion for a new trial is neither more nor less that a direct attack upon the judgment. This is its sole aim and purpose. The question here presented is purely one of practice. In this instance, certainty of the true rule is more to be desired than the particular nature of the rule established. We are fully satisfied that a most wholesome construction of the statute is found in Fulton v. Hanna; and, in view of the fact that the construction there declared has stood so long without successful assault either by the courts or the legislature, we feel that adherence should still be given to it.

We are not prepared to say that substantial error was committed in overruling the defendant's demurrer to the complaint for uncertainty. Conceding the ruling erroneous, still it is not every erroneous ruling of the trial court in this regard that demands a reversal of the judgment. Substantial injury to defendant must have resulted from the action of the court. If this complaint be uncertain as to whether or not some of the alleged damage done by McDade was done before the stay bond was filed, under objection, evidence offered tending to indicate that fact would not have been admitted. Again, the instructions to the jury could readily have protected defendant's right in this regard. There being no bill of exceptions before us, we know nothing that occurred at the trial pertaining to this matter. But defendant had abundant opportunity at that time to protect himself against any disastrous results which might have been occasioned by the uncertainty of the pleading. It is said in Alexander v. Mill Co., 104 Cal. 536, 38 Pac. 411: "It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that this court will order a reversal of the judgment, based upon the trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be mere abstract error, but it must be prejudicial and injurious error, in order to avail appellant, for otherwise he has no cause of complaint." We are satisfied there is no prejudicial error disclosed upon this point.

We find no merit in the plea of the statute of limitations.

For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

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125 Cal. 383

HELLMAN v. CITY OF LOS ANGELES et al. (L. A. 687.)

(Supreme Court of California. July 17, 1899.)

MUNICIPAL CORPORATIONS — LOCATION OF STREETS—SUFFICIENCY OF CROSS COMPLAINT—EVIDENCE—COMPETENCY.

1. In an action to quiet title to land abutting on a street, a cross complaint by the city, seeking to esablish the street line across the land, must set out with certainty the limits of the street, in order that the parties may know what land is alleged to encroach on the street.

2. In an action to determine the boundary of a street, evidence was introduced showing that defendant had occupied the land up to the present line for 25 years, that the other landowners built up to that line, and that the street was paved, using the present line as a boundary, and assessments made accordingly. On the other hand, there was no evidence showing the line to be different, except incompetent testimony of surveyors, based on notoriously inaccurate surveys. *Held*, that the evidence did not support a decision changing the line.

3. In an action to determine the location of a street line under a former survey, testimony of surveyors was offered. Their results were obtained by an accurate survey, using one established street as a basis. The former survey was notoriously inaccurate. *Held*, that this testimony was incompetent to show where the street had been under the inaccurate survey.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by H. W. Hellman against the city of Los Angeles and others. From a decree establishing a street as prayed by a cross complaint of the city, the other defendants appeal. Reversed.

W. E. Dunn and Brown & Newby, for appellants. McKinley & Graff, Graves, Omelveny & Shankland, and Gardner, Harris & Rodman, for respondent.

GRAY, C. This action was commenced by the plaintiff against the city of Los Angeles to quiet title to a certain lot of land at the northeast corner of Spring and Fourth streets in the said city. The city filed a cross complaint, alleging that the appellant Boaz Duncan, and other parties, all of whom were subsequently brought in and made parties to the action, owned lots along and fronting on Fourth street, on both sides thereof, between Spring and Main streets, and that all these lotowners, including the plaintiff, had "so encroached upon Fourth street, both upon the north and upon the south, that the width of said Fourth street, as it now exists upon the ground between the fences and other improvements of said parties, is considerable less than sixty feet." The cross complaint also sets forth that in 1849 a survey and map of said city was made, known as "Ord's Survey," which was adopted as the official map of said city, and which shows Fourth street to have a uniform width of 60 feet. The principal relief prayed for in the cross complaint is that the lines of Fourth street be determined, and that the claims adverse to the use of Fourth street as a public street of said city be forever quieted. The appellant demurred to this cross complaint for insufficiency of facts to constitute a cause of action, and for uncertainty because the north and south boundaries of Fourth street were not set out, and it could not be ascertained therefrom to what extent the improvements of the several parties, including appellant, encroached upon said street. In overruling this demurrer the court erred. The complaint was uncertain in the particulars specified in the demurrer. Whether the suit be treated as an action to quiet title, or to establish the boundaries of Fourth street, the appellant was entitled to be informed by the cross complaint specifically as to what portion of the premises occupied by him were claimed to be an encroachment, and within the boundaries of Fourth street.

We are also of opinion that the evidence is insufficient to justify the decision of the court. So far as the appellants' rights were concerned, the question of fact to be decided was as to the exact location of the south boundary of Fourth street, at the place where appellant's property was located, according to Ord's survey, which is conceded to be the original and official survey of the city of Los Angeles. Appellants introduced evidence tending to show that those under whom they claim title acquired the same by deed from the city of Los Angeles November 21, 1855, and that appellants' predecessors in interest erected a picket fence along Fourth street, on the line now occupied by the northerly line of appellants' building on the southeast corner of Spring and Fourth streets; that said fence was moved in the year 1888, when said building was erected; that said Fourth street was paved, and the sidewalk built to the line occupied by said building, and the owners of said property paid their proportion of said assessment for said paving up to said line; that up to 1897 all the improvements on the south side of Fourth street, between Spring and Main, were on a line occupied by defendants' building, and had occupied that line for at least 25 years prior thereto. This was the best evidence introduced, and the only competent evidence offered to show the location of the south line of Fourth street.

The testimony of the engineers was incompetent to establish the location of Fourth street, and the objection to such testimony should have been sustained; and the same may properly be said of the maps with the exception of the Ord map. This map, and the contract in pursuance of which it and the Ord survey were made, were proper evidence in the case; but the map could not locate itself on the ground. It appeared in evidence that all the monuments of the Ord survey were lost, and no attempt was made to establish their location, either by reputation, the declarations of deceased persons, or by the testimony of witnesses having knowledge of such location; but it seems that, in the absence of any such evidence, the engineers have attempted to locate the streets by selecting the most uniform street in the oldest part of the city, and, assuming that one boundary of that street is on the Ord survey, they propose to locate the other streets of the city, by first measuring the distance required by the Ord map, and then adding to or subtracting from such distance as may be required to leave all the streets of a uniform width of 60 feet, and require the removal of as few buildings as may be. In making their measurements on the ground, they have disregarded the Ord map. They make the block in which appellants' lot is situated 599.76 feet long, and the block immediately across Fourth street from and north of said lot they find to be 605.07 feet long, whereas the Ord map gives the blocks a uniform length of 600 feet. They might have come nearer the map if they had given the blocks on each side of Fourth street a more nearly uniform length, by placing Fourth street 2 or 3 feet further north. The work and testimony of the engineers is only a guess at the location of Fourth street as originally established by the Ord survey.

It may be proper, in the absence of any better evidence, to regard the line of ancient and continuous improvements as evidencing the line of Sixth street as it was run by the Ord survey; but no use of this line can be made to establish any other line in the city for two reasons: First, the engineers have demonstrated by their measurements, and their testimony is an admission, that the Ord survey must have been very inaccurate; second, the inaccuracy of the early surveys in California, as well as in other states, is a matter of such common knowledge that the courts are warranted in taking judicial cognizance of the existence of such inaccuracy, as they frequently have done. It needs no argument to show the impossibility of locating an unknown line of an inaccurate survey by running from a known line of the same survey. In the absence of better evidence, the court might have been warranted in finding for appellants on the evidence as to the south boundary of Fourth street as it had been indicated on the ground by the line of fence and other improvements for 25 years. Diehl v. Zanger, 39 Mich. 601; Orena v. City of Santa Barbara, 91 Cal. 621, 28 Pac. 268. There was no competent evidence in the testimony or maps of the engineers to show the location of the southern boundary of Fourth street, and, therefore, the judgment of the court has nothing to support it.

We think the conclusions reached herein find support in the following cases: Payne v. English, 79 Cal. 540, 21 Pac. 952; City of Los Angeles v. Cohn, 101 Cal. 374, 35 Pac. 1002; Bullard v. Kempff, 119 Cal. 9, 50 Pac. 780; Orena v. City of Santa Barbara, supra; Ralston v. Miller, 3 Rand. (Va.) 44. For these reasons, we advise that the judgment and order appealed from be reversed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(125 Cal. 400)

GRAVES v. HEBBRON. (S. F. 912.)

(Supreme Court of California. July 18, 1899.)

RES JUDICATA—PUBLIC LANDS—TITLE—PRE-EMPTION RECEIPT—PATENT—EVIDENCE.

1. A judgment in ejectment, wherein plaintiff claimed the right to possession of land under a final pre-emption receipt which entitled him to a patent of the land, the boundaries of which had been determined by government survey, is conclusive in another action involving the same issues between the same parties, though subsequent to the decision of the first action the plaintiff obtained a patent of the land described in his pre-emption receipt.

2. Evidence other than the record of a former judgment is admissible to show that a question in issue in a present action is the same as one determined in another action between the same parties.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county.

Action to quiet title brought by Thomas Graves against J. R. Hebbron. From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. V. Morehouse and F. J. Hambly, for appellant. A. S. Kittredge and W. A. Kennedy, for respondent.

CHIPMAN, C. Action to quiet title to a certain tract of land situated in Monterey county. Plaintiff had judgment. Defendant appeals from the order denying his motion for a new trial.

The land in question is a piece of about 13 acres, which defendant claims lies in the N. W. ¼ of the N. W. ¼ of section 29, township 15 S., range 6 E., but which plaintiff contends is part of the N. E. ¼ of section 30 of that township. Plaintiff describes in his complaint the particular tract by metes and bounds. Defendant denied plaintiff's title, and alleged title in himself. Defendant, by way of separate answer, avers that he commenced an action December 31, 1894, entitled "Hebbron v. Graves," against plaintiff in this action, "for the recovery of the possession, claiming to be the owner thereof, and seised in fee and entitled to possession of the following described land." Then follows the description of certain land lying in sections 19, 20, and 29 of said township, as to which defendant avers that the title was then involved, and also that the location of the line dividing sections 19 and 20 and sections 29 and 30, running north and south, and the location of the corner common to sections 19, 20, 29, and 30, were involved and litigated, and averring that it was admitted by Graves at the trial of said action of Hebbron v. Graves that, if the boundary line between sections 19 and 20 and 29 and 30 was situated and located as claimed by Hebbron, then Hebbron was entitled to judgment for the lands described in his complaint; that, to entitle plaintiff in this action to recover, "the said line running north and south between said sections 29 and 30 must be removed nearly eight chains further east than as located, fixed, and determined, adjudged and decreed, by the judgment in the said suit of the said Hebbron against the said Graves, and the common corner to sections 19 and 20, 29 and 30, must be removed 6.84 chains east of where the same was located, fixed, determined, adjudged, and decreed in the said judgment of the said Hebbron against the said Graves, duly given and made by the said superior court aforesaid"; that, if the line and common corner referred to remain as determined in that action, then plaintiff in this action has no right, title, or interest in the premises sued for. Averred that the defendant Graves appealed from the judgment and from the order denying new trial to the supreme court, where the judgment and order were affirmed. 20 Pac. 740.

Plaintiff introduced the patent of the United States, dated April 14, 1890, to the N. E. ¼ of section 30. A witness testified that the land in question is part of the N. E. ¼ of section 30. Plaintiff thereupon rested. Defendant showed title to N. W. ¼ of the N. W. ¼ and the E. ½ of N. W. ¼ of section 29. It was stipulated that the transcript on appeal in Hebbron v. Graves might be offered and introduced in evidence for the same purposes and "to the same effect as the original record might be introduced, if the same were presented," and the transcript in that case is set out in the transcript in this case. It contains the judgment roll, statement of the case, the evidence at the first trial, the steps taken to appeal,—in short, the entire record on appeal. Defendant offered the transcript, as counsel stated, for the purpose of showing that the parties were the same as here, and to show that the land involved was the same, and that the object was to settle the boundary lines between the lands of the parties, the location of the corner common to sections 19, 20, 29, and 30, and that counsel would follow up the offer by showing that the appeal was perfected and the judgment of the lower court affirmed, and that "the controversy here is precisely the same controversy as in that suit." Plaintiff objected to the judgment roll on the ground of its immateriality, irrelevancy, and incompetency, and on the same ground objected to the admission of the statement of the case, part of the transcript; and it is now claimed by respondent that the statement is not properly part of this record, and cannot be considered, because there was no distinct ruling upon both of his objections. Some discussion ensued upon the objection, in which the court took part, and counsel for plaintiff stated as follows: "Our principal objection is that it is apparent from the inspection of the record itself [the transcript] that the judgment roll was made up and that judgment was entered long prior to the title which we are now litigating." In ruling upon the matter the judge said, among other things: "* * * . do not see that the judgment, as against the party not holding the title, can be availed of, as against a subsequent patent from the United States government for the land. * * * The party, under his patent, has to go upon the ground and ascertain the stakes, and determine where his boundaries are, and the only right to put in controversy the boundaries (the survey of the United States government) exists under the patent; and any prior litigation in which that question is put in controversy, if it is decided adversely to him as to the limits of his possession under the patent, I do not think can be asserted in a subsequent action, and the offer of the judgment roll will be denied upon that ground." It is manifest from the colloquy which ensued upon the offer, between respective counsel and the court, and the remarks of the court when the ruling was made, that the point under discussion was as stated by plaintiff's counsel, and quite fully discussed by the court, from which the quotations above are taken. When the court ruled out the judgment roll, it practically ruled against the whole transcript. Having excluded the judgment roll, the statement went with it. It perhaps would have been well for defendant's counsel to ask a ruling also as to the statement, inasmuch as there was a separate objection to it; but we are unwilling, in view of the circumstances as they occurred, to hold that we cannot look to the statement here as part of the offer. It appeared in evidence that, prior to the action of Hebbron v. Graves, Graves held the N. E. ¼ of section 30 by an original homestead entry, which, before commencement of the action, he had commuted to a pre-emption claim, and had made final payment to the government, and held a final pre-emption receipt, entitling him to patent. At that time Hebbron had patent to the N. W. ¼ of N. W. ¼ of section 29, and other lands.

In support of the ruling of the court, respondent relies upon Amesti v. Castro, 49 Cal. 325, and refers also to Caperton v. Schmidt, 26 Cal. 479. In the first of these cases the question arose between two claimants of contiguous Mexican grants, title to both of which was inchoate at the time the judgment pleaded in bar was entered. In that action the executors of Castro sued in ejectment to recover from Amesti a parcel of land, to which both claimed title under their respective grants, and Castro recovered judgment. Subsequently a patent was issued to Amesti which included the land recovered in the former ejectment suit. Castro's grant was also confirmed, and the survey excluded from his rancho the premises recovered in the ejectment suit. The claimants, being dissatisfied with the survey, caused the same to be returned to the district court for revision under the act of congress, and it was approved and became final. Subsequently the heirs of Amesti commenced an action in ejectment to recover, from the defendants claiming under Castro, the same lands which were formerly recovered by the executors of Castro. The only defense offered was the judgment in the former action as an estoppel, in support of which the judgment roll was offered, and was excluded by the trial court, and that ruling was affirmed here. An examination of the opinion will show that the court treated Amesti's title prior to confirmation as incipient, under which the question of the boundaries of his land remained undetermined, and that the duty later on of definitely fixing the boundaries rested first with the Mexican government, and later, by treaty, with the United States government, and that "it alone, or its properly constituted tribunals, could adjudicate his claim, fix his boundaries, and invest him with perfect title." In Caperton v. Schmidt the court said: "The estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist at the time when such verdict and judgment are rendered, and cannot preclude either party from showing that their rights have been varied or extinguished at a subsequent period." The case now here is altogether different from Amesti v. Castro. When the parties acquired their rights, the surveys had been made and the boundaries of the land had been determined by the government. Graves had a clear right to the N. E. ¼ of section 30, and could then go and find his land by the survey as already made, and he pre-empted the land according to this survey; and this was true as to Hebbron's title. So far as the boundaries of his land were concerned, Graves acquired no new or greater right by his patent than he would have had under his final receipt. His final receipt was prima facie evidence of ownership of the land, and was a "certificate of purchase," within the meaning of section 1925, Code Civ. Proc. Witcher v. Conklin, 84 Cal. 499, 24 Pac. 302. The land, as then surveyed, could not thereafter be sold by the government, nor thrown open to pre-emption by another. Id. His receipt entitled him to a patent by the same description as given in the receipt, and in fact the patent so describes the land. It was held in Byers v. Neal, 43 Cal. 210, where judgment for the possession of a quarter section of land was rendered against one after he had proved up and paid for his land, under the pre-emption laws of the United States, and subsequent to the rendition of the judgment had received a patent for it, that the judgment was conclusive, and barred his rights in a subsequent action. It may be doubted whether the learned trial judge was correct as to the question of title, if that alone had been litigated, for Byers v. Neal, supra, seems to hold otherwise; but upon this point it is not necessary to express an opinion. As to the question of boundary, however, we think the court was in error in holding that, although formerly litigated and decided against him when he held only a final receipt, the pre-emptor (plaintiff) could again litigate the same issue with the same party after he had obtained his patent. And so it may be said of the remarks quoted from Caperton v. Schmidt, supra. So far as the question of boundaries is involved here, the rights of the parties are precisely the same as when the question first arose. Their rights as they then existed have not been "varied or extinguished."

It is not claimed by respondent that there was error or fraud in the original survey; nor was it claimed by him that his patent called for any land different from that described in his final receipt, nor that the land claimed in this action was different from the land claimed in the former action. The subject-matter of the action and the parties were admittedly the same, and it is now contended by appellant that the location of the line between sections 19 and 20, and the corner common to sections 19, 20, 29, and 30, had to be determined in that action before the court could determine which of the parties owned the land in dispute. Manifestly the trial court in this action so regarded the matter, but as it held that the plaintiff was not precluded from maintaining the action, notwithstanding the former adjudication, because he had subsequently obtained a patent to his land, he held, with entire consistency, that the judgment roll was immaterial and irrelevant. Indeed, any evidence tending to prove former adjudication would have been equally irrelevant, if the position of the court had been correct. For like reason the court refused to admit evidence of a witness called to prove that the land inclosed and occupied by defendant, and now involved, is the same land as that recovered under the former judgment, as surveyed and located by the county surveyor, who was a witness in the former action. While it is true, as contended by respondent, that this witness, under the statement of counsel for appellant that the evidence was offered solely to support his plea in bar, could not testify as to facts other than such as appeared at the former trial, we think the evidence offered was directed to the facts shown at that trial. The court ruled the evidence out,—no doubt because, no matter what the facts then were, the subsequent patent gave plaintiff a new cause of action. We think this conclusion of the court was erroneous, and entitles appellant to a new trial, for it goes to the very essence of the case.

But it is urged that the judgment relied upon by defendant is uncertain, ambiguous, and indefinite, and cannot constitute an estoppel; citing People v. Frank, 28 Cal. 507; Ferrea v. Chabot, 63 Cal. 564. In the latter of these cases it is said, quoting from Russell v. Place, 94 U. S. 606: "A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but, to this operation of the judgment, it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the action will be at large and open to new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." We have carefully examined the pleadings and the judgment in the former action. It would occupy much space—we think unnecessarily—to give the various descriptions there found. Suffice it to say that there is some uncertainty in the calls of the judgment. But looking to the pleadings in that action and the evidence found in the transcript, and to the pleadings in this action, together with the offer at the trial to follow up the judgment with proof that in fact the boundary lines now involved were in the former action fixed and determined, we think the court erred in excluding the testimony. Defendant did not rely alone on the face of the judgment, but he also relied upon the extrinsic evidence contained in the transcript, and upon what he expected to show otherwise, to establish the allegations of his answer. The evidence contained in the transcript, in connection with the other extrinsic evidence offered, was certainly admissible to show what appellant claimed was the fact; and inasmuch as the ruling of the court not only excluded the transcript, but would have excluded any and all evidence tending in the same direction, and was an erroneous ruling, we think a new trial is called for, and should be granted. What may be the result of this evidence, it is not our purpose to indicate. It is advised that the order be reversed.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

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125 Cal. 372

ORLANDI et al. v. GRAY et al. (L. A. 543.)

HAYNE v. SAME.

(Supreme Court of California. July 17, 1899.)

MECHANICS' LIENS—FINDING ON ISSUES—TIME OF FILING—SUFFICIENT OCCUPATION.

1. A finding of fact on the issue of the validity of plaintiffs' contract with the subcontractor, created by affirmative matter set up by an answer in an action to foreclose mechanics' liens, alleging that plaintiffs performed the labor and furnished the materials for the architect, who was also a subcontractor, with knowledge that he was acting both as architect and subcontractor, is not necessary, where there is no claim of actual fraud or deception, and the pleadings admit that the owner of the building was fully conversant with the fact that the architect was also a subcontractor; the mere dual position of the architect not being sufficient of itself to render his contracts with the original contractors and with plaintiff void.

2. Under Code Civ. Proc. § 1187, relating to the time of filing mechanics' liens, providing that, in cases of contracts, the occupation of a building by the owner, or the acceptance by such owner of said building, shall be deemed conclusive evidence of completion, an occupation must be exclusive, and inconsistent with a continuance in the completion of the contract; and an occupation by the owner while work is being performed, with full knowledge of the circumstances under which the work is being done, is not sufficient to start the running of the statute as to the time when liens should be filed.

Department 1. Appeals from superior court, Los Angeles county.

Actions by C. Orlandi and J. W. Jones, partners, and by Lambert J. Hayne, against Mrs. C. M. Gray and others, to foreclose two mechanics' liens. At the trial the actions were consolidated, and from a single judgment in favor of plaintiffs, and an order denying a motion for a new trial, defendants appeal. Affirmed.

J. S. Chapman, for appellants. Borden & Carhart, for respondents.

GAROUTTE, J. This appeal arises upon the foreclosure of two mechanics' liens. At the trial the actions were consolidated, and a single judgment rendered in favor of plaintiffs. An appeal is taken from that judgment, and also from an order denying the motion for a new trial. Only two questions of any importance are involved.

By the answer of defendant Gray, the owner of the building, it is alleged that the architect, Bourgeois, was a subcontractor for Pugh & Sons, the original contractors, and that plaintiffs in this action performed the labor and furnished the materials for which they now seek a lien, for Bourgeois, under his contract, with knowledge of the fact that he was the architect of the building, and also a subcontractor. For these reasons it is claimed that the architect's contract with the original contractors is void, and that the architect's contract with these plaintiffs is also void. The trial court failed to make a finding of fact upon the issue created by this affirmative matter, and error is now predicated upon that failure. Whatever else may be said upon this contention, we deem it sufficient to say that the subcontract of Bourgeois was attached to the original contract, and recorded with it in the recorder's office. This fact is admitted by the pleadings. Therefore it must be held that the owner of the building was fully conversant with the fact, and under such circumstances the mere dual position occupied by Bourgeois, of architect and subcontractor, does not, ipso facto, render these contracts void. There is no claim of actual fraud or deception, and, in the face of the aforesaid admission, no finding was necessary.

One of these plaintiffs was to furnish materials and do the staff work upon the building at an agreed price of $920. The other plaintiff was engaged to do certain sculpture work upon the front of the building at a wage of $3 per day. The trial court found as a fact that the building was completed upon January 4, 1897, and this finding is now attacked as without support in the evidence. The building is a large building, and the owner, by herself and tenants, moved into it during the first half of October, 1896. It is now claimed by this appellant that the completion of the building dates from that time, by reason of her occupation. This contention is based upon the following provision of section 1187 of the Code of Civil Procedure: "And in cases of contracts the occupation or use of a building, improvement or structure by the owner or his representative, or the acceptance by such owner or his agent of said building, improvement or structure, shall be deemed conclusive evidence of completion." The owner now contends that, under this provision of the Code, she and her tenants having taken actual possession of the building, there resulted a "statutory completion" at that time, and the time for filing liens began to run at once. Under the peculiar facts of this case, such a construction of the statute would result in an absurdity; for here one of these lien claimants substantially did all his work after this occupation by the owner took place, and therefore, by such a construction, his time to file a lien began to run almost before he had performed any labor upon the building. The framers of the statute never intended any such results to follow. Neither did they intend that such a subcontractor should be cut off absolutely from the right to file a lien upon the building. The present views of the court upon this question are well stated in Willamette Steam Mills Lumbering & Manufacturing Co. v. Los Angeles College Co., 94 Cal. 239, 29 Pac. 632. It is there said: "The occupation or use, however, which, under the statute, is to be deemed conclusive evidence of completion, must be open, entire, and exclusive, and not of such a character as would be consistent with a continuance by the contractor in the completion of his contract; and whether in any particular case there has been such occupation or use must be determined from the facts of that case, as in the ordinary case must be determined the fact of actual completion. One must be shown to have acted towards the contractor and in reference to the building in such a way as by necessary implication to give notice that the building had been accepted by him in satisfaction of the contract. A continuance by the contractor in the work of completing his contract while the building, or a portion thereof, should be occupied by the owner, or even used by him for the purpose for which it was intended, would prevent such occupation or use from being regarded as conclusive evidence of completion." It is now insisted that the rule of law quoted from the foregoing opinion is obiter. We will not pause to settle that contention. It is immaterial at the present time, for we deem the law there laid down eminently sound. Tested by the principle there declared, the facts of this case entirely fail to show an occupation or use by the owner which would start the statute in motion as to the time when liens should be filed. At least, a finding of fact made by the trial court to that effect would not be disturbed. Let us look at the facts. The sculptor began his work about the time the owner went into possession. He continued his work for almost 60 days thereafter. This work was done under plans and specifications found in the original contract, and also under plans and specifications found in the subcontract of Bourgeois, which contract was attached to and filed with the original contract in the recorder's office. It thus appears that the owner during all this time had full knowledge of the circumstances under which the work was being done. In addition to this, we find these plaintiffs doing this work with the owner's consent, and directly before her eyes. It necessarily follows that the occupation or use of the building by the owner was not exclusive. Neither was it inconsistent "with a continuance by the contractor in the completion of the contract." Again, in this case it may well be said the owner did not act towards the contractor, in reference to the building, in such a way as by necessary implication to give notice that the building had been accepted by her in satisfaction of the contract. Finally, the citation which we have quoted declares that a continuance of work by the contractor after the occupation or use by the owner would prevent such occupation or use from being regarded as conclusive evidence of completion, and that is exactly the case we have here. Tested by the law above declared, the finding of the court as to the time when the building was completed will not be disturbed. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

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125 Cal. 357

SELNA v. SELNA et al. (Sac. 656.)

(Supreme Court of California. July 14, 1899.)

VENDOR'S LIEN—WAIVER—BURDEN OF PROOF.

1. The filing and allowance of a claim generally against the estate of a deceased purchaser for the balance of the purchase price of land do not constitute a waiver by a vendor of his right to a vendor's lien therefor, under Civ. Code, § 3046, which provides that one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

2. In an action to establish a vendor's lien, the burden is on the purchaser to show a waiver of the lien; and, so long as the debt remains unpaid, the courts will not presume that the lien has been waived, except on clear and convincing testimony.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Leopold Selna, individually and as administrator, against Pearl E. Selna and others. Judgment for defendants and plaintiff appeals. Reversed.

Pearl E. Selna and Louttit & Middlecoff, for appellant. Budd & Thompson, for respondents.

COOPER, C. Action to recover $420, and have same declared a lien upon certain real estate. Judgment for defendants. Appeal from the judgment on the judgment roll.

It appears from the findings that on August 30, 1894, the plaintiff sold and conveyed by deed of grant the premises described in the complaint to one Patrick Selna, for the sum of $1,500, all of which amount had been paid prior to August 2, 1897, except the sum of $500, and on said last-named date said Patrick Selna executed and delivered to plaintiff his promissory note for said balance of $500. On this note there was paid on the 27th day of December, 1897, the sum of $80. On January 15, 1898, the said Patrick Selna died intestate, being at the time of his death the owner of the said real estate, leaving a balance of $420 due and owing to plaintiff on said promissory note, and leaving surviving him his wife, Pearl E. Selna, one of the defendants herein. February 4, 1898, the plaintiff was duly appointed administrator of the estate of said Patrick Selna, deceased, qualified, and letters of administration were issued to him. February 19, 1898, the plaintiff, as such administrator, published notice to creditors as required by statute, and on the 15th day of April, 1898, prepared his claim against said estate for the balance of $420 so due upon said note. The claim contained a copy of the said promissory note, but made no reference to any claim of lien, and was properly verified as required by statute. The claim, as so presented, was allowed and approved April 15, 1898, by the judge of the superior court in which the estate was pending, and was on said last-named date filed with the clerk of said court. July 15, 1898, the said superior court, by decree duly made and entered, set apart the said premises to defendant Pearl E. Selna as a homestead. The complaint was filed August 3, 1898. All recourse against any other property of the estate is expressly waived, and it is sought to have it adjudged that the $420 balance of the purchase price of said premises is a lien thereon, and that the premises be sold to satisfy said lien. The learned judge of the court below found all the facts as herein stated, but, as a conclusion of law, found that the plaintiff, by so having the said claim allowed and filed, waived all right to have the same declared to be secured by a vendor's lien. The sole and only question to be determined upon this appeal is whether or not the plaintiff, by so having his claim allowed and filed, waived his right to a vendor's lien upon the property described in the complaint. There is no proof or finding of any act or word of plaintiff tending to show an intention to waive the lien, except the act of having his claim so allowed and filed. As to vendors' liens, the provisions of our Civil Code are as follows:

"Sec. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

"Sec. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien.

"Sec. 3048. The liens defined in sections 3046 and 3050 are valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value."

It is evident that the statute gives to the seller of real estate a lien for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. The court in this case found that the $420, part of the purchase price, remains unpaid and unsecured, except by the note and the filing thereof as a claim. The rule of our Civil Code was intended to make more clear and definite the equity rule as to vendors' liens. The principle upon which this lien has been established by courts of equity is that a person who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it and not pay the full consideration money. The true origin of the doctrine may with high probability be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England. 2 Sugd. Vend. p. 324, and note 2. Judge Redfield, in the case of Manly v. Slason, 21 Vt. 275, said: "There can be no doubt that the existence of such a lien is among the settled doctrines of the English chancery. * * * Its foundation exists in the general principles of equity and moral justice, by which the seller is entitled to hold upon the estate until he gets the price." The lien of the vendor is of so high a nature that it is not extinguished by his death, but passes to his representatives. Nor is it discharged by death of the grantee, but may be enforced against his estate, or those into whose hands the property may come. 2 Warv. Vend. pp. 700, 701.

The question as to what constitutes a waiver of this lien of the vendor has been a source of much controversy. The authorities generally agree that, to constitute a waiver of the lien, there must be some act or omission by the vendor showing an intention on his part to waive the lien. The rule is thus stated in Overt. Liens, § 622: "To constitute a waiver of the right to the lien, there must be some act or omission by the vendor which actually or impliedly evinces an intention on his part to dispense with the security given him in equity. Therefore, in any question of this character, the point to determine will be, has the vendor, by such or such an act or omission, so placed his rights in relation to the lands sold or to the vendee that it would be inequitable to sustain this right in his favor? Or has his act been such that it shows a determination not to rely upon his lien?" And to the same effect are the following authorities: 2 Jones, Liens, § 1073; 2 Warv. Vend. p. 712; Note to Mackreth v. Symmons, 1 White & T. Lead. Cas. Eq., pt. 1, pp. 482–484. Applying the rule thus laid down, was the act of plaintiff in filing his claim such an act as would make it inequitable to allow him to sustain his lien, or such that it showed a determination on his part not to rely upon it? We think that the mere fact of making out and filing the claim did not show any determination or intention of plaintiff not to rely upon his lien. Neither do we think such fact in any way would make it inequitable to now allow such lien. No one has been injured by any delay, act, or conduct of plaintiff. The filing of the claim did not deceive any one, and the right of plaintiff to a lien is such that we cannot presume from any trivial circumstance that such right was waived. The plaintiff could not have maintained any action upon the note without first presenting his claim. Code Civ. Proc. §§ 1500, 1510. The claim was not secured by any mortgage or recorded lien, and therefore it was not necessary for it to contain any statement as to the claim of lien. Code Civ. Proc. § 1497. It might have stated the claim of lien, and that the claimant did not intend to waive it, and it would perhaps have been the better practice if it had so stated; but, as the statute does not expressly require such statement, we think it would be a harsh rule to hold that the absence thereof, of itself, waived the lien.

The burden of proof is upon the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. 2 Story, Eq. Jur. § 1224; Wilson v. Lyon, 51 Ill. 168; Truebody v. Jacobson, 2 Cal. 269; 2 Warv. Vend. p. 713. And so long as the debt exists, courts will not presume that the lien has been waived, except upon clear and convincing testimony. Id. pp. 712–714; Coles v. Withers, 33 Grat. 195.

Defendant, in support of her claim that the lien was waived, relies upon Fitzell v. Leaky, 72 Cal. 484, 14 Pac. 201; Avery v. Clark, 87 Cal. 623, 25 Pac. 920; and Manufacturing Co. v. Ewing, 109 Cal. 355, 42 Pac. 435. In Fitzell v. Leaky, the action was brought to enjoin the defendant, as sheriff, from selling one-fourth of a water ditch claimed by plaintiff to be appurtenant to, and a part of, his homestead. The question discussed was whether or not the interest in the water ditch was a part of the homestead. There was no issue, or determination of any issue, as to a vendor's lien; but the court, in the opinion, used this language: "If Kelly ever had the right to have a vendor's lien adjudicated and declared by a court of equity, he has never commenced proceedings to that end, but has waived his lien by taking a general judgment, which, if docketed, was a lien on all the real property of the plaintiff." The remark made by the learned judge who wrote the opinion was obiter dictum, but, if it stated the law correctly, it has no application to the facts of this case. Here plaintiff had no judgment docketed, nor any judgment which was a lien upon any property. His allowed claim was in certain respects in the nature of a judgment, but only a qualified judgment. It was not a lien upon any real or personal estate. It was not conclusive upon the heirs of the estate. Code Civ. Proc. § 1636; Weihe v. Statham, 67 Cal. 84, 7 Pac. 143; In re Hill's Estate, 62 Cal. 186. Before the death of Patrick Selna, plaintiff had the right to look, not only to the land, but to the property owned by him, in determining whether or not the note could be collected. After his death, and the allowance of the claim, he had a right to look to the same property, diminished by the right given the administrator to take a certain portion of it for expenses of administration, for the payment of preferred claims and such family allowance as the court might make for the support of the family of deceased. The filing of the claim did not give plaintiff any security upon any specific property, nor any lien upon any property. It is stated by the authorities that if the vendor recover a judgment at law, and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money. Walker v. Sedgwick, 8 Cal. 404; Overt. Liens, p. 691; McAlpin v. Burnett, 19 Tex. 497; Dubois v. Hull, 43 Barb. 26; 2 Warv. Vend. p. 719; Palmer v. Harris, 100 Ill. 276; Chapman v. Lee, 64 Ala. 483. In Avery v. Clark it appeared that one Robbins, the grantor, conveyed to Mrs. Humeston a tract of land, and took as part payment the promissory notes of herself and husband, secured by their mortgage upon the land conveyed. It was held that the unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer." The case of Manufacturing Co. v. Ewing was replevin for a harvester sold and delivered to one Ewing in his lifetime. Under the contract of sale the title to the harvester was to be and remain in plaintiff until the full payment of the price had been made. Certain promissory notes had been given to plaintiff by said Ewing, and upon the last one there remained a small balance due when the maker thereof died. The plaintiff duly made out and presented its claim against the estate of said Ewing for the balance due upon this note. The claim was allowed and placed on file. This court held that the sale was a conditional one, and that upon the default of the purchaser the plaintiff had either of two remedies: He could retake the property or recover it by action, or he could regard the sale as an absolute one and recover upon the notes,—but that, the two remedies being inconsistent, he could not pursue both. The principle upon which the case was decided has no application to the present case. We advise that the judgment be reversed, and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff, and in accordance with the views herein expressed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff, and in accordance with the views herein expressed.

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125 Cal. 369

PEOPLE v. KING. (Cr. 500.)

(Supreme Court of California. July 15, 1899.)

FORGERY—SUFFICIENCY OF INFORMATION—ADMISSIBILITY OF EVIDENCE—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. Under Pen. Code, § 960, providing that no information is insufficient by reason of any defect in form not prejudicial to a substantial right, an information for the forgery of a check is not insufficient because it charges the forgery of a certain name to the check, instead of forgery of the check itself.

2. Under Code Civ. Proc. § 1863, providing that, when the characters in which an instrument is written are difficult to decipher, expert evidence is admissible to declare them, on a trial for forging a check on which, under the forged name, was an irregular character, expert testimony was inadmissible to show that it was a certain letter, when it did not appear that the characters in which the check was written were difficult to decipher, or that it had been executed by defendant as agent, or that the letter was an initial of his name.

3. On a prosecution for forging a check, testimony that defendant rented a room from complaining witness for a month, and handed her the check with his indorsement, saying it was good; that she gave him the difference between it and a month's rent, whereupon he went away, promising to return in the evening, but did not return; that the check was in fact a forgery; and that defendant refused to give his true name when arraigned,—is sufficient to sustain a verdict of guilty.

4. On a trial for forging a check payable to defendant or bearer, it is not error to refuse to charge the jury that such check would pass from hand to hand as coin, and that they could not infer he knew it was forged from the fact that he was named as payee.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

J. M. King was convicted of forgery, and he appeals. Affirmed.

J. J. Fitzgerald, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. Defendant was convicted of the crime of forgery, and appeals from the judgment and order denying his motion for a new trial.

The point most earnestly urged as ground for reversal is that the court erred in overruling defendant's demurrer to the information. The information charges that on the 15th day of August, 1898, in the county of San Joaquin, the defendant knowingly, feloniously, and with intent to defraud and damage one Mrs. Ewing, did falsely make, forge, and counterfeit the name of Mrs. E. M. Carson to a certain check, which check is fully set out in the information, and is for the sum of $15, drawn upon Wells, Fargo & Co.'s Bank; that the defendant on said day did willfully, knowingly, and falsely utter, publish, and pass as true and genuine the said check, with intent to damage and defraud the said Mrs. Ewing, the defendant well knowing at the time of so uttering and passing the said check that the same was false, forged, and counterfeit. It is urged that the first part of the information charges the forging and counterfeiting of the name only, and not of the instrument. Section 960 of the Penal Code of this state reads as follows: "No indictment or information is insufficient, nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." Section 959 provides that the indictment or information is sufficient if it can be understood therefrom "(6) that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Applying the above rules of our Code to this information, we think it sufficient. A copy of the check is set forth in the indictment, which is as follows: "San Francisco, Aug. 13, 1898. No. 93. Wells, Fargo & Co.'s Bank: Pay to J. M. King or bearer $15.00 (fifteen and & no-100 dollars). Mrs. E. M. Carson." The defendant is charged with having falsely forged and counterfeited the name of Mrs. E. M. Carson to this check. Without discussing imaginary distinctions between the meaning of name and signature, we think that a person of common understanding by reading this information would know what was intended. There is not such defect in matter of form as would tend to the prejudice of a substantial right of defendant. An indictment or information is sufficient if it substantially conforms to the statute. People v. Mahlman, 82 Cal. 585, 23 Pac. 145. And no one could say that defendant, as a man of common understanding, was not fully informed as to the acts which he had committed, so as to enable him fully to prepare his defense. Again, the information charged the defendant with falsely uttering and passing as true and genuine the said false and forged check, knowing the same to be false and forged. We think the information did state facts sufficient to constitute a public offense, and that there was no error in overruling the demurrer. For the same reasons, the order of the court denying the defendant's motion in arrest of judgment was correct.

Upon the check offered and received in evidence, and under the name of "Mrs. E. M. Carson," was an irregular character, made by pen and ink, and apparently made at the same time the name was written. Defendant offered to prove by experts that the character was the letter "S," and the court refused to hear such evidence. Defendant saved an exception, and now claims the ruling was error. He claims the evidence was material, and that it should have been admitted, under Code Civ. Proc. § 1863, which reads as follows: "When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language." It had not appeared that the characters in which the instrument was written were difficult to be deciphered, or that the language of the instrument was not understood by the court. Conceding that the defendant could have proved that the character was the letter "S," it seems to us, from the light thrown on this investigation by the record, that the fact would have been wholly immaterial. It was not shown, nor attempted to be shown, that any agent of Mrs. Carson wrote the check or placed the character there. It was not claimed that the character was placed there by defendant as agent of any one, or that it was an initial letter of his name. We think, therefore, that the fact as to what the character was could not of itself and alone have been material. If defendant forged the check and the name of Mrs. E. M. Carson thereto, it was none the less a forgery, even if he did put the letter "S" under the name. The case relied upon (People v. Bendit, 111 Cal. 275, 43 Pac. 901) is not in point. In that case the defendant, in the presence of the clerk of William Cluff & Co., wrote the name to the receipt, "Wm. Cluff & Co., per A. B." This court, in holding the act did not constitute forgery, said: "There was no pretense that 'Wm. Cluff & Co.' was the genuine signature of that firm. It was written by appellant himself in the presence of the party who paid the money. He added the initials 'A. B.' to it, and he was understood to be acting as agent of the firm, and to have written the name Cluff & Co. as such agent." We do not understand in the present case that even a statement was made by defendant's counsel as to what was meant by the character claimed to be an "S."

Defendant testified that he did not sign the name of Mrs. Carson to the check, and that it was not his writing. It is claimed that there was no evidence that defendant made the check, or that he knew it was false when he uttered it. The testimony of Mrs. Ewing is to the effect that on the 15th of August, 1898, the defendant came to her house and wanted to rent a room, the price of which was $8 per month; that he handed her the check described in the information, and told her it was good, and that she could cash it at the office of Wells, Fargo & Co.; that he thereupon indorsed it "J. M. King," and she gave him the difference between the month's rent and the check,—$7; that he told her he would not return before half past 9 that night, and that he never returned; that this all occurred in San Joaquin county. Mrs. Carson further testified that defendant worked for her three days in the month of August; that she never wrote the check or the signature, and never authorized any one else to do so, and never delivered it to defendant. Defendant, when arrested and shown the check, said he did not know that he had ever seen it before, that it was his name on the back of it, and that, if he passed it, somebody must have given it to him. When arraigned, the defendant refused to give his true name. This evidence is amply sufficient to sustain the verdict.

Defendant claims that it was error to refuse to give to the jury his instruction numbered 3. The instruction was to the effect that, if the check was payable to defendant or bearer, it would pass from hand to hand as freely as coin, and that for this reason the jury could not infer or presume that the defendant knew the check was forged from the fact that he was named therein as payee. We cannot see how the instruction was material, even if it stated the law in the abstract correctly. That a check payable to bearer would pass from hand to hand as coin would be no defense, if the defendant, with intent to defraud, forged the check. We know of no law, and defendant's counsel has pointed out none, that exempts the forger of such a check from the penalty of the law. The court, in other parts of the charge, gave the law bearing upon the facts fully, and more favorable to defendant than it would have been compelled to do under the evidence.

The eighth instruction given at the request of the people is assigned as error. No objection to this instruction is pointed out, and, upon reading it, we do not discover any error therein. We think the judgment and order should be affirmed, and so advise.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(125 Cal. 316)

WORMOUTH v. GARDNER et al. (S. F. 1,143.)[1]

(Supreme Court of California. July 6, 1899.)

UNITED STATES LAND DEPARTMENT—DECISION—CONCLUSIVENESS—FINDINGS OF FACT.

1. An application to the United States land department by one claiming a right to purchase land, wherein a person having acquired a homestead entry was made defendant, is within the jurisdiction of such land department; and the decision of the department cannot be reviewed, unless founded on an erroneous notion of law.

2. An application for the right to purchase land from the United States land commissioners on the ground that a patent was issued to the heirs of one holding under a Mexican grant, and that the patent erroneously excluded the land in controversy, was determined against the applicant on the ground that the land never had been within the boundaries of the grant, and that the applicant at the time he purchased an interest

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[1] Rehearing denied August 5, 1899.

in the land in controversy from parties claiming under the grant, knew that it was not included therein. *Held*, that the decision was based upon facts defeating the claim of the applicant, and could not be reviewed by the court.

Department 2. Appeal from superior court, Marin county.

Action by Ebenezer Wormouth against Peter and Jacob Gardner. Judgment for plaintiff, and defendants appeal. Affirmed.

Hepburn Wilkins, for appellants. E. B. Mahon and L. D. McKissick, for respondent.

McFARLAND, J. This is an action in ejectment to recover possession of certain lands described in the complaint. Judgment below went for plaintiff, and defendants appeal from the judgment, and from the order denying a motion for a new trial.

Plaintiff claims title under a homestead entry made in accordance with the United States laws upon that subject (see Wormouth v. Gardner, 105 Cal. 149, 38 Pac. 646), and before the filing of the cross complaint hereinafter mentioned he received a United States patent for the land in pursuance of his homestead entry. The principal contention of defendants for a reversal is in relation to what they call their "equitable title." This title, as shown in the cross complaint, is briefly as follows: It is averred that the land in contest here was within the exterior boundaries of a certain Mexican grant, made in 1835 to Juan Reed, of a certain tract of land, called the "Rancho Corte de Madera del Presidio" (usually called the "Reed Rancho"); that this grant was presented to the land commissioners and the United States district court, and was confirmed; that a United States patent to the rancho was issued to the heirs of Reed in February, 1885; and that the patent excluded the land in contest in this case; and that the Reed heirs supposed the land was included within said grant, and with that understanding conveyed the same to various parties, through whom, by mesne conveyances, whatever right they had to this piece of land became vested in the defendant Jacob Gardner, whose immediate grantor was one Throckmorton. It is further averred that in January, 1875, the said Throckmorton made application to the United States land department to purchase said land under the act of congress entitled "An act to quiet titles in California," approved July 23, 1866, basing his application upon the facts hereinbefore stated, and that the plaintiff herein, Wormouth, was made a party defendant in said application, and that a contest took place in the land department between Throckmorton, upon his claim as aforesaid, and Wormouth, as a homestead claimant; that the register and receiver of the United States land office at San Francisco, in which application was made, decided the case in favor of Wormouth, and against Throckmorton; that Throckmorton appealed to the commissioner of the general land office, who also decided the case against him; and that he then appealed to the secretary of the interior, who again decided the case against him and in favor of Wormouth; but that each of said officers decided the case upon an erroneous proposition of law, and that, therefore, it ought to be decreed that the plaintiff holds said land in trust for defendant Jacob Gardner, and should convey the same to the latter. A demurrer to this cross complaint was sustained by the court below, but upon appeal this court held that the averments of the complaint were sufficient on their face to show that the decision of the land department had been based upon an erroneous construction of the law, and reversed the case, with directions to the court below to overrule the demurrer; the court declaring, however, in its opinion, very clearly, the principles upon which it should be determined whether or not the decision of the land department was final. See Wormouth v. Gardner, 112 Cal. 506, 44 Pac. 806. After the remittitur went down, the plaintiff filed an answer, in which all the material averments of the cross complaint were denied. Upon the trial the defendants introduced all the proceedings had in the land department in the said contest of Throckmorton and Wormouth. That contest was one entirely within the jurisdiction of the United States land department; that is, each party was endeavoring to get title to what each admitted to be United States government land, which was subject to disposition under the laws of the United States. The land department therefore had exclusive jurisdiction to determine all facts which arose in the contest, and, in order to successfully attack the decision of the department, the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law. But this he has failed to do. The department, among other things, found that the land in contest never was within the boundaries of the grant to Reed, that it was never regarded as being included in that grant, and that Throckmorton, at the time he claimed to have purchased from the Reed heirs, either knew or had good reason to believe that the land was not included in the grant, and was not a bona fide purchaser, within the meaning of the act of July 23, 1866. In Wormouth v. Gardner, 112 Cal. 506, 44 Pac. 806, this court said: "Whether Throckmorton did in fact purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the secretary of the interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him, but if, upon the undisputed facts, he made an erroneous application of the law pertinent to those facts, his action is open to review." In the case at bar it nowhere appears that the secretary of the interior made an erroneous "application of the law," but it does appear that his decision was based upon facts which necessarily defeated the claim of Throckmorton. For the same reasons the decision of the United States land department was conclusive as to Wormouth's title as a homestead claimant. What appellant claims as his legal title was presented to the jury in the shape of an issue as to damages for detention of the land. The jury found a verdict of $2,000, which the court reduced to $1,600. The United States patent to the Reed heirs was finally determinative of the boundaries of the grant, and we see no other point in the case necessary to be discussed. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.

125 Cal. 388

In re CLARKE. (Cr. 536.)

(Supreme Court of California. July 17, 1899.)

INSOLVENCY — APPEARANCE OF DEBTOR — WAIVER OF BOND—VALIDITY OF ADJUDICATION — CONTEMPT PROCEEDINGS — PUNISHMENT—HABEAS CORPUS—GROUNDS FOR RELIEF.

1. A debtor in involuntary insolvency proceedings, who moved to strike a creditors' petition from the files because not properly entitled, and, upon denial of his motion, demurred, and then answered to the petition, thereby submitted himself to the jurisdiction of the court, and waived all objections thereto for want of bond required, although his motion papers expressly stated that his appearance was special only.

2. Where a debtor has appeared by demurring and answering to a creditors' petition in involuntary insolvency proceedings, the want of the bond required therein will not invalidate an adjudication of insolvency, when no specific objection on that ground has been made until after such adjudication.

3. An adjudication of insolvency in involuntary proceedings, stating that all the allegations of the creditors' petition are true, and that the debtor was on a certain day, ever since has been, and still is, insolvent, is sufficient, without formal findings.

4. The failure of the clerk of the court to properly enter an adjudication of insolvency will not render it invalid.

5. Where a defendant in contempt proceedings has made a written showing in response to an order to show cause why he should not be punished for contempt, his presence in person at the hearing is unnecessary.

6. Where the object of contempt proceedings is to compel an insolvent to answer concerning his property, he should be imprisoned until he consents to answer, and not for a definite period.

7. One who has been adjudged insolvent in involuntary proceedings, and imprisoned for contempt for failing to appear and answer as to his property, cannot be discharged on habeas corpus on the ground that he has been discharged from his debts in subsequent voluntary insolvency proceedings.

In bank. Habeas corpus by Alfred Clarke, to be discharged from imprisonment for contempt of court. Refused.

T. M. Osmont, for petitioner.

TEMPLE, J. The petition shows that on the 2d day of October, 1891, six creditors of petitioner filed a petition in the superior court asking to have him adjudged an insolvent. An order to show cause was issued, signed by the judge, but not made by the court. The bond given was not signed by the petitioning creditors. October 29th the petition was amended by adding three new creditors, and in other respects. No new bond was given after the amendment, and no new citation was issued. November 7, 1891, petitioner appeared, and moved to strike out the petition on various grounds, and also demurred. The motion was denied, and the demurrer overruled. He answered, a trial was had, and an order was made May 12, 1892, which adjudged that on the 14th day of September, 1891, Alfred Clarke was an insolvent debtor; and petitioner was ordered to file schedules as required by law. Petitioner represents that he has always challenged the jurisdiction of the court on various grounds, and particularly because no bond was given as required by the statute. It is further charged that the order of adjudication has never been entered, and that petitioner moved in the superior court to have the proceedings dismissed because the judgment was not entered within six months after it was made. Petitioner also states that, while said ineffective proceedings were pending, he made application to be declared an insolvent, and that on his petition and notice an adjudication was made, and such proceedings were afterwards had in the matter that on the 6th day of November, 1896, a decree was entered discharging him from all debts. The decree has never been vacated, suspended, or appealed from. It further appears from the petition that a citation was issued out of the superior court, requiring petitioner to appear on a day named and answer concerning his property. He did appear, and the matter was continued from time to time, until at last he failed and refused to appear and make answer to inquiries concerning his property. A citation was then served upon him, requiring him to appear on the 3d day of February, 1899, to show cause why he should not be adjudged guilty of a contempt of court for failing to appear and answer questions. He appeared by counsel, and showed cause by a demurrer and by an answer. The demurrer was overruled, and the answer held insufficient, and he was adjudged guilty of a contempt of court, and was committed until he would consent to answer touching the insolvent estate. By virtue of such order he is now being deprived of his liberty.

The evidence shows that the petition is incorrect in some of the most material points. The first appearance of Clarke in the insolvency proceeding was by a motion to strike from the files the amended petition for various reasons, among which are: (1) It was wrongly entitled; (2) did not conform to leave granted to amend; and (3) certain specified portions were impertinent, irrelevant, and immaterial. No point was made that the court had not obtained jurisdiction of the person of the defendant, except that it is stated, "This paper is not a general appearance or an appearance to the merits, and respondent reserves his right to demand that he be brought into court by the issue of a regular process."

On general principles, a statement that a defendant or party makes a special appearance is of no consequence whatever. If he appears and objects only to the consideration of the case, or to any procedure in it, because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect in the notice or motion is required, or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance, no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material. See 2 Enc. Pl. & Prac. 625, notes, and cases cited. As a rule, one cannot avail himself of the advantage of being a party, and escape the responsibilities. Some early cases in this state (Deidesheimer v. Brown, 8 Cal. 340, and Lyman v. Milton, 44 Cal. 631) seem to hold that a defendant, having first objected to the process or service by which he was brought in, may then, if his objections are overruled, answer to the merits, and on appeal from the judgment still avail himself of his objections to the jurisdiction of the court over him. This rule seems unjust and illogical, and, I think, does not prevail elsewhere. It gives the defendant, whose objections to the jurisdiction of the court have been erroneously overruled, an opportunity to go to trial, and, if the judgment is favorable, to abide by it, while, if it is unfavorable, he can procure a reversal. The plaintiff would have no such advantage. And what would be the condition of such a defendant after reversal? If the reversal means that he is not yet in the case, he may move to dismiss, under section 581, Code Civ. Proc. If it merely gives him a new trial, the procedure seems farcical. In this case, by his first appearance, Clarke asked favors which could be demanded only by a party to the record; and, upon his motion being denied, he demurred to the petition upon nearly all the statutory grounds. He also filed an answer, which raised issues of fact, upon which a trial was had and findings were filed. Certainly by these proceedings he submitted himself to the jurisdiction of the court.

Is the proceeding absolutely void because no bond was given? Anderson v. Superior Court, 122 Cal. 216, 54 Pac. 829, was a petition for a writ of prohibition; and it was said, in effect, that, though the alleged insolvent might have waived the bond, the court should not proceed in the matter against his objection. It would seem, then, if he did not object, it might be considered as waived. No specific objection on this ground was made by the petitioner,—at least, until long after the adjudication of insolvency. In his notice of motion to strike out, he stated as one of his grounds "that the court had not acquired jurisdiction to proceed under the amended petition." The same notice discloses that he was urging as an objection that the proceedings were wrongly entitled, and that the petition could not be amended; and, no doubt, these were the reasons why he thought the court had no jurisdiction. No other reasons are suggested. In his demurrer he stated as one ground that "the court has no jurisdiction of the person of the defendant, or of the subject of the action." As he also demurred for insufficiency of the statement of facts, the demurrer itself constituted an appearance which gave the court jurisdiction of the person, if it had not already acquired it. There was no objection for lack of a bond. The petition avers that, four days after the petition was filed, Clarke appeared and objected to the form of the bond and the sufficiency of the sureties. The sureties failed to justify, but his objections were ignored. This is most decidedly a case where the allegations must be taken most strongly against the pleader. This notice may itself be construed into a waiver of all other objections to the bond. Several other instances are recited in the petition, but the particulars are not given, except that on January 5, 1894, he moved the court to vacate the judgment on the ground that no legal process was ever issued and no bond was given under the amended petition; and in October, 1894, he again moved the court to vacate the order because it had never been entered. The adjudication was made May 12, 1892. We find, therefore, that Clarke specifically objected to the form of the bond and to the sufficiency of the sureties, and at the same time denied the numerous allegations and charges of wrong-doing contained in the petition, and his insolvency, and caused a trial to be had of such issues, without calling the attention of the court to the fact that a bond had not been given. Doubtless he conceded the power of the court to allow an amendment, and believed that the bond already given under the first petition would serve under the new. The objection was in the nature of a plea in abatement, and I think it was waived.

It is objected that no sufficient adjudication was made, and that it has never been entered. The adjudication is complete in form and substance. It states that all the allegations in the amended petition are true, and that Clarke was on the 14th day of September, 1891, and ever since has been, and still is, insolvent. The adjudication then proceeds unnecessarily to add as a conclusion of law that Clarke was on the 14th day of September, 1891, an insolvent debtor. This is what the petitioner calls the adjudication. The document is one, and whether the court says it "finds" or "adjudges" or "decrees" or "considers" is immaterial. Formal findings were not required, and it is sufficient if the court, by order, adjudges the respondent in such proceeding insolvent, as required by statute. The clerk did, however, make an entry of an order in his minutes. It is too brief,—a trouble not infrequent in clerical work. After the title it is: "This matter having been heretofore submitted to the court for consideration and decision, and now the court having fully considered the same, it is ordered that Alfred Clarke be, and he is, adjudged and declared to be an insolvent debtor." From this order so defectively entered, Clarke appealed to this court, and the order was affirmed. Perhaps the court, as in the case of Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639, considered itself justified in looking to the entire record, including the findings. It is there said that, though findings are not required, still, if made, they constitute a part of the judgment roll. No other entry than in the minutes of the court was required. In re Blythe's Estate, 110 Cal. 229, 42 Pac. 642. The adjudication is but an interlocutory order, from which an appeal is specially provided. It should have been entered in the minutes, and an informal entry of it was made. Even if it be considered a judgment, and the attempted appeal from it was ineffectual, the fact that it was not entered does not render it invalid. In re Cook, 83 Cal. 415, 23 Pac. 392; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515.

Petitioner contends that there was not sufficient showing before the superior court to justify the issuance of the citation to him. Upon habeas corpus the burden is upon the petitioner to show that a restraint which is apparently legal is not so. The commitment states facts sufficient to authorize the citation, and there is no proof upon the subject.

The examination was postponed from day to day, and finally Clarke failed to be present at the appointed time. An order was served on him, requiring him to appear and show cause why he should not be punished for a contempt in refusing to appear. He showed cause by a written statement challenging the jurisdiction of the court. This was taken under advisement by the court, and finally overruled; and the petitioner was adjudged guilty of a contempt, and was committed for one day, and until, etc. He now contends that he should have been present in person. His showing in response to the order was heard and considered, and this was his own chosen method. He will not be heard to say he was not present.

The sentence was objected to because it provides for an imprisonment for a definite term of one day. It is contended that he could only be imprisoned until he would consent to testify. I think this is a mistake, but, if not, the illegal part is void. The portion not inflicting a punishment is not within the rule declared in Ex parte Kelly, 65 Cal. 154, 3 Pac. 673. To strike out the direction that he be imprisoned for one day would vacate the entire punitive part of the order. Had he consented during the day to testify, he might then have raised the point.

I cannot see that the voluntary proceedings by which petitioner claims to have been discharged as an insolvent, if proven here, as they were not, could help the petitioner. Such a discharge might in a proper case be pleaded in bar, but the fact would not deprive the court in which the other proceeding is pending of jurisdiction. The prisoner is remanded.

We concur: HARRISON J.; McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.; HENSHAW, J.

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125 Cal. 376

TAFT v. TARPEY. (S. F. 1,163.)

(Supreme Court of California. July 17, 1899.)

DEDICATION—RESERVATION IN DEED—INTENTION—EVIDENCE.

1. A reservation in a deed, in form, "reserving from this grant the right of way over a strip of land thirty feet wide on the westerly line of said tract of land for canal or road purposes, both or either," does not operate of itself as a dedication to the public, and thereby conclude the owner from using such strip for the purposes mentioned in the reservation.

2. Where a reservation in a deed of a strip of land for a right of way for ditch and road purposes does not operate as a dedication of such strip to the public, and the owner has constructed a ditch and planted trees thereon, in an action to restrain defendant from entering upon the land and destroying the ditch and trees, for the purpose of opening a highway, an objection by such defendant to evidence to show the width of the land occupied by the ditch and trees, on the ground that the deed dedicated the entire strip to the public, is without merit.

3. In an action to restrain defendant from entering upon plaintiff's land to open a highway by virtue of a clause in plaintiff's deed reserving a certain strip for a right of way for ditch and road purposes, evidence that the grantor of plaintiff's grantor had made a reservation similar to that in plaintiff's deed in the sale of land to witness, and evidence of what he had told witness concerning it, is incompetent to show dedication, where such witness bought his land a year before plaintiff's grantor made his purchase.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by Emma M. Taft against M. F. Tarpey to restrain defendant from entering upon plaintiff's land for the purpose of opening a road over the same. From a judgment in favor of plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

A. C. Williams and Frank C. Cleary, for appellant. H. H. Welsh, for respondent.

CHIPMAN, C. Injunction. Plaintiff seeks to restrain defendant from entering upon her land for the purpose of opening a road over the same. Defendant claims that the strip of land in question was dedicated to the public for a road by plaintiff's predecessors in estate, and was also reserved for road purposes from the deed by which she claims title. The court found the following facts: That on April 21, 1884, one George H. Eggers was the owner in fee of the W. ½ of the S. E. ¼ section 20, township 13 S., range 21 E., situated in Fresno county, and on that day conveyed the same to George W. Taft (plaintiff's husband) by deed which contained a clause following the description of the land, to wit: "Reserving from this grant the right of way over a strip of land thirty feet wide on the westerly line of said tract of land for canal or road purposes, both or either." Said Taft entered into possession and occupied the premises until July 15, 1895, when he conveyed the land to plaintiff, who has ever since occupied, and now occupies, the same. In 1883 said Eggers conveyed the E. ½ of S. W. ¼ of the same section (lying directly west of plaintiff's land) by deed in which, following the description, is the following clause: "Saving and excepting therefrom a strip of land thirty feet wide off the east side of said tract of land, and a strip of land thirty feet wide off the west side of the northwest quarter of said section 20; * * * said excepted strips of land being reserved for road and ditch purposes." In January, 1884, said Eggers conveyed to defendant the N. E. ¼ of said section, "reserving therefrom a road and ditch way on the easterly side thereof." In 1890 plaintiff's grantor constructed a ditch for purposes of irrigation along the eastern side of the strip of land so reserved from his deed for a distance of one-quarter of a mile. This ditch and its banks occupied a strip of land 15 feet wide for its entire length. Taft planted fig trees and grapevines along the western bank of said ditch, and in a straight line to the south boundary of his land. The ditch occupied no more land than was necessary for its purposes, and there is not now, and never has been, any highway or traveled road upon said 30-foot strip east of said line of fig trees and vines, since the same were planted there. In 1889 defendant entered upon the strip of land reserved as aforesaid, between the lands of plaintiff and the said lands directly west of plaintiff's lands, and graded and built a wagon road along the center of these two strips about 30 feet wide, occupying 15 feet of the strip reserved from plaintiff's land, and plaintiff's said ditch and trees and vines "do not in any way interfere with or obstruct the free use of said road and roadway by defendant or any other person. This road is the most convenient means by which defendant can have egress from his said lands in the direction of the city of Fresno." The court found, and the defendant admits, that he intends to enter upon the remaining portion of said strip of land, and dig up and destroy plaintiff's said ditch and trees and vines. The board of supervisors of Fresno county never accepted said strip of land as a highway, nor did they ever declare the same to be a highway. As conclusions of law, the court found the plaintiff entitled to judgment restraining defendant from "interfering with or digging up the portion of said premises upon which is now constructed plaintiff's ditch, and on which is planted plaintiff's said fig trees and vines, or from in any way entering upon said thirty-foot strip of land east of the line of fig trees and vines and ditch of plaintiff, and from * * * constructing * * * a wagon road thereon." Judgment was entered accordingly, from which, and from an order denying defendant's motion for a new trial, this appeal is prosecuted.

1. The principal question discussed by counsel arises out of the reservation in Eggers' deed to Taft in 1884. Appellant claims that this clause in the deed operated as a dedication to the public for a highway, and that the interest of the public extended and attached to the donation in its entirety, upon no part of which had plaintiff a right to encroach and plant trees or dig ditches. We cannot regard the language of the deed as showing an intention to dedicate the land for a public use in any such way as to conclude the owner, and, unless by the terms of the instrument such intention can be reasonably affirmed, there was no dedication effected by the deed itself. The condition or reservation, so far as the language discloses, was for the benefit of the grantor alone. In such case, or where the way is for the benefit of both parties to the deed, no presumption of any intention to dedicate such way to the public arises. The reservation was not only for road purposes, but also for ditches; and the public were equally entitled, if at all, to the way for both purposes. But it cannot be said that a use by the public for ditches was contemplated, for the public had no occasion for ditches, while the grantor might have. We must look elsewhere than to this deed for any right in the public. There is no evidence that Eggers ever made known his intention as to this strip of land prior to the purchases made by plaintiff and defendant. Defendant purchased his land in January, 1884, and plaintiff's grantor purchased in the following April. Defendant testified: "Inasmuch as I was buying the land, and the

county road was a half mile away, I wanted to know whether I was going to have access to my land. I asked him [Eggers] about what reservations there were for roads in order to get to the county road, and he pointed out this reservation, and said it was his purpose, with any purchaser of land, as between his northern land and the county road, to leave a road where they could pass, and the public could travel to do their business." Defendant says he examined the record, "and found that he had done so in all cases as he had stated, and accepted it as such." But plaintiff's grantor's deed was not then in existence, and defendant could not have referred to the reservation now in question. A former owner of the land directly west of plaintiff's land, on which was also a reserved strip, testified that in 1889 he heard Eggers say "that he had dedicated to the public thirty feet off the west side of the land owned by Mr. Taft for road and ditch purposes, for the use of the public who bought his land." But this was five years after Taft had bought the land, and, besides, the declaration was not that the whole strip was for road purposes. Plaintiff's grantor, Taft, testified: "At the time I accepted the deed I did not know anything about the reservation. I supposed there was thirty feet there, but didn't know whether it was thirty feet off me, or thirty feet off both parties. I have talked with Mr. Eggers with reference to the matter. He has told me frequently that he reserved a road there * * * for road and ditch purposes, and he was surprised that Mr. Tarpey was trying to take the whole shooting match." In this there was no declaration that the entire strip was for road purposes. The evidence tended to show that before plaintiff's ditch was dug there was no defined road in use along the west line of her land. Plaintiff testified: "After the fig trees were planted, there was no travel east of them. * * * There was never any defined roadway west of the place at any time before this present road was placed there [the road opened by defendant], other than a mere trail leading up and down there. And the wagon tracks east of the line of fig trees ran diagonally through. In fact, they seemed to go where they wanted to over the place,—all over the land,—prior to the time the fence was built across the front. The fence was built in 1889." Defendant did not use this means of access to his land until in 1889,—five years after his purchase,—when he graded the road 30 feet wide, taking 15 feet from each of the reserved strips, and since that time this graded road has been in use by the public, with the knowledge and consent of plaintiff and her grantor. There is no evidence of the use by the public of the entire 60 feet embraced in the two strips at any time. The only defined road shown to have been in use since Eggers sold to plaintiff's grantor and defendant is a road 30 feet wide, which plaintiff concedes is a public highway, and which the court found, upon sufficient evidence, is of ample width for all public purposes without encroaching upon plaintiff's land any further than as now located. This road has its origin as a public road not by force of the deed of Eggers to Taft, but by subsequent dedication to, and user by, the public. It was probably the intention of Eggers that there should be roads for public use along all the reservations mentioned in the deeds made by him, but this intention was not expressed in the deeds, and was not carried out otherwise by him. The public acquired the right in the instance before us by the acquiescence and other acts of dedication by plaintiff and her grantor, and by the declarations of Eggers made after he sold the land. The declarations of Eggers show that it was not his intention that the entire width of 60 feet should be dedicated to the public for road purposes, for he included a way for ditches as well, and he expressed surprise that defendant should assume that the whole width was for a road. Besides, both defendant and plaintiff, by herself and her grantor, acted upon this view of the reservation; and defendant opened and graded a road 30 feet wide, leaving 15 feet for a ditch, which plaintiff's grantor occupied for ditch purposes about the same time. Defendant built the road in the spring of 1889, and Taft built the ditch and planted his trees and vines in February, 1890. This action was brought March 31, 1896. For six years defendant and the Tafts acted on the assumption that they were keeping within their rights; and as it was only by this actual user, and not by the terms of the deed, that they and the public acquired any rights, we do not see that defendant can now be heard to complain.

2. It is claimed as error that evidence was admitted to show the width of the land occupied by the ditch and trees and vines, the objection being that the deed dedicated the entire strip for road purposes, and it was immaterial where the ditch and trees were, as the public had a right to the whole 30 feet. There would be merit in the objection, if we could adopt defendant's construction of the deed. Upon the view of it we have taken, the evidence was relevant.

3. It is assigned as error that defendant was precluded from proving that Eggers had made a reservation similar to that in plaintiff's deed in the sale of land to witness, and that Eggers told witness "that it was his rule, when he sold his land out there, he reserved thirty feet right of way all around these places." This was not error. Witness bought his land in 1883. The evidence had no necessary connection with the purchase by Taft in 1884. Plaintiff admitted that the deed of witness contained a reservation similar to that in question. It was not competent to prove a custom or rule of Eggers in making deeds to land, and this is as far as the evidence proposed to go. We cannot see

that its exclusion was prejudicial to defendant.

4. It is objected that the evidence does not support the fourth, fifth, and seventh findings. They are to the effect that the ditch occupies no more land than is necessary to its reasonable use; that the roadway is of sufficient width for all purposes of a highway, and as now used is not obstructed in any way by said ditch; that defendant threatens to enter upon said land and dig up and remove said ditch. Defendant's answer declares his purpose to be as found by the court, and justifies the finding, and we think there is sufficient evidence to support the other findings. Discovering no reversible error, it is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

6 Cal. Unrep. 305

PEOPLE v. SOLOMON. (Cr. 501.)

(Supreme Court of California. July 18, 1899.)

RECEIVING STOLEN GOODS—CORROBORATION OF ACCOMPLICE—GUILTY KNOWLEDGE—INSTRUCTIONS.

1. Under Pen. Code, § 1111, requiring corroboration of the testimony of an accomplice, evidence in a prosecution for receiving stolen goods that defendant placed the goods in the back room of a saloon, saying that he had loaned money on them, and offering no explanation why they were put there, is sufficient to corroborate the testimony of the accomplice.

2. Under Pen. Code, § 1111, requiring corroboration of the testimony of an accomplice, it is not necessary that corroborative evidence should go so far as to establish by itself, and without the aid of the testimony of the accomplice, that defendant in a prosecution for receiving stolen goods possessed the requisite guilty knowledge.

3. It is not error for the court to refuse to give an instruction, the substance of which he has given in a preceding one.

4. In a prosecution for receiving stolen goods it is not error for the court to refuse to instruct that the fact that defendant did not attempt to prevent the owner from recovering his goods is evidence that he did not know that they were stolen.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

B. Solomon was convicted of receiving stolen goods, and appeals. Affirmed.

J. J. Fitzgerald, for appellant. Atty. Gen. Ford, for the People.

GRAY, C. The defendant appeals from an order denying a new trial, and from a judgment convicting him of the crime of buying and receiving stolen goods, as defined in section 496 of the Penal Code.

It is objected, first, that the evidence is insufficient to convict, for the reason that there is no corroboration of the testimony of the thief and accomplice, W. H. Eldred, of whom defendant received the stolen goods. It appears by evidence, independent of the testimony of Eldred, that the defendant was in possession of the stolen clothes which he is charged with receiving soon after they were stolen, and deposited them in the back room of a saloon, telling the bar keeper that he had loaned $2.50 on them; that he would take them out the next morning, and that if an old soldier called, and paid $2.50, to let him have them; that defendant was a dealer in second-hand clothes, and his place of business was right beside this saloon; that he did not call for the clothes as he said he would, but let them remain in the back room of the saloon until discovered by an officer, four or five days after they were stolen; that defendant sold a pair of pants, part of this clothing, for $1, before his arrest; that the goods were worth $7.50; that he told the officer that he got the clothes from an old soldier, and had loaned him $2.50 on them, and he (the old soldier) was going to get him some more goods, or take the goods away. The goods, when found by the officer, were done up in a piece of bed ticking, tied up like a roll of blankets. No explanation is attempted as to the conduct of defendant in depositing the clothes in the back room of the saloon, instead of keeping them in his place of business. The stolen shears were found in defendant's shop. We think the foregoing facts tended to show guilty knowledge on the part of defendant, and thus tended to connect the defendant with the commission of the offense with which he was charged, and that the testimony of the accomplice was corroborated, as required by section 1111 of the Penal Code.

Instruction 1 asked by the defendant was properly refused by the court. It is not necessary that the corroborating evidence should "go so far as to establish by itself, and without the aid of the testimony of the accomplice, that the defendant knew at the time of the receipt by him of the goods described that they were stolen." In instruction 5 given at the request of defendant the court clearly and fully defined the rule as to the corroboration of the testimony of an accomplice as it applied to the case before the jury, and it was not necessary to repeat this instruction. For this reason the court was warranted in refusing instruction 3 asked by defendant. The seventh instruction requested by the defendant was properly refused. That the defendant "did not attempt to prevent the owner of said goods from again possessing his property" cannot be urged as evidence that he received the goods without knowledge of their having been stolen. We advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(125 Cal. 434)

LIVERPOOL & L. & G. INS. CO. v. SOUTHERN PAC. CO. (S. F. 761.)[1]

(Supreme Court of California. July 22, 1899.)

FIRES SET BY LOCOMOTIVES—NEGLIGENCE—INSTRUCTIONS—EVIDENCE—ADMISSIBILITY.

1. Where it appears that defendant's engine was defective, and emitted cinders; that plaintiff knew of its defect, and continued to permit it to be used in hauling away ice from plaintiff's ice houses, but appointed a man to follow it up, and extinguish fires ignited by it,—the question whether plaintiff was guilty of contributory negligence was properly submitted to the jury in an action for damages resulting from a fire caused by the engine.

2. In an action for damages resulting from a fire alleged to have been caused by defendant's engine, a charge that, if the jury believed it more probable that the fire was caused by the engine than by any other cause, they should find accordingly, is not erroneous as submitting the question to the mere conjecture or surmise of the jury.

3. In an action for damages caused by a fire ignited by defendant's engine, where it is not disputed that plaintiff employed a man to watch for fires caused by the engine, it is not erroneous for the court to refer to the existence of "counter precautions," where he leaves the question of their sufficiency to the jury.

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[1] Rehearing denied August 21, 1899.

4. In an action by an insurance company to recover from a railroad company a loss arising from defendant's negligence, and paid by plaintiff, proof of loss is properly admitted as showing plaintiff's liability to the insured.

5. In an action by an insurance company to recover from a railroad company a loss caused by defendant's negligence, the admission of a statement in a stipulation to the effect that defendant had offered to pay the insured $12,500 in addition to the insurance money is not injurious to defendant when the court expressly charges that this offer is not evidence that defendant had been guilty of negligence, or was responsible for the loss.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by the Liverpool & London & Globe Insurance Company against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Van Ness & Redman, for respondent.

HENSHAW, J. Appeal from the judgment and from the order denying the defendant a new trial.

On July 15, 1893, the Sierra Ice Company was the owner of certain ice houses situated in Nevada county. Upon that day three of its houses, which were insured with plaintiff for $15,000, were totally destroyed by fire. The ice company presented its claim of loss for $44,000. The plaintiff paid the full amount of insurance, and after payment, being subrogated to the ice company, made demand upon the Southern Pacific Company for reimbursement, contending that the fire had been negligently set by the Southern Pacific Company in operating one of its locomotive engines. The Southern Pacific Company denied all responsibility for the fire, and refused payment. Plaintiff requested the ice company to join with it in an action against the Southern Pacific Company for a recovery. The ice company refused to do so, and was made a defendant in this action. During the trial of the action, however, the ice company, by stipulation of the parties, was dismissed from the case. The verdict and judgment were for the plaintiff.

The three ice houses which were destroyed were situated about a quarter of a mile from the main track of the railroad company. A side track was run into the premises of the ice company by the railroad company at the expense of the ice company. It was built for the convenient transportation of freight to and from the ice company's works. The engines and cars belonged to the railroad company, and were operated exclusively by it. The ice house which first caught fire stood close to the track, so that ice might be readily loaded from it upon the cars. Upon the day of the fire the railroad company was engaged in removing certain cars which had been loaded with ice from this ice house. In so doing the train men made a "flying switch." In making this switch the engine was started suddenly forward, pulling one of the cars away from the others and running with it on one track, leaving the other cars to follow more slowly behind and take another track after the engine and first car had passed. After the engine had made this sudden start in front of the ice house, and had run some distance down the track, a fire was observed on the roof of the ice house, just above the eaves, and exactly opposite where the engine had made its start. From these facts, and from others which appear in the case, and which will be set forth as occasion may require, plaintiff contends that the evidence sufficiently establishes that the fire was caused by the sparks discharged from the engine and falling upon the roof of the building. After the fire, the engine was sent to the roundhouse, and the spark arrester above the fire box of the engine was examined. The examination revealed that the screen of the spark arrester had a hole in it about two inches by six in dimension, which would allow the escape of live cinders and sparks. The superintendent of the ice company had heard that this engine had previously caused other fires, and had detailed a man to follow the engine as it ran in and out of the premises, and to be on the lookout and extinguish any fire that might be set. The fact that the spark arrester was imperfect does not appear to have been known to anybody until after its examination subsequent to the fire. Three different engines were from time to time employed in operating the "swing train" upon the ice company's premises, but the engine which was upon the premises at the time of the fire was the one most frequently used.

Appellant's first contention is that the evidence establishes that the ice company knew the danger to which its property stood liable from the use of the engine, and that with this knowledge, having invited the engine upon the premises, and voluntarily exposed its property to the risk, it is precluded from recovering from an injury which directly results from such exposure. That the principle of law here declared is sound there can be no question, but that the facts in this case were so well established in appellant's favor as to bring the ice company within the application of the principle is a very different matter. Appellant relies particularly upon the case of Railroad Co. v. Spear, 44 Mich. 169, 6 N. W. 202. The facts in that case were that plaintiffs owned a warehouse and a quantity of hay stored near it on premises of their own, and that upon these premises they had caused to be laid a track upon which railroad engines and cars had been running for their accommodation for a long time before the fire. When plaintiffs had occasion for cars, they had an arrangement with the railroad company to draw them in and take them out. A particular engine belonging to the railroad company was made use of for this purpose, and about the time of the fire it was going in and coming out several times a day. One of the plaintiffs testified that on the occasion of the fire the engine went in and out, throwing sparks. He was sitting in his office, watching them, and saw as she passed that a spark had communicated fire to the hay. The engine was noted for throwing sparks, and had two or three times before set loose hay on fire on the dock. "She had set fire, thrown fire around on the dock, and set loose hay on fire before in that season. She threw live cinders a quarter or a half an inch in diameter." The witness who so testified was one of the plaintiffs in the action. He had called the attention of the train dispatcher of the railroad to the dangerous condition of the engine, and the train dispatcher had said that he would see the engine fixed. Plaintiffs always had trouble with it, and were afraid of it because of its throwing sparks. The train dispatcher kept putting off the repairs. Nevertheless, plaintiffs continued to employ from day to day this dangerous implement until such a calamity as they feared actually occurred. These facts, Judge Cooley said, speaking for the court, instead of showing a cause of action, effectually disprove one. "It was a case of private employment, whereby the proprietors of the engine were solicited to send it upon the private business of the employers into a place where the latter well knew, and had for a long time known and understood, it was likely to do mischief. * * * There is just the same and no more reason for plaintiffs to complain of it than there would have been had they hired the owner of a vicious animal, known by them to be such, to bring him for their purposes upon their premises, and then been injured by him as they should have anticipated they might be. That which one consents to and invites he cannot complain of in the law as an injury." But in its facts the case at bar is broadly distinguishable from the one relied upon. The ice company did not invite this particular engine upon their premises. They requested the railroad company to send an engine, and it sent, from several which it was in the habit of using, this particular one. The ice company had not direct knowledge that the locomotive was dangerous. The extent of their information appears to be that they had heard it had set fires before; and finally they did, as apparently the plaintiffs in the Michigan case did not, take counter precautions against the risk of fire, by employing a man to watch and guard against this very danger. Therefore, if it be admitted that the evidence established that the ice company invited upon its premsies for its own private ends a locomotive engine of the defendant known to be dangerous (a proposition which we are far from conceding the evidence does establish), nevertheless it appears that the ice company took certain counter precautions against the danger, and whether those precautions were such as reasonable care would dictate was a question properly submitted to the jury. We say properly submitted, for it does not follow, as appellant contends, that, because the facts as to the nature of the precautions employed by the ice company to guard against the danger were proved without conflict or dispute in the evidence, and from the additional fact that the precautions did not prevent the fire, that for these reasons the question of contributory negligence upon the part of the ice company became one of law to be decided by the court, and not one of fact to be submitted to the jury. If it is even fairly debatable whether or not the ice company acted with ordinary prudence in the light of its knowledge, the question is one for the jury; and the fact that such precautions as it took did not avail to prevent a conflagration is in no way determinative of the question, for, if it may be said that it can be determined by the result whether or not the person in any given case has exercised the degree of care with which the law charges him, it must logically follow that in every case in which a plaintiff has sustained injury he has been guilty of contributory negligence. It is always easy after an accident to see how it could have been avoided, but a man's duty before the calamity is not measured by such ex post facto information. Burke v. Witherbee, 98 N. Y. 562. There are some acts which, if a plaintiff commits, and there are some omissions of which, if he be guilty, that are of such nature as clearly to fix upon him culpability and contributory negligence, if injury to him thereby result. But there is a vastly larger number of cases which come, not within this category, but, where the question whether or not the acts of the plaintiff come up to or fall short of the degree of care required of him by law, is one of fact to be determined by the jury. Clearly this is such a case, and it seems necessary, in support of the conclusion, only to refer to such cases as Fernandes v. Railway Co., 52 Cal. 45; Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; Redington v. Cable Co., 107 Cal. 317, 40 Pac. 432; McKune v. Lumber Co., 110 Cal. 480, 42 Pac. 980.

Appellant complains of instruction 2 given by the court at the request of the respondent. The instruction is too long for quotation. In hypothetical form it groups certain facts, and tells the jury that, if they believe these facts to be established by the evidence, a prima facie case is made out which would warrant a finding that the engine of defendant caused the fire. It is said that the instruction violates the constitutional provision, and that the court trespassed upon the domain of the jury in advising them upon the facts, and that the whole instruction is argumentative and unfair. A careful reading of it satisfies us that the criticism is not well founded. The evidence as to the cause and origin of the fire was circumstantial. As a part of the instruction, the court said: "If, upon the whole evidence, and taking into consideration all the conditions and circumstances surrounding the fire, you find it to be more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding upon that point, to wit, the origin of the fire, should be accordingly." This portion of the instruction is especially criticised as a declaration to the jury that they might reach a determination upon an important fact from mere conjecture, guess, or supposition, without any evidence in support of it; that they were told that they could reach a verdict upon the doctrine of probabilities; and it is said that a case is not proven by a preponderance of evidence when a mere probability is established. We think, under the facts and circumstances of this case, that this criticism is also without merit. The question of the origin of the fire was one to be determined by circumstantial evidence. No one saw a spark from the engine alight upon and set fire to the roof of the ice house. It was, then, under the peculiar circumstances of this case, a proposition for the plaintiff to establish that the probability was that the engine occasioned the fire. Nor does the use of the word "probability," in the instruction of the court, cast the question into the domain of mere conjecture and surmise. In civil cases which are decided in favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability, and this is well recognized. Says Greenleaf: "In civil cases * * * it is not necessary that the minds of the jurors be freed from all doubt. It is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth." And again: "A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is probability." "Circumstantial evidence is of two kinds, namely, certain * * * and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning." 1 Greenl. Ev. (15th Ed.) pp. 23, 24, 72. Says this court, in Butcher v. Railroad Co., 67 Cal. 518, 8 Pac. 174: "Evidence that sparks and burning coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter." And further reference may be had to Sheldon v. Railroad Co., 14 N. Y. 218; Kelsey v. Railway Co. (S. D.) 45 N. W. 204; Yanktown Fire Ins. Co. v. Fremont, E. & M. V. R. Co. (S. D.) 64 N. W. 514; Longabaugh v. Railroad Co., 9 Nev. 271.

It has already been said that the court did not err in submitting to the jury the question of the contributory negligence of the plaintiff in the matter of the use of the particular engine. It submitted to the jury the proposition as to whether or not the precautions made use of by the ice company to prevent a fire were, under all the circumstances, such precautions as would be employed by a prudent man in a like case. But appellant objects that the court instructed the jury that the ice company did employ counter precautions, and insists that the question whether or not it employed counter precautions was one of fact for the jury. We think this criticism captious. Whether or not the counter precautions were adequate to relieve the ice company from the charge of contributory negligence was properly for the jury; but it is not disputed that the ice company did something—took some measures—against the danger to which its property was exposed. It employed a man to follow and watch the engine. Over this there was no dispute. It could not have injured the defendant that the court designated these acts of the ice company "counter precautions," when it carefully left the determination of their reasonable sufficiency with the jury.

The proof of loss was properly admitted in evidence as establishing plaintiff's liability for the moneys which it had paid to the ice company, and as a declaration within the issues of the pleadings against the defendant ice company. Plaintiff's counsel stated upon its introduction that no claim was made that any statement contained in it was binding upon the appellant. It was admitted for a limited purpose. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. The stipulation by agreement of the parties expressed upon the face of the writing itself was made admissible in evidence, and the declaration contained in the stipulation that the appellant had offered to pay the ice company the sum of $12,500 in addition to the insurance money was not injurious to the appellant, as the court instructed the jury, at the request of appellant, that "said offer was of itself neither an admission that the defendant had been guilty of negligence, nor that it had caused said fire, nor that anything was due to said Sierra Lakes Ice Company, or the plaintiff herein, by reason of said fire." The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HARRISON, J.; VAN DYKE, J.

McFARLAND, J. I dissent for several reasons, but, waiving other points, it is sufficient to say here that, in my opinion, the court below, in giving instruction No. 2 asked by respondent, committed a material and prejudicial error for which the judgment should be reversed. The instruction is very long, and is, I think, erroneous as a whole, because it deals mainly with questions of fact, and is argumentative. The specific part of it which, in my opinion, is clearly erroneous is as follows: "Proof to the effect that immediately before the breaking out of the fire, an engine of the defendant, burning coal for the purpose of generating steam, was in operation immediately by, and in close proximity to, the place where the fire broke out, and that such engine had, on previous occasions, set fire by sparks escaping therefrom, and that said engine was so operated in relation to said property that a spark or sparks escaping therefrom could have set the fire, and the condition of the property and the surrounding circumstances being such as to warrant a belief on your part that the fire was more likely brought about by a spark or sparks from said engine than from any other cause, would be such reasonable evidence, and would prima facie establish that the fire had been caused by said engine, and would warrant a finding upon your part to that effect, in the absence of evidence that the fire arose from some other cause." This language does not include a single proposition of law. It simply tells the jury how they should weigh the evidence, and how certain inferences of fact should be drawn from other facts, and is an unwarrantable interference with the province of the jury. Such an instruction has been repeatedly held by this court to be erroneous, and to be in contravention of section 19, art. 6, of the constitution. The error of such an instruction is aptly illustrated by the case of People v. Walden, 51 Cal. 588. The defendant in that case was charged with having fraudulently changed certain ballots which had been voted at an election, after they had been deposited in the clerk's office; and it was shown on the trial that a key which would fit and open the lock of the door leading to the clerk's office had been found on the person of the defendant, and the court below, speaking of the key, told the jury: "If you believe it would open the clerk's office where the ballots were kept, then the possession by the defendant unexplained raises a reasonable presumption that he had it for the purpose of opening that door." The court, in its opinion, said: "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption, it was clearly error, since no such presumption would arise from the fact stated, as a matter of law. If it was an attempt on the part of the court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind, and connection of events, must be presumed from the existence of another, this was an interference with what, as we have shown, is the exclusive province of the jury. It was charging the jury 'with respect to matters of fact,' and was a contravention of section 19, art. 6, of the constitution of the state." In Re Carpenter's Estate, 94 Cal. 406, 29 Pac. 1101, the court (we quote from the syllabus, which correctly states what was decided) said: "Instructions as to the weight and value of evidence, stating what the jury are at liberty to conclude from certain facts, if found, involving a conclusion, not of law, but of the judging mind from the evidence, are in violation of the constitutional inhibition as to instructions upon matters of fact. The court has no right to dictate, or even suggest, the process of reasoning by which the evidence shall be judged." See, also, Stone v. Mining Co., 52 Cal. 315; People v. Carrillo, 54 Cal. 63. For these reasons, and in accordance with the principle declared in the above-cited authorities, the judgment, in my opinion, should be reversed, and a new trial granted.

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125 Cal. 396

In re PACKER'S ESTATE. (L. A. 691.)

(Supreme Court of California. July 18, 1899.)

EXECUTORS—SALES OF LAND UNDER ORDER OF COURT—WHEN TITLE VESTS IN HEIR.

Act March 23, 1893 (St. 1893, p. 212), amending Code Civ. Proc. §§ 1537, 1538, provides that an order to sell realty may be granted to an administrator when it appears to be for the best interest of the estate, although there are no debts or liens. Decedent died in 1891, leaving no debts or liens, and after the passage of this statute an order of sale was granted to his administrator under its authority. *Held*, that the title to the lands vested in the heirs at the testator's death, subject to the debts and liens, if any, and consequently the statute conferred no authority for this order.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

In the matter of the estate of John B. Packer, deceased. Application for an order of sale. From a decree ordering the sale, an heir appeals. Reversed.

Jas. Burdett, for appellant. C. L. Batcheller, for respondent.

CHIPMAN, C. Pending administration of the above-entitled estate, the administrator filed his petition praying for an order to sell certain real property belonging to the estate "on the ground that it was for the advantage, benefit, and best interests of the estate and those interested therein," setting forth in detail "in what way an advantage and benefit would accrue to the estate, and those interested therein, by such sale." An order was duly made, reciting the substance of the petition, and fixing a time and place for its hearing. This order was duly published as required by law. Upon the hearing, proofs in support of the petition were submitted, and no one interested in the estate opposed the application. The sale was ordered and made in due course, and was duly confirmed after hearing of returns of account of sale and upon due notice. The surviving wife of deceased, one of the heirs at law, appeals.

The petition showed that there were no debts, expenses, or charges of administration to be met, and that the only ground for the order was as above stated. Section 1537, Code Civ. Proc., as amended in 1893, reads: "* * * And if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit and best interests of the estate and those interested therein that a sale be made, the petition * * * must set forth in what way an advantage or benefit would accrue to the estate, and those interested, by such sale," etc. Section 1538, Id., provides as follows: "If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit and best interests of the estate and those interested therein, to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed, and an order thereupon made" directing all persons interested to appear and show cause, etc., at a time and place specified. Section 1542, Id., authorizes the court to order the sale if the allegations of the petition are sustained by the proofs. Sections 1543 and 1544 relate to the same matters. Appellant relies upon the case of Brenham v. Story, 39 Cal. 179; citing, also, Pryor v. Downey, 50 Cal. 409; McNeil v. Society, 66 Cal. 110, 4 Pac. 1096; Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; and some other cases; also, 2 Woerner, Adm'n, §§ 469, 470. In Brenham v. Story an act of the legislature approved April 15, 1861 (St. 1861, p. 152), authorized the administrator of Charles White, deceased, "to sell at public or private sale, at his discretion, and without having first obtained an order of the probate court therefor, the whole or any portion of the real estate, or any right, title, or interest therein claimed, held, or owned by the said Charles White at the time of his death, as in the judgment of such administrator will best promote the interests of those entitled to said estate." This act was amendatory of section 1 of an act approved April 6, 1860 (St. 1860, p. 148). Other sections of the act of 1860 required the administrator to report the sale to the court for approval, and empowered the court to act ex parte on the report, and made no provision for notice of any hearing on the report. Upon such approval of the court the administrator was authorized to make a deed. This was a special act, passed after the death of the intestate. The general law then was much the same as now, and authorized the sale of real estate for the purpose of making payment of family allowance, debts of the decedent, or the debts, expenses, or charges of administration or legacies; but the general law did not then provide for a sale of real estate, there being no such charges, whenever, in the judgment of the administrator, the sale would best promote the interests of those entitled to the estate. This latter, however, was what the legislature undertook to do by special act after the death of the ancestor. The court said: "Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned [the debts, etc.]; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has. His estate is indefeasible, except in satisfaction of these prior liens, and the legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way." Respondent misconceives the controlling principle of the case in placing it on the fact "that in passing the act the legislature usurped judicial functions." The decision rests upon the want of power to order the sale after the title had vested in the heirs, except for the purposes provided by the law in force at the death of the ancestor. In the case before us decedent died July 10, 1891, while a resident of this state, and letters were duly issued to respondent as administrator in May, 1892. The act under which the sale was ordered and made was approved March 23, 1893 (St. 1893, p. 212). Whether the law is constitutional as applied to the property of decedents who have died since the passage of the act is a question not presented, and need not be considered or decided. But we think the precise question here involved was decided in Brenham v. Story adversely to respondent's contention, and must rule this case. The principle there laid down, that upon the death of the ancestor the heir at once becomes vested with the full property, subject only to liens then existing, or created by statute then in force, has never been questioned by the court. See Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; and many other cases that might be cited. It is true, as we are reminded by respondent, that in the Brenham Case the court said: "The right of an heir to his inheritance depends upon positive law, and it is not a natural or an absolute right. It is competent for the legislature to change the rule of inheritance, or to restrict the testamentary power. It may provide, as it has done, that the heir or devisee shall take subject to certain burdens, as the payment of the debts," etc. But this is far from saying that the legislature might, as was attempted in that case, after the title had vested in the heir, empower the administrator to sell the inheritance for purposes not authorized at the time the title vested, and to which it was not subject when it vested. Respondent cites Cooley's Constitutional Limitations and some cases in support of the power. These may be worthy of consideration when a case arises under the statute where the decedent has died since the enactment of the amendments, but they do not convince us of any unsoundness in the principles stated in Brenham v. Story, supra. The statute authorizing the mortgaging of estates, to which our attention is called, rests upon the principle that the mortgage provides for the payment of liens existing under the law, or likely to arise thereunder.

Respondent presents reasons in support of the statute as applicable to estates where the decedent died after the passage of the law, but, as we have said, that question does not necessarily arise here, and ought not to be decided until it does arise. Any expression of opinion upon it now would be obiter. We advise that the order be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

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125 Cal. 417

In re DONNELLY'S ESTATE. (S. F. 1,321.)

(Supreme Court of California. July 21, 1899.)

LIFE SENTENCE—EFFECT ON CIVIL RIGHTS—RIGHT OF INHERITANCE.

Under Pen. Code, § 674, which provides that a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead, a person who is serving a life sentence at the time of his father's death does not inherit from him.

In bank. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Thomas Donnelly, deceased. From a decree of distribution depriving him of a share in decedent's estate, Charles J. Stilwell appealed. Affirmed.

Crittenden Thornton, for appellant. Alex. D. Keys, Dunne & McPike, T. J. Crowley, T. J. Lyons, E. C. Harrison, and Humphreys & Morrow, for respondents.

HARRISON, J. Thomas Donnelly died intestate February 17, 1896, and on December 3, 1897, the superior court made a decree distributing his estate to his widow and the successors in interest of three of his children. The decedent left surviving him another child, James J. Donnelly, who, prior to his father's death, viz. October 5, 1894, was sentenced to imprisonment in the state prison of the state of California for the term of his natural life, and who at the time of his father's death and at the date of the said decree of distribution was in confinement therein under such sentence. February 11, 1897, James made an assignment and transfer of his interest in the estate of his father to Charles J. Stilwell, who, by virtue thereof, claimed to have a portion of the estate of the decedent distributed to him. The court denied his claim, and distributed the estate as above stated. From this decree of distribution Stilwell has appealed.

Section 674 of the Penal Code is as follows: "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead." Civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law. In Anderson's Law Dictionary civil death is defined to be "extinction of civil rights." Bouvier says, "Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them is considered as dead." Abbott defines civil death to be "the legal privation or extinction of a person's rights and capacities among his fellow members of society." In Nerac's Estate, 35 Cal. 392, the court said: "If the convict be sentenced for life, he becomes civiliter mortuus, or dead in law, in respect to his estate, as if he was dead in fact." If James had died a natural death at the time he was sentenced to imprisonment in the state prison for the term of his natural life, the correctness of the decree would be unquestioned, and for the purpose of any right of inheritance his civil death must have the same effect. The right of inheritance is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. The provisions of sections 675 and 676 of the Penal Code, instead of impairing this construction given to section 674, strengthen it by showing that, but for these provisions, in the opinion of the legislature, the civil death of the felon would extend to the cases therein named; and the enumeration of the cases wherein section 674 is inoperative authorizes the conclusion that those are the only cases in which it is not to be applied. Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, cited by the appellant, has no application to the facts of the present case. In that case the testator died in 1869, leaving to his son, Charles, an estate in the lands in question, which the court held to be a vested remainder in fee, limited upon the life of his mother, but subject to be defeated by his dying without children. This remainder was property capable of being transferred by Charles, and vested in him at the death of his father. In 1875 Charles was convicted of murder, and sentenced to imprisonment in the state prison for the term of his natural life. The court was not called upon to consider whether his right of inheritance was destroyed by the sentence, but whether the sentence operated to devest him of the property at that time owned by him, and held that the sentence did not have the effect to devest him of his interest in the land. The same rule exists in this state by virtue of section 677 of the Penal Code, which provides: "No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law." Under the conclusion reached herein it is unnecessary to consider the respondent's motion to dismiss the appeal. The decree is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(125 Cal. 415)

In re STRAUT. (S. F. 1,185.)

(Supreme Court of California. July 21, 1899.)

INSOLVENCY—DISTRIBUTION OF ASSETS—INDIVIDUAL AND FIRM CREDITORS.

An involuntary insolvent in the inventory of his property included the assets of his firm, which had become insolvent, and also included firm creditors in his list of creditors. Many of the creditors proved their demands, some of them being creditors of the insolvent only, and others creditors of the firm. Of $2,100 to be distributed among creditors only $3.50 came from the firm assets, and the partnership affairs were never settled. The assignee distributed the fund to all of the creditors pro rata, including firm creditors. *Held*, that section 39 of the insolvent law (St. 1895, p. 144), providing that in cases of insolvent partners the proceeds of the partnership property shall be first applied to payment of partnership creditors, and moneys derived from the estates of the partners to the payment of individual debts, either set of creditors having the right to resort to any surplus there might be in the fund first to be appropriated, did not apply where only one partner was adjudged insolvent, and that the creditors were entitled to share pro rata, as provided by section 35 of the act.

Department 2. Appeal from superior court, Napa county.

Appeal by individual creditors of George Straut, an insolvent, from orders allowing firm creditors to share pro rata with them. Affirmed.

F. E. Johnston, H. C. Gesford, and E. L. Webber, for appellants. H. M. Barstow, for respondent. C. J. Beerstecher, for assignee.

TEMPLE, J. The insolvent had been a member of a co-partnership doing business under the firm name of Meigs & Straut. The firm had become heavily indebted, and had ceased to do business. Some individual creditors of Straut caused him to be adjudged an insolvent debtor on the 26th day of August, 1895. In obedience to an order of the court Straut made and filed an inventory of his property, which included the assets of the co-partnership. He also gave a list of his creditors, including the creditors of the firm. The sheriff of the county was directed to take charge of the estate, and a meeting of the creditors was provided for. Many creditors proved their demands. Some were only creditors of Straut, but others were creditors of the firm. An assignee was appointed, and the usual assignment made. On the 24th day of July, 1897, the accounts of the assignee were settled. He had subject to distribution to creditors $2,100.17. It was distributed to all the creditors pro rata, including the firm creditors. This distribution was objected to by the individual creditors, who contended that they should be first paid, and that the co-partnership creditors would take nothing unless there was a surplus after paying the individual creditors. The assets would suffice to pay only a small per cent. of the allowed claims of the individual creditors. The proceeds in the hands of the assignee were from individual property, except $3.50, which was from the partnership assets. The partnership affairs have never been settled. Whether its assets possess further value does not appear.

Section 39 (St. 1895, p. 144) of the insolvent act provides for the proceeding in the case of partnerships. The assets of the partnership and the individual estates of the partners are taken by the assignee, and the proceeds of partnership property are to be first applied to the payment of partnership creditors, and the moneys derived from individual estates to the payment of individual debts. Either set of creditors could resort to any surplus there might be in the fund first to be appropriated to the other class. Appellant contends that this rule should prevail in this case, where only one of the partners has been adjudged insolvent, and the court has no jurisdiction over the estate of the partnership. But the statute cannot be extended beyond the special case for which it was provided. According to section 35 all creditors whose debts are proved and allowed may share pro rata, without a preference, except as provided in section 1204, Code Civ. Proc., in regard to claims of servants and others. By section 41 all debts due or to become due may be proved against the estate. Each partner owes all the debts of the partnership, and his goods may be taken to pay them. He may become insolvent through the indebtedness of the partnership, and in the case of his individual insolvency his creditors may undoubtedly have recourse to his interest in the partnership assets. Of course, his interest would be taken subject to the prior rights of partnership creditors, and to the expense of settling the affairs of the partnership. As the partnership debts can be proved against the estate, a discharge must have the effect of relieving his separate estate from all liability for partnership debts. The partnership might not be insolvent, but the insolvency of an individual partner would necessitate a dissolution, and an assignee could insist upon a liquidation, and obtain for the creditors of the individual the value of the insolvent's interest in its assets. In this mode, perhaps, the assignee could cause the partnership assets to be applied to the payment of partnership debts before such creditors could have recourse to the individual estate. But as the statute now stands the court cannot discriminate in distributing the funds of the estate. The orders are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(6 Cal. Unrep. 315)

COWDERY v. McCHESNEY. (Sac. 591.)

(Supreme Court of California. July 25, 1899.)

EVIDENCE—QUALIFICATION OF EXPERT WITNESS.

In an action to recover for personal services in nursing and caring for defendant's testator, plaintiff introduced as an expert witness as to the value of the services a woman of experience in the same kind of work, and who had seen the nature of plaintiff's services on the ranch where they were performed. In answer to the question, "From your experience, and what you saw on the ranch, are you able to say what such services are reasonably worth?" she replied, "Well, I am able to tell what I think." *Held*, that the court erred in excluding the testimony on the ground that witness had admitted her incompetency.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Minnie E. Cowdery against Clark McChesney, as executor of George M. Kasson, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

Minor & Ashley, for appellant. John A. Percy, Budd & Thompson, and Nicol & Orr, for respondent.

GRAY, C. This action is brought to recover the reasonable value of certain services, as housekeeper, superintendent of the household and domestic affairs, and as nurse, alleged to have been performed by plaintiff for her deceased uncle, George M. Kasson, in his lifetime. For several years immediately preceding the death of Kasson he was afflicted with various disorders of body and mind which rendered it necessary that he should have the constant attention of some one to take care of his person and home. He engaged the plaintiff to perform this service for him, agreeing that she should be well paid. To show the value of her services, the plaintiff called as a witness Mrs. S. A. Hathaway, who testified to her acquaintance with deceased; that she had been at his house the night before and on the morning of his death, and had observed what was necessary to be done to take care of him properly; and that she had occupied a position at the state insane asylum as a keeper of a ward, it being her duty to superintend the ward, and see that the work of caring for the patients was properly done. She was then asked, "From your experience at the asylum, and what you saw on the Kasson ranch, are you able to say what such services as Mrs. Cowdery rendered there were reasonably worth?" to which the witness answered, "Well, I am able to tell what I think." Plaintiff then asked her, "What were the services rendered by Mrs. Cowdery upon the Kasson ranch reasonably worth, if you know?" This question was objected to on the ground "that the witness has shown, by her own examination, that she is not competent to testify." It would seem that the court erred in sustaining this objection. The testimony of the witness shows that she was in a position to give an intelligent opinion as to the reasonable worth of the plaintiff's services in caring for her afflicted uncle, and the question objected to was therefore competent and proper. When plaintiff rested her case, no evidence had been elicited as to the value of her services; consequently the above ruling of the court was prejudicial to her rights. On account of this error we advise that the judgment and order denying a new trial be reversed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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125 Cal. 456

LANZ v. FRESNO LOAN & SAVINGS BANK. (S. F. 1,077.)

(Supreme Court of California. July 24, 1899.)

BANKS—LIQUIDATION—ACTIONS BY CREDITORS.

That the bank commissioners have directed a bank to liquidate, and wind up its affairs, and that this is being done entirely by its own officers, who are collecting its assets, and disbursing money to depositors, does not deprive its creditors of their right to commence actions against it.

Department 1. Appeal from superior court, Fresno county.

Action by Henry Lanz against the Fresno Loan & Savings Bank. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Horace Hawes, for appellant. L. L. Cory and W. D. Tupper, for respondent.

GAROUTTE, J. Plaintiff brought this action to recover from the defendant certain sums of money deposited with it. The answer alleged that the deposits were made under and in accordance with a by-law of the defendant which required notice to the bank of any intended withdrawal of moneys deposited. It was further alleged that the defendant was visited by the bank commissioners, who required the defendant to levy an assessment upon its capital stock of $10 per share, and use the funds thus raised in the conduct of its business; that defendant refused to comply with this direction, and the bank commissioners "advised and directed defendant to liquidate, and wind up its affairs"; that defendant closed its doors to all new business, and proceeded to wind up its affairs, and is still doing so under the direction of said bank commissioners. The court, after finding in substance the foregoing facts, further found: "That at all times since the defendant closed its doors the officers of the bank have had entire charge and control of the collection of all debts, securities, and assets, and the disbursement of the same, and a large amount of money has been since said time collected by the officers of said bank, and disbursed to various depositors; and securities have, from time to time, been turned over to creditors of the bank in payment of their claims; that no payments have been made to plaintiff, but that defendant has, however, from time to time, received advices and instructions from the bank commissioners." From the foregoing facts the court found as a conclusion of law that plaintiff was entitled to judgment, which was accordingly ordered, and this appeal is taken therefrom.

There is no question raised as to the validity of the indebtedness of the bank to plaintiff, but it is insisted upon the part of the bank that it is in process of liquidation, and therefore cannot be sued by a depositor. In view of the findings of fact made by the trial court to the effect that the bank had collected and disbursed to various depositors large sums of money, and that securities have been from time to time turned over to various creditors of the bank in payment of their claims, and that plaintiff has been entirely overlooked in the making of these disbursements, it would seem that there should be some legal remedy which he might invoke to secure his rights. We see no importance to be attached to the demand of the bank commissioners that the bank levy an assessment of $10 per share upon its stock, and a refusal upon its part to comply with the demand. That matter appears to be wholly immaterial here. Neither do we attach any importance to the mere advice or direction of the bank commissioners given to the bank to wind up its affairs. We do not see that the bank stands in a different position, as to the law, when it proceeds to liquidate upon the advice and direction of the commissioners to that end, from that which it occupies when, realizing its unfortunate condition, it proceeds to liquidate without advice or direction. The banking act (section 11, St. 1887) provides that whenever a bank refuses to comply with orders given by the commissioners, directing the manner and conduct of its business to be changed so as to comply with the requirements of its charter and the banking act, "or whenever it shall appear to said commissioners that it is unsafe for any such corporation as in this act mentioned to continue to transact business, they shall notify the attorney general of such fact, who, after examination, in his discretion, may commence suit in the proper court against such corporation, to enjoin and prohibit the transaction of any further business by such corporation; and upon the hearing of the case, if the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested or for such corporation to continue to transact business, and that such corporation or institution is insolvent, shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law." This injunction of the trial court is, in effect, an order throwing the bank into liquidation, and until the bank goes into liquidation under such order it is not protected from the suits of creditors. Until such time it is acting entirely independent of courts, and largely independent of bank commissioners. In this case it nowhere appears that any proceedings have ever been taken by the bank commissioners and the attorney general resulting in the judicial declaration contemplated by the banking act, and until such action is taken the bank's legal status as to its creditors is not changed. From the standpoint of the law, in the absence of an express provision to that effect, it is incredible to believe that a bank, of its own motion, may close its doors, and proceed to a liquidation which prevents its creditors from seeking the aid of courts to enforce their rights. However tightly the doors of the bank may be closed to creditors by the directors, those directors cannot close the doors of the courts to its creditors; and the doors of the bank can never be closed so tightly at the mere desire of the directors or stockholders but that a court will open them at the request of the creditors. We conclude that, in the absence of the judicial declaration contemplated by the banking act, the right of action against the bank by creditors stands exactly as though its doors had never been closed, and its business was progressing in the usual and ordinary channels. There is no authority in this state opposed to the conclusion we have declared. In Crane v. Bank, 106 Cal. 64, 39 Pac. 215, there was a judicial decree against the bank as provided in the banking act, and in the other recent cases decided by this court bearing upon the construction of the banking act here involved nothing is decided contrary to the views now expressed. Under the authority of Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110, there is no merit in the claim raised by appellant as to the noncompliance upon the part of plaintiff with the by-laws of the corporation defendant. For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(125 Cal. 453)

BOYD et al. v. HERON et al. (S. F. 1,026.)[1]

(Supreme Court of California. July 24, 1899.)

STREET RAILROADS—BONDS—ISSUANCE—STOCKHOLDERS' LIABILITY.

Under Civ. Code, §§ 456, 510, which provide that street-railroad companies may issue bonds in payment of contracts for constructing and completing their roads, and section 359, which provides that the bonded indebtedness of a corporation may be created or increased by a vote of the stockholders representing at least two-thirds of the entire capital stock, a stockholder is not liable, in an action to enforce his stockholders' liability, for bonds issued in part payment for the construction of the road, for the issuance of which the stockholders never voted.

Department 2. Appeal from superior court, Alameda county.

Action by James T. Boyd and others against E. A. Heron and others to enforce stockholders' liability. From a judgment in favor of defendants, plaintiffs appealed. Affirmed.

Adair Welcker (W. H. Fifield, of counsel), for appellants. S. B. McGee, C. H. Wilson,

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[1] Rehearing denied August 23, 1899.

Chickering, Thomas & Gregory, Fitzgerald & Abbott, and John Yule, for respondents.

HENSHAW, J. Plaintiffs brought this action against defendants as stockholders of the Consolidated Piedmont Cable Company, a street-railroad corporation, for the purpose of enforcing their liability as stockholders for an indebtedness arising upon 10 bonds for $1,000 each, issued in part payment for the construction of the company's road. Plaintiffs suffered nonsuit, and from the judgment which followed they appeal.

The bonds were issued under authority of sections 456 and 457 of the Civil Code. These sections are under the subtitle of "Railroad Corporations," but by section 510 of the same Code their provisions are applicable to street-railroad corporations. It was urged, with other grounds of nonsuit, that no liability was cast upon the stockholders by the issuance of these bonds, because the mode of their issuance was unauthorized by law. The contention of the appellants upon this point is that the bonds were duly issued in compliance with the provisions of sections 456 and 457, were issued for a purpose recognized by those sections, and that, though issued in payment of the work of construction, by their issuance a new and original liability was created against the corporation and against those who were stockholders at that time. By respondents it is insisted that the bonds could only be legally issued after compliance with the provisions of section 359 of the Civil Code; that these bonds were not so issued, that the stockholders never assented to the issuance, and that, therefore, the bonds are void, or that, at the least, no liability against the stockholders on account of the bonds has been created. This position of respondents, we think, is sound. The issuance of these bonds was not an increase, but the creation, of a bonded indebtedness. Under the provisions of section 359 of the Civil Code the bonded indebtedness of a corporation may be created or increased by a vote of the stockholders representing at least two-thirds of the entire capital stock, at a meeting called by the directors, etc. Section 456 of the Civil Code declares that railroad corporations may issue bonds in payment of any debts or contracts for constructing and completing their road, and further authorizes the directors to impose regulations and restrictions upon the issuance. Section 359 is a general section, applicable to all corporations, one of the most important provisions of which is to give the stockholders a voice in saying whether or not a bonded indebtedness shall be created or increased. No reason is perceived why railroad corporations should be relieved from the operation of this salutary provision. It does not thereby follow that section 456 is void, but that it is to be construed with section 359, as was done in the case of Railway Co. v. Hellman, 109 Cal. 571–594, 42 Pac. 232. Therein it is said that section 359 "provides the method by which the bonded indebtedness of all corporations is to be created or increased," while section 456 confers upon railroad corporations the power to create such an indebtedness. Construing these sections together, then, under section 456 the directors may prescribe reasonable regulations which shall govern the proposed bond issue, but before the issue can be legally made the assent of the required number of stockholders thereto must be had in compliance with the mode laid down in section 359. In McLane v. Railroad Co., 66 Cal. 606, 6 Pac. 748, the provisions of the statute under which those railroad bonds were issued were substantially identical with the terms of section 456 of the Civil Code. The legality of the bond issue in that case was upheld, but at that time there was not upon our books any such statutory provision as is found in section 359, Civ. Code. Whether or not the bonds are void, so as to cast no liability upon the corporation, we are not here called upon to consider; but we think it quite plain that those who were stockholders at the time of the bond issue may be heard to say that, because of the irregularity of the issue, and of their deprivation of an important right to vote upon the bond issue, no liability against them has been created. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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125 Cal. 427

BENNALLACK v. RICHARDS et al.

(Sac. 594.)

(Supreme Court of California. July 22, 1899.)

RECEIVER—APPOINTMENT—EXECUTORS' SALE OF LANDS—CONFIRMATION—TITLE.

1. In a suit for an accounting for the rents of lands, brought against one in possession by one who claims title, when the former denies the latter's title and alleges title in himself, equity will not appoint a receiver to collect the rents, as the principal question in dispute is legal, and not equitable.

2. Under Code Civ. Proc. § 1561, which provides that, when property is directed by the will to be sold, the executor may sell any property without an order of the court, but that no title passes unless the sale be confirmed by the court, a sale made pursuant to the provisions of a will which empowered the executor to sell without an order of the court must be confirmed, to authorize a conveyance and vest the title in the purchaser.

3. Where the executors of an estate have entered into a valid contract for sale of lands, and put the purchaser in possession, and he has made valuable improvements and collected the rents, equity will not appoint a receiver, in an action for an accounting, where the executors claim title on the ground that the sale was not confirmed, where it was their duty to report such sale for confirmation, and they failed so to do.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county.

Action by Mary A. Bennallack against W. G. Richards and others. From an order appointing a receiver, Samuel Granger, one of the defendants, appeals. Reversed.

Alfred D. Mason, for appellant. C. W. Kitts and J. M. Walling, for respondents.

HAYNES, C. Appeal by Samuel Granger from an order appointing a receiver. Mary A. Bennallack in March, 1895, commenced an action in the superior court of Nevada county against William G. Richards, Francis S. Richards, and James Bennallack, as executors of the last will of Philip Richards, deceased, and William G. Richards, Francis S. Richards, and William S. Richards, personally, to quiet her title to lot 28 in block 30 in Nevada City. A sufficient statement of facts may be made without attempting a synopsis of each different pleading: Philip Richards in May, 1887, died testate, seised of said lot. His will was duly probated, and William G. Richards, Francis S. Richards, and James Bennallack who were nominated therein as executors, were appointed and qualified as such. Certain legacies or "money bequests" were made in the will, and the testator's brothers Francis S. and William S. Richards were named as residuary legatees. The will directed that no part of the estate be sold until two years after the testator's death; that in the meantime the executors should collect the rents, and after paying taxes, etc., the remainder should be applied to the payment of said "money bequests." The will further provided: "After the expiration of two years from my decease, my said executors are hereby empowered to sell at public or private sale any portion of my estate, real or personal, to such persons, on such terms, and for such sums as they may deem advisable; and all this to do and perform without any order of court whatever, and also to make, execute, and deliver any and all deeds, bills of sale, or other conveyances necessary to dispose of said estate and convert the same into money, without any order of the court, or being required to account to any court." The lot in question was duly appraised at $3,000 in April, 1891, and on May 11, 1891, was sold by the executors, under the power given them by the will, to Samuel Granger, for the sum of $3,365; but the sale was not then reported to or confirmed by the court, but the executors, supposing that the will gave them power to convey without a confirmation of the sale, at once executed to the purchaser a deed for said lot, received the purchase money, and distributed it to the legatees, under an order of the court, and the purchaser was put in possession. In a cross complaint filed by Francis S. Richards, one of the executors, it is alleged that said sale was never confirmed by the court, nor any order made for a conveyance; that Granger entered into possession of the lot on May 11, 1891, and remained in possession until February 9, 1893, and during that time received rents to the amount of $500 over and above all expenditures thereon; that on May 16, 1891, "Granger assigned to James Bennallack, in trust for the benefit of Mary A. Bennallack, his interest in said lot, for the sum of three thousand five hundred dollars," of which he then received $3,000, and the remainder he received from rents collected between that date and February 9, 1893, when he conveyed the lot to said Mary A. Bennallack, who then went into and remained in possession of the property, and appropriated the rents, until May 8, 1897, when she sold and conveyed the lot to Granger for the sum of $3,500, and that Granger has ever since been in possession, and received a rental of $106 per month; that in 1894 Francis S. Richards conveyed to James Bennallack all his interest as residuary legatee in said lot, and Bennallack conveyed said interest to Granger on May 8, 1897. Said cross complainant further alleged that about the sum of $1,000 remains unpaid upon the legacies; that there is not sufficient money in the hands of the executors to pay the same; that said sum of $3,365, the original purchase money paid for said lot by Granger, was paid to legatees in 1891, by order of the court, in part payment of legacies; that during their said possession of said lot said Granger and Mary A. Bennallack each made valuable and necessary improvements, repairs, and expenditures thereon, the value of which he does not know. Alleges that they are trustees of the rents for the benefit of the estate, that an accounting is necessary, and that said Granger is a necessary party, and offered, as such executor, to make such restitution to Samuel Granger and Mary A. Bennallack as the court should direct. The prayer is that Granger be brought in and made a party; that he and said Mary A. Bennallack be credited with the amount for which the property was sold to Granger on May 11, 1891, viz. $3,365, and also with the amounts paid by them for necessary repairs, taxes, and insurance, and charged with the amount received by them for rents; the balance to bear interest at 7 per cent. per annum, with annual rests. The answer to said cross complaint alleged that said sale and deed had been duly confirmed by order and decree of the court duly made and entered on February 19, 1895; and, after denials as to the amount of rents received, they set out particularly the repairs and improvements made upon the property, amounting to $3,500, and alleged the payment of taxes amounting to about $300, and denied that they, or either of them, now or ever were trustees of the rents for the estate, or ever occupied any fiduciary relation to it. This answer was filed December 29, 1897. On March 28, 1898, W. G. Richards, as executor, served notice of a motion for the appointment of a receiver, which notice stated that it would be based upon the affidavit accompanying the notice, and the judgment roll in the case of Granger v. Richards et al. (No. ——— in said court), the papers in this case, and the decision of the supreme court on the appeal heretofore prosecuted herein. 48 Pac. 622. Said affidavit alleged that said estate owned said lot, that the monthly rental is $106, and attacked appellant's financial responsibility. Granger filed a counter affidavit alleging his ownership of the lot, denying that he is irresponsible, and alleging that he owns other and known visible property in this state of great value. On May 24, 1898, a receiver was appointed, and this appeal is from the order making said appointment.

The judgment-roll referred to in said notice of motion is not set out in the transcript, nor any intimation of its purport given. The reference to the decision of this court does not give the title of the case, nor refer to any question of law or fact decided in it. We must assume, therefore, that neither were used on the hearing to sustain any allegation of fact. The original complaint filed by Mary A. Bennallack in 1895 was stricken out on motion of defendants. Bennallack, one of the executors, died in November, 1897. Francis S. Richards, the other surviving executor, was not made a party (either plaintiff or defendant) to the cross complaint, though he was served with it, and his default entered for not answering.

No case was made for the appointment of a receiver. Appellant, Granger, was brought into the case by the cross complaint, and no relief was sought against him, other than an accounting for the rents and profits. The title was put in issue, apparently for no other purpose than for an accounting. Appellant is in possession, but the action is not in form for the recovery of possession, but solely for an accounting. Respondents are certainly not entitled to an accounting until their title and right of possession are determined. Appellant's answer to the cross complaint denies that the estate has title, and alleges title in himself. It is evident that without the adjudication of that question in favor of the executors, they cannot be entitled to recover the rents and profits; and, if the legal title is in the estate, the executors may recover possession in an action of ejectment. The principal question, therefore, is one of legal, and not of equitable, cognizance. High, Rec. § 557, lays down the rule thus: "Whenever the contest is simply a question of disputed title to the property (plaintiff asserting a legal title in himself against a defendant in possession and receiving the rents and profits under claim of legal title) equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of procedure at law. * * * A departure from the rule can only be justified upon strong grounds of judicial necessity, or in case of fraud clearly proven, or of imminent danger, unless immediate possession is taken by the court; and the burden rests upon complainant to make out a clear case, to justify the relief." There can be no question that the executors had ample power and authority under the will to make a valid sale; but confirmation of the sale by the court was necessary, to authorize a conveyance (Code Civ. Proc. § 1561), and to vest the title in the purchaser.

The cross complaint alleges that the sale was never confirmed by the court, but does not allege that the sale was reported to the court, and that confirmation was refused or the sale vacated. That there was a valid contract of sale between the executors and the purchaser, subject only to confirmation by the court, I think is clearly shown by the cross complaint; and one term or provision of that contract was supplied by the statute, viz. that they would report the sale to the court for confirmation. This court has said (In re Pearsons' Estate, 98 Cal. 603, 612, 33 Pac. 455): "The purchaser from an executor at a sale under a power in the will deals with him, in making the purchase, as he would with any other vendor. He makes the purchase subject to a confirmation by the court, but in all other respects he may incorporate in his contract of purchase the same terms and conditions as he would in dealing with any other agent for the sale of property, and he can repudiate his contract of purchase only for the same reasons as he could in case he had bought from another. * * * In this state it is essential that the will shall have been admitted to probate before the power can have any validity, but in all other respects the contract of purchase and sale between the executor and his vendee is attended with the same incidents, and is to receive the same construction, as a similar contract between any other vendor and vendee. Prior to 1861 a sale by an executor under a power in the will was valid, without any confirmation by the court. In that year the legislature amended the procedure so as to require that such sales should be confirmed by the probate court, the same as those made under its own order. The confirmation thus required is, however, for the protection of the estate, and for the purpose of determining whether the sale shall be confirmed. The scope of investigation by the court is limited to ascertaining whether the sale was legally made and fairly conducted, and the sum bid was not disproportionate to the value of the property sold, and that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, cannot be obtained. Code Civ. Proc. § 1554. If any of these facts exist, the court is authorized to vacate the former sale. In re Durham's Estate, 49 Cal. 490. But, unless such facts are shown to the court, the court must make an order confirming the sale. Section 1554." In making this sale the executors exercised and exhausted their power to deal with the property, unless, upon reporting the sale to the court, confirmation of the sale was refused. It certainly cannot be true that executors acting under such a power may make a valid and unimpeachable contract of sale to appellant, refuse to report it to the court for confirmation, in violation of a duty imposed upon them by law, and, having put him in possession, and permitted him to make improvements to an amount nearly or quite equal to the value of the property at the time the contract of sale was made, invoke the powers of a court of equity to compel an accounting for the rents received, doubtless largely increased by the improvements made, and have a receiver appointed to collect and retain them, to be disposed of by some future order of the court. "He who seeks the appointment of a receiver must himself come into court with clean hands." High, Rec. § 7. The statute does not limit the time within which the executors may report the sale for confirmation. "The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk, at any time subsequent to the sale." Code Civ. Proc. § 1552. The duty and power to report the sale of said lot to the court for confirmation, therefore, remained and existed at the time this cross complaint was filed; and, as the fact that the sale had been made was called to the attention of the court by the allegations therein made by the executor, he might with propriety have been cited to discharge that duty by making such report. Until that is done, we see no ground upon which the executors can invoke the aid of a court of equity to compel an accounting, or to place the property in the hands of a receiver. I therefore advise that the order appointing a receiver be reversed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appointing a receiver is reversed.

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125 Cal. 444

MAYBERRY v. ALHAMBRA ADDITION WATER CO. (L. A. 367.)

(Supreme Court of California. July 22, 1899.)

WATER COURSES—CONTRACT—CONSTRUCTION—ARTIFICIAL WATERS.

A contract made in 1860 between the owner of a cañon containing a natural stream and an adjoining landowner gave the landowner the right to use the "waters flowing in said glen" for irrigating his lands, and in consideration the water owner was given a right of way across the lands for an irrigating ditch, subject to the landowner's right to use for irrigation the waters flowing in the ditch, "or in any water ditch, flume, or aqueduct used, dug, or erected" on the land. In 1887 the water owner began to develop water artificially, and ever since has conducted it with the natural water over the landowner's premises, and he has acquiesced therein. *Held*, that the parties had put their own construction on the contract by their acts, and that the landowner had a right to use the waters developed artificially and turned into the stream.

In bank. For opinion in department, see 54 Pac. 530.

BEATTY, C. J. A rehearing of this cause was ordered after decision in department. We refer to the department opinion for a statement of the facts to be considered, and we adopt its conclusions, except upon one point. With respect to the rights of the parties to the use of the water artificially developed by the defendant, we think the contract of 1860 (quoted in full in 88 Cal. 68, 25 Pac. 1101) requires a construction more favorable to the plaintiff than was placed upon it by the superior court and by the department. When Kewen and Wilson entered into that contract, the possibility of developing in the future water in addition to that then flowing in the cañada was one of the circumstances by which they were surrounded, and there is nothing in the terms of the contract to denote whether they did or did not take it into consideration. If, therefore, the defendant, by causing the water which it has developed to flow through the aqueduct which it maintains across the Kewen land, has brought such water within the literal terms of that clause of the contract which entitles the plaintiff to use on two days of the week "the water flowing in any water ditch, flume, or aqueduct used, dug, or erected by the parties of the first part," etc., we cannot see how the defendant can appeal to the circumstances surrounding the parties at the date of the contract to modify the natural construction of the language in which their intention is expressed. But, aside from this, the least that can be said of this provision of the contract is that it is ambiguous and doubtful. Such being the case, the practical construction placed upon it by the parties must control. It appears that the defendant, from the commencement of its development of water, in 1887, down to trial of this action, has been conducting all the water "flowing in the glen" —natural and artificial mingled together— through its pipe across plaintiff's land. It does not lie in defendant's mouth to say that it has been doing this without right, and its only right is derived from the contract of 1860. It has thus put its construction upon that contract, and, the plaintiff having acquiesced, it must be held that the parties have themselves determined that the defendant has the right under the contract to conduct the developed water across the plaintiff's land. If so, it follows that the plaintiff has the right to use it on two days of the week, so long as it is so conducted. If one stipulation of the contract applies to the flow artificially created, so must the others. We do not decide that the defendant is obliged to continue to conduct the developed water across the Kewen tract, but only that, so long as it claims and exercises the right to do so, the plaintiff can claim and exercise the reciprocal right to use the water as the contract provides. Nor are we to be understood as holding that the plaintiff is entitled to divert from defendant's pipes at any time more water than is reasonably necessary for the irrigation of that portion of the original Kewen tract of which he is the owner. He is not, in other words, to make a wanton diversion, to the injury of defendant without benefit to himself. The judgment and order of the superior court are reversed, and the cause remanded for further proceedings in accordance with the opinion of the department as herein modified.

We concur: HENSHAW, J.; TEMPLE, J.; McFARLAND, J.

125 Cal. 413

LEAKE v. COLGAN, Controller.

(S. F. 1,949.)

(Supreme Court of California. July 21, 1899.)

STATUTE — TITLE — AMENDMENT—ABOLITION OF OFFICE—LATER ACT.

1. An act amending a statute creating an office, defining its powers and duties, fixing the salary, and making an appropriation to carry it into effect, may abolish the office after a certain date without specifically mentioning such object in its title, where it refers properly to the act amended, without violating Const. art. 4, § 24, declaring that an act shall embrace but one subject, which shall be expressed in its title.

2. Where an act amending an act creating an office abolishes such office after two years, a later act, passed by the same legislature, creating an auditing board for the commission created by the original act, does not continue the office beyond the two years, but only regulates its affairs during the remaining period of its existence.

In bank. Petition by Ed. E. Leake for mandamus to compel E. P. Colgan, controller, to draw warrant for salary. Denied.

Judson Brusie, for petitioner.

PER CURIAM. This is a petition for a writ of mandate asking that the controller be directed to draw his warrant in favor of petitioner as commissioner of public works for his salary for the month of March, 1899. In 1893 the legislature created the office of commissioner of public works, defining its duties and powers, and fixing the salary, and made an appropriation to carry the purposes of the act into effect. St. 1893, p. 345. In 1897 the legislature passed an act entitled "An act to amend an act entitled 'An act to create a commissioner of public works, defining his duties and powers, prescribing his compensation, and making appropriation,' approved March 24, 1893, relating to the office of the commissioner of public works." Section 2 of this act is as follows: "This act and the act creating a commissioner of public works, defining his duties and powers, prescribing his compensation and making appropriation, approved March 24, 1893, relating to the office of commissioner of public works, of which this act is amendatory, shall cease, terminate and be at an end on the first day of March, 1899, and the office of commissioner created hereunder and under said act approved March 24. 1893, and all officers and employees appointed by said commission, shall cease, and their employment thereafter shall be discontinued, and the state of California shall in no manner whatever be liable for the compensation of the commissioner, officers, or employees employed by him, or by said commission, after said date." St. 1897, p. 26. As to the meaning of this language there is not the least uncertainty. It is contended, however, that the subject-matter of this section is not embraced within the title of the act, and that it is therefore void under article 4, § 24, of the constitution, which declares that an act shall embrace but one subject, which subject shall be expressed in its title, and that it shall be void as to matters not so expressed. But the fixing of the term or tenure of office under an act such as this, or the abolition of the office, are all matters embraced within, and germane to, the subject of the original act, and they may find an expression in an amendatory act without specific mention of them in the title to such amendatory act. Such is the well-settled rule, based upon very obvious considerations. Reference need only be made to Cooley, Const. Lim. (6th Ed.) p. 174, § 3; Suth. St. Const. § 97 et seq.

It is further argued that an act passed by the same legislature at a date later than the one under consideration shows a definite purpose to continue the office beyond the time expressed in the act for its determination. St. 1897, p. 171. By this last-mentioned act an auditing board for the commission of public works is created; but this amendatory act continued the office in existence for about two years, and there is nothing in the latter act to call for the conclusion that the legislature meant to do other than to regulate the affairs of the office during the remaining period of its existence. The application for a writ is denied.

125 Cal. 420

CITY OF LOS ANGELES v. POMEROY et al. (L. A. 289.)

(Supreme Court of California. July 21, 1899.)

PUBLIC LANDS—MEXICAN GRANT—TITLE ACQUIRED ON CONFIRMATION.

The original owner of a Mexican land grant conveyed a right to open an irrigating ditch over the same. Before the recording of the conveyance and the opening of the ditch, he conveyed the grant, without reservation, to other parties, who petitioned for its confirmation. After the ditch was opened, a patent in confirmation was issued to the petitioners. *Held*, that they acquired the whole legal title under their patent, free of every servitude.

In bank. Appeal from superior court, Los Angeles county.

Action by the city of Los Angeles against A. E. Pomeroy and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

R. H. F. Variel and J. S. Chapman, for appellants. W. E. Dunn and Lee & Scott, for respondent.

BEATTY, C. J. This is a suit to enjoin the defendants from interfering with a certain dam and ditch by means of which the plaintiff diverts water from the Los Angeles river for the use of its inhabitants and for domestic purposes. The dam and ditch in question are situated upon a part of the Providencia rancho, which belongs to the defendants, and the question is whether the city has the right to maintain them. The cause was tried in the superior court without a jury, the facts found in favor of the plaintiff, and judgment entered accordingly. The defendants appeal from the judgment and from an order denying a new trial.

The following is a general outline of the case presented by the record: The Los Angeles river flows through the city of Los Angeles, which has succeeded to the rights of the former pueblo in respect to the waters of the river. Above the city is the Los Feliz rancho, and above that the Providencia. The Providencia was granted by the Mexican authorities to Vicente de la Osa in 1843. In 1845 De la Osa made a grant, in the form usually employed at that time, to Maria Ignacia Verdugo de Feliz, her heirs and successors, of "the right to open a zanja over my said land, and to use of the water of the river to irrigate the lands of the potrero known as that of the Feliz, or place of San Jose, for fifty dollars, which he has received to his satisfaction," etc. This instrument appears to have been inscribed, according to the Mexican practice, in a book of public records,—an authenticated copy being delivered to the grantee,—but it was never recorded in the county records of Los Angeles until 1868. In the meantime, in 1849, De la Osa had granted and conveyed the Providencia, without reservation, to Alexander and Mellus, who in 1852 petitioned for a confirmation of the grant. Upon their petition the grant was confirmed, and in 1872 a patent was issued to them. By various mesne conveyances the defendants have acquired the title of Alexander and Mellus. The successors of Verdugo Feliz in the ownership of the Feliz rancho, and their tenants, are shown to have been in possession of an irrigating ditch as early as 1855, through which they diverted water from the river at or very near the point where the dam in controversy here is situated. How long before 1855, if at all, that old ditch had been opened and used, there is nothing to show. Nor is there anything, aside from a highly reasonable presumption, to show that it was opened in pursuance of the grant or license from De la Osa, above quoted. It is very satisfactorily proved, however, that from 1855 to 1868 the tenants of the Feliz rancho continually maintained their dam and ditch, and diverted a sufficient quantity of the waters of the river to irrigate so much of the potrero of the Feliz ranch as lay under the ditch. As to the extent of the potrero, the only evidence offered was that of plaintiff to the effect that it contained in all 500 acres, of which only 324 acres were under the ditch; i. e. so situated as to be irrigable from that source. There is no evidence as to the quantity of water required for the irrigation of those 324 acres.

In 1868 the successors of Verdugo Feliz conveyed the potrero of the Feliz, with its appurtenances, to Howard, but without any special mention of the ditch or any water right or easements in the Providencia. Later in the same year Howard granted, bargained, and sold to the Canal & Reservoir Company, a corporation, its successors and assigns, "the right and privilege to use that certain zanja, or irrigating ditch, or canal, through which water is taken from the river Los Angeles, and conveyed in and upon that portion of the Feliz ranch heretofore conveyed, * * * together with all the easements and rights thereto appertaining, and the right of way over and through said Feliz ranch, * * * as also the ranch Providencia, * * * always provided that the said party of the first part, his heirs, executors, or assigns, have, and do hereby especially reserve, the right to take and extract all the water from the said zanja or irrigating canal that is or may be necessary for the irrigation and domestic purposes, benefit, and uses of the said afore referred to portion of the Feliz ranch, at such time and in such manner and for such places as the said party of the first part, his heirs, executors, etc., may deem proper." Under this grant or license the Canal & Reservoir Company took charge and control of the ditch, enlarged and extended it, and conducted water to the city of Los Angeles until 1872, when they executed a lease of the entire canal to the city for a term of 30 months, with an option to the city to purchase within the term the leased property for a stipulated price. Under this lease the city took charge and control of the entire works, from the dam on the Providencia all the way down, and so remained until 1886. The city did not, however, avail itself of its option to purchase within the term of its lease, which expired in December, 1874, but remained in possession, without objection on the part of the Canal & Reservoir Company, and without paying rent,—no rent being reserved in the lease, or mentioned in any way, except the nominal sum of one dollar,—for the entire term of 30 months. In 1877, and from time to time, the city enlarged the capacity of the ditch so that it carried, in 1878, about 30 cubic feet per second,—equivalent to about 1,500 inches constant flow under 4-inch pressure. What the original capacity of the ditch was is quite uncertain. The superior court found, upon evidence that seems to me very shadowy and untrustworthy, that it was 15 cubic feet per second, and based its decree on that finding. I think 8 cubic feet per second, or 400 inches constant flow, would be nearer the mark; and that, indeed, is all that the plaintiff claims in its complaint. In 1878 the Canal & Reservoir Company conveyed to the city all that part of its ditch, etc., situated within the corporate limits of the city, but no change in the use or management of the ditch, or any part of it, took place in consequence of this conveyance. The city continued thereafter, as before, to use the whole line of ditch for the supply of water to its inhabitants without objection on the part of the Canal & Reservoir Company. About this time, however,—that is to say, in 1877 or in 1878,—the city abandoned the use of that part of the ditch situated on the Providencia ranch, and made a new diversion at a point lower down, where a pile dam was constructed for the purpose of turning the water into the new ditch. This change in the place of diversion continued until the year 1891,—a period of 13 or 14 years,—during which time that part of the old ditch situated on the Providencia ranch grew up with willows and weeds, and fell into a state of general dilapidation. The dam at the head and 600 or 800 feet of the upper end of the ditch were entirely obliterated.

Pending this change in the point of diversion—in the year 1886—the city entered into a contract with the Citizens' Water Company, a corporation, whereby that company agreed, in consideration of the use of 20 inches of the city's water, to convey through its pipes all the water required by the city for public purposes within the district covered by its system. As the water company, under this contract, drew its supply from the Canal & Reservoir Company's ditch, the city seems to have left to it the task and responsibility of keeping the ditch in order at all times, except when a large quantity of water was required for irrigation. Matters being in this posture in the winter of 1889–90, the water company found it impracticable to obtain a supply of water at the pile dam on account of the damage caused by an extraordinary freshet in the river, and proceeded to open a new ditch connecting with a new dam on the lower end of the Providencia rancho. At that date the title to this portion of the Providencia rancho derived from De la Osa through Alexander and Mellus was vested in the Providencia Company, a corporation, the immediate predecessor of the defendants, and the officers of that company promptly contested the right of the water company to open a ditch, or divert water on their land. The city authorities were notified of the controversy, but they seem to have given the matter no attention, and the result was that the water company and the Providencia Company agreed upon a modus vivendi pending the determination of their respective rights. The substance of their agreement was a permission by the Providencia Company to maintain the ditch and divert the water on its land as long as the water company continued to pay five dollars a day for the privilege; the arrangement being terminable upon 60 days' written notice by either party. In pursuance of this agreement the water company reopened the old ditch originally used by the tenants of the potrero of the Feliz from 1855 to 1868, as above stated, and made a diversion of water by means of a dam located at or very near the site of the original dam, the only material difference being that the ditch was enlarged, and a much greater quantity of water diverted. Pending this arrangement, the defendants purchased the Providencia rancho, and thereafter permitted the diversion of the water under the agreement until August, 1893, when it was terminated by written notice from the water company. Upon the termination of the agreement and the refusal of the water company or the city to make any further payment thereunder, the defendants turned the water from the ditch back into the natural channel of the river by opening a gate therein just below the dam. Thereupon this action was commenced, in which the superior court has found that the city has a right to maintain its dam and a ditch with a capacity of 15 cubic feet per second—equivalent to 750 inches constant flow—on the lands of the defendants, and has enjoined them from obstructing or interfering with the city in the exercise of such rights.

The defendants, in support of their appeal from the order denying their motion for a new trial, contend that the findings of the superior court are contrary to the evidence, and the specific question to be determined is whether the city has proved a title by grant or prescription to the easement which it claims in the Providencia rancho. The right of the city to so much of the water flowing in the river at any point above the city limits as it may require for public purposes or for the use of its inhabitants is established by the decision in the case of City of Los Angeles v. Pomeroy (L. A. No. 419) 57 Pac. 585, recently decided; but this right in the waters of the river does not include the right to maintain dams or ditches upon the lands of upper riparian proprietors for the purpose of effecting a diversion of the water, and to maintain this action the city, like any other litigant, must show a good title to the easement which it claims. In this case there seems to have been an attempt on the part of the city to assert a prescriptive title founded upon adverse user of the ditch and dam in question, but this claim was disallowed by the superior court upon the unquestionable ground that the complete disuse of the old dam and all that part of the ditch within the boundaries of the Providencia rancho from 1878 to 1890 extinguished any servitude that might otherwise have existed. Civ. Code, § 811, subd. 4. The only other claim of title which the city can make is through the deed of 1845 from De la Osa to Verdugo Feliz, granting the right to divert water on the Providencia rancho sufficient to irrigate the potrero of the Feliz rancho. Unless the city has deraigned a good title from that source, the findings of the superior court cannot be sustained. In my opinion, there is more than one fatal defect in this title. In the first place, De la Osa granted only the right to a ditch and flow of water sufficient for the irrigation of the potrero of the Feliz, and, conceding that this right was vested in Howard at the date of his conveyance to the Canal & Reservoir Company, in 1868, he, by that conveyance, reserved it all to himself, so that nothing could have passed to the Canal & Reservoir Company except such rights over and above that granted by De la Osa as Howard and his predecessors may have acquired by adverse user; and all such rights, it is conceded, have been lost to the city by cesser of the use. This, however, is not conclusive of the controversy here, for if the city, as successor of the Canal & Reservoir Company, has the right to maintain the ditch and dam, it does not concern the defendants what may be the respective rights of the city and the successors of Howard in the potrero of the Feliz to the use of the water lawfully diverted. To conclude the city on this point it would therefore be necessary to decide in favor of the defendants the much-debated question as to the character of the city's tenancy under the lease from the Canal & Reservoir Company, and whether it is still subsisting. In view of our conclusions upon the point next to be considered we find it unnecessary to determine this question.

The grant from De la Osa, under which the city claims, was made in 1845. In 1849 he conveyed the whole rancho, without reservation, to Alexander and Mellus, who subsequently petitioned for its confirmation. It was confirmed and patented to them, without reservation, in 1872. The title thus conveyed to them did not inure to any person claiming under a grant from the original grantee. As against Verdugo Feliz and her successors, Alexander and Mellus acquired the whole legal title to the rancho free of every sort of servitude. At most she and her successors had an equity, which, so far as appears, has never been established or asserted, and has certainly not been alleged or proven in this action. The authorities supporting this view are numerous and uniform. See McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421, and authorities cited at pages 66, 67, 121 Cal., and page 424, 53 Pac.; Hartley v. Brown, 46 Cal. 202, and authorities there cited. The title of the city to the easement claimed therefore wholly fails, and for this reason the order and judgment of the superior court must be reversed. It would also be necessary to reverse the order appealed from upon the ground that there is no evidence that it would require 15 cubic feet per second to irrigate the potrero of the Feliz. The judgment and order appealed from are reversed, and cause remanded.

We concur: McFARLAND, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.; HARRISON, J.

125 Cal. 495

SAN DIEGO COUNTY v. RIVERSIDE COUNTY. (L. A. 391.)

(Supreme Court of California. July 28, 1899.)

COUNTIES—CLAIMS AGAINST—DEMAND — COMPLAINT — SUFFICIENCY—TAXATION—APPORTIONMENT—LIEN FOR TAXES ON RAILROAD—WHEN ATTACHES.

1. St. 1893, p. 364, §§ 43, 44, providing for the allowance of claims against a county, or such portions thereof as may be found justly due, and for a second application on dissatisfaction of claimant, and for suit against the county on rejection of claim, do not apply where the entire claim has been rejected on the first demand; and where defendant county, created out of territory part of which belonged to plaintiff county, received more than its amount of delinquent taxes belonging to plaintiff before the creation of defendant, according to a ratio established as the basis of division of the assets of plaintiff, one presentation of plaintiff's claim before commencing suit is sufficient.

2. In an action by plaintiff county against defendant county, created out of territory part of which belonged to plaintiff, to recover money received by defendant as delinquent taxes beyond its apportionable amount according to a ratio established as the basis of division of the net assets of plaintiff at the time of the creation of defendant, where the complaint alleges that the taxes in question had been delinquent for a long period, owing to a question as to the validity of the assessments, and that the state board of equalization had made reassessments which were accepted by the county and the railroad company, it is sufficient to show a lawful reassessment as against a general demurrer, though there is no direct allegation that the first assessments were invalid.

3. Under Const. art. 13, § 10, providing that the franchise and roadway of all railroads operated in more than one county shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties and cities in which such railroads are situate in proportion to the number of miles of railway in such counties and cities, the state board of equalization, in making a reassessment to take the place of an invalid assessment, are required to make their apportionment to the counties as they existed at the time of the in-

valid assessment, and not as they existed at the time of reassessment.

4. The lien for taxes on the property of a railroad company is not created by the assessment, but attaches on the first Monday of March in each year; and, after assessment has been made, and the amount of taxes ascertained, it is payable to the county in which the roadbed was included at the time the lien attached.

5. In an action by one county against another to recover a sum of money received by defendant county as taxes on a railroad beyond its apportionable amount, errors in the complaint as to the number of miles of railway on which defendant received taxes, making the complaint ambiguous, are not reached by a general demurrer.

In bank. Affirmed.

For opinion in department, see 55 Pac. 7.

BEATTY, C. J. This action was commenced in the county of Los Angeles to recover certain moneys claimed to have been received by the defendant to the use of plaintiff. Defendant demurred to the complaint upon the grounds of absence of jurisdiction and want of facts. The superior court overruled the demurrer, and, defendant declining to answer, entered judgment for the plaintiff, from which this appeal is prosecuted.

If the facts alleged in the complaint constitute a cause of action, there appears to be no ground upon which the jurisdiction of the court can be successfully assailed. It appears from the complaint, among other things, that the county of Riverside was created by an act of the legislature approved March 11, 1893 (St. 1893, p. 158), out of territory formerly belonging, part to the county of San Diego and part to the county of San Bernardino, and that commissioners were appointed in pursuance of the provisions of said act to settle and adjust the mutual claims and obligations of the counties of Riverside and San Diego with respect to the property and existing indebtedness of the latter county; that said commissioners duly organized, and afterwards made their award, by which it was determined, among other things, that Riverside county should pay to San Diego county the sum of $2,782.86, and that the net assets of San Diego county, as the same stood at the date of the act creating Riverside county, should be divided between the two counties as follows: 61,087 parts out of 71,087 parts to San Diego county, and the remaining 10,000 parts to Riverside county. This ratio of division was subsequently ratified and accepted by the respective boards of supervisors of the two counties, and partly carried out. Before the creation of Riverside county, there were 158.85 miles of railway belonging to the Southern Pacific Company within the county of San Diego upon which the taxes were delinquent for the years 1880 to 1887, inclusive, no part of which taxes were paid until after reassessment in pursuance of the act of March 23, 1893 (St. 1893, p. 290). The taxes of 1880 to 1885, inclusive, were paid by the railroad company in 1893, and were considered and included in the award of the commissioners, and divided by the supervisors of the respective counties according to the ratio above stated. But the taxes for the years 1886 and 1887 were not then paid, and were not considered, or in any manner adjusted, by said board of commissioners, or by said boards of supervisors. In August, 1894, and subsequent to the award of said commissioners, the taxes of 1886 and 1887 still remaining unpaid, the state board of equalization, in pursuance of said act of March 23, 1893, made reassessments of said 158.85 miles of railway for the years 1886 and 1887, but, instead of apportioning and certifying the whole of said assessments to the county of San Diego, as they should have done, they apportioned and certified the assessments upon 71.06 miles to the county of Riverside, that being the number of miles within the territory transferred from the former to the latter county by the act of March 11, 1893. These reassessments were thereafter entered upon the tax rolls of the respective counties according to the erroneous apportionment of the state board of equalization, and the taxes were paid by the state treasurer (by whom they were collected from the railroad company) to the treasurers of the respective counties, according to the same erroneous apportionment, the result being that, out of the whole amount paid, the county of Riverside received $7,969.65 more, and San Diego that amount less, than they would have received if the whole amount of said delinquent taxes had been divided according to the ratio established by the commissioners and accepted by the respective boards of supervisors as the basis of division of the net assets of San Diego county. The county of San Diego accordingly made due demand upon the county of Riverside for said sum, and, payment being refused, brought this action, in which judgment is rendered in its favor for the amount so demanded, with legal interest. Appellant contends, upon several grounds, that this judgment is not sustained by the allegations of the complaint.

1. It is contended that one presentation, only, of plaintiff's claim, before commencing suit, was insufficient, in view of the construction placed upon sections 43 and 44 of the county government act (St. 1893, p. 364) in Arbios v. County of San Bernardino, 110 Cal. 553, 42 Pac. 914. But neither that decision nor the law construed has any application to a case in which the entire claim has been rejected on the first demand for allowance, which was the case here.

2. It is contended that the county of San Diego can have no claim against San Bernardino county for any of the moneys here in question, because the facts alleged do not constitute a legal basis for a reassessment, and, consequently, that there was no legal obligation upon the part of the railroad company to pay them, or any part of them, to San Diego county. The particular point of this objection is that it is nowhere alleged in the complaint that the original assessments for 1886 and

1887 had been adjudged invalid, or that they were invalid in fact, whereas such adjudication or such actual invalidity was a necessary condition precedent to a reassessment. It is true that under the act of March 23, 1893, no reassessment was authorized, except in case of an invalid assessment; and it is true that there is in this complaint no direct allegation that the railroad assessments for the years 1886 and 1887 were invalid. It does appear, however, that the taxes for those years had been delinquent for a long period, owing to a question as to the validity of the assessments, and that the state board of equalization had made reassessments which were accepted and acted upon by the county and by the railroad company by payment and receipt of the taxes levied thereon. As against a general demurrer, I think these allegations sufficient to show a lawful reassessment and rightful claim on the part of San Diego to any taxes justly apportionable to that county.

3. It is contended that, if the state board of equalization had the power to make these reassessments, they were required, by section 10 of article 13 of the constitution, to make the apportionment to Riverside county, as they did make it. That section provides that "the franchise, roadway, * * * of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities, * * * in which such railroads are situated in proportion to the number of miles of railway laid in such counties, cities," etc. Under this provision of the constitution, the state board of equalization, making a reassessment in 1894 to take the place of an invalid assessment for the year 1886 or 1887, were required to make their apportionment to the counties as they existed in 1886 or 1887, not as they existed in 1894.

4. It is contended that, if the original assessments for 1886 and 1887 were invalid, then there was no valid lien for the taxes until the reassessment in 1894, and that, Riverside county having been created in the meantime, the taxes on that portion of the railroad within Riverside county accrued to and were payable to it. But the assessment does not create the lien. It is merely one of the steps for its enforcement. The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but when that has been done, and the amount of the tax ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached.

5. There is an evident mistake in the complaint where it is alleged that the money paid to Riverside county was the tax upon 92.60 miles of railway. Taking all the allegations of the complaint together, it clearly appears that in the territory transferred from San Diego county to Riverside there were 71.06 miles of road, and in the territory transferred from San Bernardino county there were 21.54 miles, making in all 92.60 miles. These figures have been used in two places instead of the correct figures 71.06, but by computation from the figures given in the complaint it is readily shown that the tax levy in San Diego county for 1886 was $1.14 upon $100, and that the sum paid to Riverside county for that year was the exact amount of the tax on 71.06 miles of road. In the same way it will appear that the payment on the reassessment for 1887 was also the tax on 71.06 miles. These errors in the complaint made it, to some extent, ambiguous, but they are not reached by a general demurrer.

6. It is contended on the authority of Orange Co. v. Los Angeles Co., 114 Cal. 390, 46 Pac. 173, that, since the commissioners failed to make a division of the taxes for 1886 and 1887 in their report or award, no part of such taxes can be recovered by San Diego county. But all these taxes were properly payable to San Diego county in the first instance, and the portion received by Riverside county was so received only in consequence of a mistake made by the board of equalization and by the state treasurer. If, therefore, the failure of the commissioners to make a division renders a division impossible, the case of Riverside county is so much the worse. The county of San Diego, instead of having about six-sevenths of the tax, should have had it all. If there is any error in the judgment, it is not an error of which the appellant can complain. The judgment is affirmed.

We concur: TEMPLE, J.; McFARLAND J.; GAROUTTE, J.; HARRISON, J.

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125 Cal. 468

POWELL v. BANK OF LEMOORE et al.

(Sac. 497.)

(Supreme Court of California. July 27, 1899.)

MORTGAGE SALE UNDER TRUST DEED—FINDINGS AS TO OFFER OF REDEMPTION—INJUNCTION RESTRAINING SALE — TRIAL — FINDINGS WHERE NO ISSUE IS RAISED.

1. Where a bill alleges the issuing of an injunction restraining a sale under a trust deed, and the answer does not deny it, a finding as to the existence of the injunction is unnecessary, as no issue on that point is raised by the pleadings.

2. In an action to set aside a sale under a trust deed, complainants alleged an offer to redeem the property by paying the whole amount. The time of the offer was not alleged, but it appeared that it was after the sale. The court found that the title to the property passed to defendant by the sale. *Held*, that it was not error for the court to fail to find whether or not the offer was made.

3. Where an injunction restraining a sale of property under a trust deed was obtained by false allegations, complainant cannot subsequently attack the sale on the ground that it was in violation of the injunction.

4. In an action to set aside a sale under a trust deed, it appeared that complainants before

the sale had obtained an injunction to restrain such sale, but that notice of this injunction had never been served upon the trustee. It further appeared that the injunction was granted upon untruthful allegations by complainants, and was improperly obtained. *Held*, that these facts do not entitle complainants to have the sale set aside.

Department 1. Appeal from superior court, Kings county.

Bill in equity by F. M. Powell against the Bank of Lemoore and others. From a decree for defendants, plaintiff appeals. Affirmed.

Rowen Irwin and Chas. G. Lamberson, for appellant. M. L. Short and Horace L. Smith, for respondents.

VAN DYKE, J. The action is one to redeem certain real estate situated in Kings county, sold to the defendant bank under a deed of trust. Judgment went for the defendant bank, and the appeal is from the judgment without a bill of exceptions.

The court below found that plaintiff, on January 12, 1897, commenced an action in the superior court of Kings county against the Bank of Lemoore, Henry C. Campbell, Thaddeus B. Kent, and the San Francisco Savings Union, and procured an order from the judge of the superior court directing an injunction to issue to the defendants therein named, enjoining them from selling the land mentioned in the complaint herein; that said injunction was served on the Bank of Lemoore at 11 o'clock a. m. of said 12th day of January, 1897, but was never served on Henry C. Campbell and Thaddeus B. Kent, the trustees who had advertised the land for sale in San Francisco; and that they had no notice or knowledge of the said injunction prior to the sale of said land by them; that said trustees sold said land at the appointed time and place, and the same was purchased by the Bank of Lemoore, through its agent, R. E. McKenna, and that upon the same day the said trustees made and delivered to the Bank of Lemoore a deed conveying said land, and that at the time they made and delivered said deed they had no knowledge or notice of the issuance of the injunction, and that said McKenna, as agent of said bank, had no knowledge or notice that a writ of injunction had been issued to prohibit the sale. The court further found that the allegation in the complaint upon which the injunction was issued, to wit, that on or about the 25th day of October, 1896, the San Francisco Savings Union, while it was the owner and legal holder of said note, for valuable consideration, to wit, the payment of one year's interest thereon in advance, made and entered into a contract with plaintiff wherein and by the terms of which the time of payment of the principal of said promissory note was extended for the period of one year therefrom, was untrue, and not founded in fact; and that the further allegation in the said complaint that no part of the principal of said promissory note, or the interest thereon, is now due, was also untrue, and not founded in fact. And because of these untruthful allegations appearing in said complaint the court directed the said writ of injunction to issue in said action above mentioned, and the court now finds that said writ of injunction was improperly obtained by the plaintiff, F. M. Powell, and but for said untruthful allegations would not have issued. As a conclusion of law, deduced from its findings of fact, the court finds that the Bank of Lemoore is the owner of the land, that the plaintiff has no title or interest therein, and that the plaintiff take nothing by his action.

The appellant contends that the judgment should be reversed because the court failed to find upon material issues made by the pleadings. One of these is that the court failed to find that the injunction was issued. This fact was alleged in the complaint, and not denied in the answer, and therefore there was no issue upon that point rendering the finding necessary. It is claimed, also, that the court failed to find on the question of the offer to redeem the property by paying the full amount. The allegation of the complaint in this respect is not specific as to the time when such offer was made, but a reading of the whole shows that the offer was made, if at all, after the sale of the land to the bank and the execution of the deed thereon. It is alleged in the complaint that the offer was refused by the bank, because, as it claims, it acquired a valid title to the land through the sale, and was the owner of the property. The finding of the court, however, that the title to the land passed to the defendant bank by the sale on January 12, 1897, by the trustees, was the ultimate and controlling fact in the case, and sufficient to support the judgment. Even if the injunction had been technically violated by the sale, the plaintiff is not in a position to complain. The court finds that, because of the untruthful allegations made by plaintiff, contained in his complaint, the writ was issued. "No one can take advantage of his own wrong" (Civ. Code, § 3517), and "he who comes into a court of equity must come with clean hands," is an old and familiar rule. Mr. Pomeroy, in discussing this rule, aptly says: "It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conception of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question." 1 Pom. Eq. Jur. § 397. But, if the injunction had been properly obtained, and the writ had been served on all the parties defendant in that proceeding prior to the sale, still the sale would not therefore have been void, but simply voidable. Bagley v. Ward, 37 Cal. 121. In such case, upon a proper showing by a party entitled to the consideration of a court of equity, relief may be granted by setting aside such sale; otherwise, it will be allowed to stand. The appeal being upon the judgment roll, the findings are assumed to be supported by the evidence, and such findings not only fail to show that the plaintiff was entitled to relief, but, on the contrary, justify the action of the trial court in awarding judgment for the defendant bank. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

125 Cal. 407

SANTA ROSA NAT. BANK v. BARNETT et al. (S. F. 992.)

(Supreme Court of California. July 21, 1899.)

LIMITATION OF ACTIONS—RENEWAL OF DEBT —MUTUAL ACCOUNTS—CONSTITUTIONAL LAW—HARMLESS ERROR.

1. A bank loaned a street-railway company large sums of money at various times, the loans being made in the form of overdrafts, the account being carried in the name of the treasurer of the company, though it was regarded both by the bank and company as the debt of the company. Subsequently the company gave the bank its note covering all the indebtedness. *Held*, that the note was merely a continuance of the existing indebtedness, and limitation began to run from the time the money was borrowed.

2. Where a depositor borrows money from a bank by means of overdrafts, and occasionally deposits money, which is applied to the overdrafts, the transaction is not a mutual account, and the statute of limitations runs from the date of each loan, notwithstanding the transaction opens with a credit to the depositor.

3. Code Civ. Proc. § 359, providing that actions against stockholders of a corporation for corporate debts must be brought within three years, is not in conflict with Const. art. 12, § 3, which provides that each stockholder shall be liable for such proportion of the debts and liabilities as are contracted while he is a stockholder.

4. Code Civ. Proc. § 359, limiting the time within which an action may be brought against stockholders, is not in conflict with Civ. Code, § 309, which provides that there shall be no limitation of action against the directors of a corporation for liabilities incurred under that section, or with Code Civ. Proc. § 348, providing for actions without limitation against persons with whom money has been deposited.

5. Where overdrafts by defendant have become barred by limitations, the failure of the court to find accurately the separate amounts of such overdrafts does not affect the result, as it does not change the nature of the account.

6. In an action on a note the plaintiff moved to amend his complaint by alleging that the note was given in payment of the balance of an open and mutual account, "in order to conform with the proof." The motion was denied, but the case was tried as fully as if it had been granted. *Held*, the refusal to grant the motion was harmless error.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county.

Action by the Santa Rosa National Bank against J. D. Barnett and others. From a judgment for defendants, plaintiff appeals. Affirmed.

R. M. Swain and Barham & Miller, for appellant. A. B. Ware, Thomas Rutledge, and W. F. Russell, for respondents.

CHIPMAN, C. Action to enforce the personal liability of defendants as stockholders in the Central Street Railway Company, a corporation. Defendants pleaded the statute of limitations, and upon that plea had judgment except as to the sum of $392.49, for which plaintiff had judgment against defendants for the proportionate share of each. Plaintiff appeals from the judgment and from an order denying motion for new trial.

The court found: That defendants were stockholders of the railway company. That from and after May 28, 1891, and until December 4, 1892, plaintiff loaned and advanced the company, from time to time, large sums of money, which were used in the construction of its railroad, the purchase of material for equipment, etc. During this time the company made deposits of money, and a balance of account was struck nearly every month, showing the amount due from the company, which balance, on December 4, 1892, was $9,607.51. On December 6, 1892, the company, by resolution, authorized its secretary and president to make and deliver its promissory note to plaintiff for the amount due plaintiff, and this note was executed December 7, 1892, for the sum of $10,000, and delivered to plaintiff. The plaintiff thereupon, on December 7th, gave the company credit on plaintiff's books for $325.89, that sum being the difference between the overdraft and the face of the note at the time of the credit. No other or different consideration was given for said note. That $9,607.51 of said indebtedness was created and existed prior to December 4, 1892, and was created at different times between May 14, 1891, and December 4, 1892, and said sum was included in and made part of the sum agreed to be paid by said note of $10,000. It is also found that this note was renewed June 7, 1894, for $9,000, a payment of $1,000 having been previously made by the company; and that the renewal note, which is the note set up in the complaint, included the same sums of money as did the original note of December 7th. As conclusions of law the court found that the sum of $9,607.51, included in said note, is barred by the statute (sections 338, 359, Code Civ. Proc.); that the sum of $392.49 was a debt created by the company at the time of making the note of December 7, 1892; and that defendants are separately liable for their proportionate share of that sum, and no more. The complaint was filed December 5, 1895, one day more than three years after the balance of $9,607.51 was found to be due plaintiff.

1. Appellant claims that the note of December 7th was in accordance with section 456, Civ. Code, "and became an executory contract, and created a debt for which the stockholders became liable,"—citing sections 2, 3, art. 12, Const.; Hunt v. Ward, 99 Cal. 615, 34 Pac. 335; that a new debt was created by the note, which became "dues of a corporation" (see constitution cited), and the statute did not begin to run until December 7th. The evidence is that the account was opened with plaintiff by William Prindle, treasurer of the Central Street Railway Com-

pany. The pass book used by Prindle was marked on the inside at top of first page, "Central Street Railway Company, in Account with the Santa Rosa National Bank, 1891," and the first entry in it is dated May 14, 1891. On the outside the book was marked, "Treasurer of Central Street Railway Company, in Account with the Santa Rosa National Bank." It was shown that these indorsements were partly written by the president and partly by the cashier of the bank. It appears that the assessments against stockholders, earnings of the company, and its funds generally, went to the credit of this account, and the checks or drafts against it were generally drawn by Prindle, the treasurer, but the bank paid as checks the warrants drawn by the president and secretary of the company on the treasurer. It is clear from the evidence that the overdraft indebtedness was treated both by the bank and the company as the indebtedness of the latter. The fact that the account was kept in the name of the treasurer did not make it his individual account in any sense, nor was it so in fact. The account shows no transactions except receipts and disbursements of money by the bank. It was an ordinary running account, such as is common with depositors in a bank. There was an implied promise on the part of the company to pay overdrafts whenever and at the time they occurred (Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29); and on the account, as balances accrued against the company, there was a primary liability on the part of the stockholders. Suit could have been brought upon this account upon the daily balances as shown by the account. A liability was incurred as shown by these balances, and, unless suit was brought within three years after the liability was incurred, the action was barred by section 359, Code Civ. Proc. Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62; Hunt v. Ward, 99 Cal. 614, 34 Pac. 335. The note of December 7th was but a renewal or extension of the indebtedness theretofore incurred on the part of the corporation, but it was not a renewal or extension of the stockholders' liability. Hyman v. Coleman, supra. We do not think the claim made by appellant can be sustained that the account was a mutual, open, and current account, within the meaning of section 344, Code Civ. Proc., and that the note, when passed to the credit of the company, must be treated as the last item in the account, drawing with it all preceding items, thus starting the statute December 7th, the date of the note, for the balance appearing December 4th. General deposits, such as these were, made in a bank where the depositor is drawing against the account from time to time by checks and drafts, are to be deemed as payments of any overdraft of the depositor. Payment, whether it be of money or of personal property at a stipulated value, made on an account as a payment, and not as a set-off pro tanto, does not make an account mutual. Norton v. Larco, 30 Cal. 126; Adams v. Patterson, 35 Cal. 122; Rocca v. Klein, 74 Cal. 526, 16 Pac. 323. Where articles of merchandise have been delivered, and there is no evidence as to whether there was in fact a sale or a payment in kind, "the legal presumption is that it was a sale, and not a payment in kind. It is otherwise in the case of a delivery of money. There the presumption is that it was a payment, and not a loan." Sanderson, J., in Norton v. Larco, supra. The evidence shows that the railway company authorized its officers to arrange to borrow money from plaintiff. An account was opened with the bank by a small deposit in April, 1891, for the company. Other deposits of considerable amount were made, but about November, 1891, the account showed an overdraft, which continued to grow until the note of December 7th was given. Balances were struck nearly every month, showing the indebtedness of the company. Deposits, from time to time, of small amounts, were made throughout the entire period, and were credited to the company as payments, and so show on the pass book kept by the company, and in which these monthly balances were entered. The nature of the account we do not think was changed by the fact that it opened with a credit to the company. We can discover no elements of a mutual, open, and current account in the transaction.

2. It is contended that section 359, Code Civ. Proc., is in conflict with section 3, art. 12, of the constitution of this state. It is claimed that the Code section was enacted prior to the adoption of the constitution, and that the latter must prevail. The constitutional provision referred to declares that "each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder," etc. No limitation of time is prescribed by the constitution within which actions must be brought. Section 1, art. 12, of the constitution continued in force all laws not inconsistent therewith. Section 359 does not attempt to relieve the stockholder from his liability under the constitution. It only limits the time within which the action may be brought, and this is not inconsistent with the constitutional declaration that such liability is imposed upon the stockholder.

3. It is claimed that section 359, Code Civ. Proc., is in conflict with sections 309, Civ. Code, and 348 Code Civ. Proc. Section 309 relates to the liability of directors of corporations, and section 348 has reference only to actions against persons or corporations with whom money has been deposited. Neither of these sections refers to the liability of stockholders. This liability is declared by the constitution and by section 322, Civ. Code. There is no conflict between these sections.

4. It is objected that the evidence does not support findings 8, 9, and 10, for the reason that the evidence shows more money to have been deposited by the company than the findings seem to imply. This may be true, for the evidence shows deposits nearly every month. Still the evidence is that the overdraft increased steadily from about October, 1891, and, even if the court failed to find as to all the deposits, it would not change the nature of the account.

5. After the evidence was closed, and the cause submitted to the court, and was by the court taken under advisement, and before the court had made findings, plaintiff served notice of motion "to amend the complaint to conform to the proofs made upon the trial of the said cause." The proposed amendment was to the effect that the original indebtedness for which the promissory note of December 7th was made was for a balance due upon an open, current, and mutual account. The evidence shows that the cause was tried upon this issue as fully as if it had been pleaded as proposed by the amendment. Even if an abuse of discretion, which we do not think it was, the ruling of the court was without injury. I advise that the judgment and order be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(125 Cal. 517)

WRIGHT et al. v. EASTLICK et al. (Sac. 555.)[1]

(Supreme Court of California. July 27, 1899.)

NEW TRIAL—GROUNDS—MISCONDUCT OF JURORS.

Where it appears that the foreman of a jury, pending the trial, went to and returned from a dance with one of defendants, and during the night they got drunk together, and were quite intimate, and that after the discharge of the jury the foreman said to the defendant with whom he attended the dance that he had brought in a verdict for him, and that the foreman and another juror during the trial drank with defendants, and went visiting with them, plaintiff is entitled to a new trial.

Department 1. Appeal from superior court, Siskiyou county.

Action by H. D. Wright and others against Lafayette Eastlick and others involving a contest regarding a line dividing mining claims. From a judgment for defendants, and an order denying a motion for new trial, plaintiffs appeal. Reversed.

Jas. F. Farraher and J. H. Magoffey, for appellants. Gillis & Tappscott, J. A. Reynolds, and G. D. Butler, for respondents.

VAN DYKE, J. This action involves a contest regarding a line dividing mining claims in Siskiyou county. The trial was by jury, and the verdict and judgment for the defendants. The appeal is from the judgment and from an order refusing the plaintiffs' motion for a new trial.

Among the grounds of the motion for a new trial is the alleged misconduct of the jury, and this is pressed on the appeal. The misconduct complained of relates principally to the jurors John Neville and John B. Lowden, the former of whom was elected and acted as foreman. The affidavits produced in support of the motion for a new trial show that during the progress of the trial Neville approached the plaintiff H. D. Wright, and stated to him that he (Neville) "was going to do the right thing; that he was pretty well satisfied who the right one was, and that he was a pretty good talker, and could make the jury see things in the right light." This occurred just prior to the departure of Neville from Yreka to Montague. On arriving at Montague, he told James M. Davidson, a witness in the case, and John T. Bradley, that plaintiff Wright had, during the trial of the case, approached him, and commenced to talk with him about the said cause, and that he had told said Wright to stop talking to him about the case, and that, if he did not, he would report him to the court. Said Neville also stated to Charles J. Fry, during the progress of the trial, that appellant Wright had attempted to talk to him about the trial, for the purpose of influencing him in his verdict. The affidavit of Wright contradicts, pointblank, this statement of the juror Neville; and, on the other hand, it is stated in Wright's affidavit that Neville attempted to approach him and talk about the case, and in his denials and affirmative statements Wright is corroborated; and Neville, in his counter affidavit, does not attempt to controvert or impeach Wright's affidavit. It is further shown by the affidavits of several parties that pending the trial, and on New Year's eve, Neville attended a dance at Hawkinsville, some 2½ miles from Yreka, in company with W. W. Eastlick, one of the defendants. They went together in the same conveyance to the dance, and returned in like manner to Yreka. During the night of the dance at Hawkinsville they drank and got drunk together; were "partners"; and frequently walked alone from the dance hall to the saloon, and appeared to be quite intimate. Just prior to attending this dance Neville stated to one of his cojurors (Elliott R. Taylor) that he (Neville) was broke. On the day after, John Lowden, who, it appears, had been an intimate associate of Neville during the progress of the trial, stated to Juror Taylor that Neville had made "a killing of ninety-seven dollars"; and Neville, on his return from the dance, stated to Juror Taylor that he "blowed in a deal of money." Shortly after the discharge of the jury, Neville, approaching defendant Wallace Eastlick, with whom he went to the Hawkinsville dance, said, "Well, old man, I brought in a verdict for you all right." And Juryman Lowden was seen talking to the defendant Lafayette Eastlick in a secret place in the rear of a saloon. Lowden and Neville went buggy riding during the trial, and one Whipple, a nephew of defendants Eastlick, held the team while they took a drink; and they also drank with the defendants Eastlick, and visited their brother together while they were both drunk. The counter affidavits go to show that Juror Neville, aside from his intemperate habits, was considered a good man and citizen, and that the treating and drinking were not all on one side, but were indulged in by both parties to the litigation. The conduct of these two jurors,—principally Foreman Neville,—visiting saloons, and going to dance houses, and drinking and carousing with parties to the action, is not controverted by respondents' counsel, but they seek to extenuate the same. They say: "The parties, the witnesses, and some of the jurors were miners; they were away from home, and the trial lasted over the holidays; and, while these things were not to be encouraged, still all that is shown in this case is the following out of the very general custom throughout the mining districts; and we think that no one who is at all familiar with the custom of miners in this state will say that because one or two jurors happened to be present and joined when the crowd was invited up to take a social drink during the holidays, that the verdict was tainted thereby." It is scarcely to be credited that such misconduct on the part of the jurors as the record in this case discloses is but following out the custom, either general or local, throughout the mining districts of this state. If there were such a custom, surely it "would be more honored in the breach than the observance." It is to be presumed that when jurymen are selected and sworn to try a cause, either in the mining or other districts in this state, they realize the obligation of their oath, and their duty as good citizens towards the community, and act accordingly. In the early '60's a district judge in this state, whose district embraced mining counties, was impeached on the ground, among others, that during the trial of a cause he left the bench and visited a saloon, and there drank and caroused with witnesses and the parties, or one of the parties. If a judge may not do these things, why should the jury, or members of the jury, be allowed to do so? By the constitution, trial by jury is secured to all, and the judge is prohibited from charging the jury with respect to matters of fact; and by the law of the state the jury "are the judges of the effect and weight of evidence." Code Civ. Proc. § 2061. The jury, therefore, while engaged in the trial of a cause, forms a very important part of the tribunal. A wrong verdict, resulting from prejudice or misconduct of the jury, or members thereof, is more detrimental to a party litigant than an error of law committed by the trial judge. An error at law can readily be corrected on appeal, whereas, if the testimony appears to be substantially conflicting, the verdict must be allowed to stand, although resulting from secret or undiscovered prejudice or misconduct. It goes for nothing that the jurymen in this case say that their verdict was uninfluenced by the misconduct complained of. As said in People v. Stokes, 103 Cal. 196, 37 Pac. 209: "A juror is not allowed to say: 'I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury room.' The law, in its wisdom, does not allow a juror to purge himself in that way." See, also, People v. Azoff, 105 Cal. 632, 39 Pac. 59; Woodward v. Leavitt, 107 Mass. 466. The verdict in this case was by the bare constitutional number required, of nine to three, and the result might have been different if it had not been for the misconduct complained of. However, as said in Palmer v. Railway Co., 13 Pac. 429: "It is not necessary for us to find that this conduct had any effect upon the verdict in order to sustain this motion for a new trial. It is enough to say that it is calculated to do so." Again, it is said in McDaniels v. McDaniels, 40 Vt. 374: "There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had the right to expect, according to law, and upon the evidence in court." The court should set aside the verdict in justice to itself as well as to the parties, that the trial may be conducted fairly, so that the verdict, when rendered, may be entitled to the respect of both parties and the confidence of the court." Thomp. Trials, § 2564, states the rule as follows: "Where the jury has been treated, fed, or entertained by the successful party or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted. This rule is, by most courts, deemed indispensably necessary to preserve the integrity of juries. It being, as already stated, a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right." We cannot be too strict in guarding trials by jury from improper influences. This strictness is necessary to give due confidence to parties in the results of their causes, and every one ought to know that for any, even the least, intermeddling with jurors, a verdict will be set aside. Knight v. Inhabitants of Freeport, 13 Mass. 218. On the showing made in this cause the court below should have granted a new trial. The conclusion we have arrived at renders it unnecessary to consider the other points made by the appellants. Judgment and order denying a new trial reversed.

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[1] Rehearing denied August 26, 1899.

We concur: HARRISON, J.; GAROUTTE, J.

(125 Cal. 459)

In re CROOKS' ESTATE. (S. F. 1,607.)[1]

(Supreme Court of California. July 25, 1899.)

DESCENT AND DISTRIBUTION—DISTRIBUTION TO A MORTGAGEE—INTERVENTION BY AN INTERESTED PARTY—APPEAL BY ONE NOT A PARTY TO THE DISTRIBUTION PROCEEDINGS.

1. Code Civ. Proc. § 1678, providing that distribution of real estate may be made to the grantees of the original heirs, legatees, or devisees, does not authorize distribution to a mortgagee of the testatrix.

2. A mortgagee of a testatrix cannot intervene in the hearing of a petition for distribution of the estate without filing some pleading or statement as to the grounds upon which he claims right to be heard.

3. A mortgagee of a testatrix, who, without filing pleadings or statement, introduced his mortgage in evidence at the hearing of the petition for distribution, is not entitled to appeal from the decree of distribution in his own name.

Department 2. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Susan Crooks, deceased. Wemble and Arnold, mortgagees of the testatrix, appeared, and sought to share in the distribution for the purpose of security. From a decree refusing the mortgagees a share in the distribution, they appeal. Motion to dismiss the appeal. Granted.

H. A. Powell, for appellants. Reddy, Campbell & Metson, for respondent.

TEMPLE, J. Susan Crooks died a resident of San Francisco, April 28, 1894, testate, and leaving a large estate. The will was probated, the executors qualified, and administration proceeded until the 28th day of November, 1897, when a petition was filed, showing that the estate was ready for distribution. Notice was given, and April 1, 1898, the matter came on for hearing. At the hearing the appellants, Wemple and Arnold, appeared, and offered in evidence a document which purported to be a mortgage executed by Robert Lee Crooks, one of the devisees mentioned in the will of the testator, and also one of her heirs at law, upon all the right, title, and interest of the mortgagor of, in, and to all the real estate in the two inventories in the estate of Matthew Crooks, and all the real estate in the inventory in the estate of Susan Crooks, and all the other real estate in which Robert Lee Crooks may have any interest as heir at law of Matthew Crooks or Susan Crooks, to secure the payment of a certain promissory note for the sum of $6,000 and interest. The note was then past due. Wemple and Arnold filed no pleading or other appearance in writing. The attorney simply appeared in the court room, offered the mortgage in evidence, and proposed to ask that the share of Robert Lee be distributed to them. In the mortgage it was stated that "the party of the first part authorizes and directs the probate court to distribute, set over, transfer, and deliver to the party of the second part all his right, title, and interest in and to said estate as security for the payment of said promissory note." To this offer Robert Lee Crooks objected, on the ground that the law does not warrant the distribution of an estate to an assignee as security, but only to heirs, devisees, and their grantees. The objection was sustained, the appellants excepting, and the distribution was made regardless of the claim of appellants. The offer of the mortgage in evidence was not accompanied by a statement as to other facts which the appellants undertook to prove, and, as no appearance was made in writing, it does not appear that the debt has not been paid. Motion is now made to dismiss the appeal because it is not made to appear from the record that appellants are aggrieved parties.

The only section of the Code authorizing distribution to the grantees of an heir or a devisee is section 1678 of the Code of Civil Procedure. The court correctly held that this section would not warrant the court in distributing the property to appellants. They are not the persons entitled under the will, nor by succession, nor are they grantees to whom distribution could be made. The decree must name the persons entitled under the will or by succession, or their grantees. A mortgage is not a conveyance, but only a contract by which property is hypothecated for the performance of an act. Civ. Code, § 2920. At the most, the court could only distribute the property to Crooks subject to the mortgage. There is no law or practice which requires the court in making distribution of an estate to determine by its decree whether an alleged mortgage upon the interest of an heir is valid, or the debt has not been paid, or whether there is not some defense to it. None of these questions are germane to the subject, nor is their consideration authorized by the statute, or at all. As determined in Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081, the decree of distribution is only conclusive upon the matter of succession, or as to rights under a will; at least where the estate is distributed without an actual contest to the heirs, devisees, and legatees. Their title dates back to the death of the testator, or of their ancestor, and a distribution directly to them does not affect rights acquired from them since it accrued. In fact, it seems to me so obvious that an estate should not be distributed to a mortgagee that the question hardly merits discussion. It does not follow, however, that appellants had not a right to be heard in the matter of the distribution. They have interests which may have been affected by the decree. To make the matter obvious, let us suppose that they had a mortgage upon the interest of Robert Lee Crooks in his mother's estate, as an heir at law, as they did. Let us suppose that the entire estate was, by will, given to others. It is in fact contended that it was so given, except a portion in trust for Robert Lee Crooks, so conditioned that it cannot be reached by his creditors. Now, if the mortgagees thought the disposition made by the will was void, and the value of their security depended upon having the court so rule, they ought to be heard, and probably might intervene in some mode which would give them a hearing. The mortgagor might be quite satisfied with a decree which would render the security valueless. But no such intervention should be tolerated unless sustained by some pleading or statement as to the grounds upon which the intervener claims the right to be heard in a proceeding to which he is not a party. His case does not come under section 1678 of the Code of Civil Procedure, but under the general proposition that one whose rights are being adjudicated upon ought to be heard. Even under the statute, I think, if there is a controversy over the matter, the issues should be made in writing. Appellants say they were prevented from proving that their debt was not paid by the objection which assumed a subsisting mortgage, but that, having such mortgage, they still had no rights. But it is quite plain that they had no rights as distributees, and, such being the case, it was most important that it should appear that they had some interest in the proceeding. This particular claim—that they had a right to be heard because their interests were involved—they did not make. As a rule, one who is not a party to the record cannot appeal in his own name. One not a party to an action or a proceeding may sometimes appeal, but in some way his interest must be made to appear in the record, and he be made a party to the ruling appealed from. According to the terms of the note contained in the mortgage offered, the money was past due, and nowhere in the record does it appear, either by allegation or proof, that it has not been paid, or that appellants had any debt or obligation secured by mortgage. They were not shown to be parties aggrieved, or parties at all to the proceeding. The motion to dismiss the appeal is granted.

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[1] Rehearing denied August 24, 1899.

We concur: GAROUTTE, J.; McFARLAND, J.

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125 Cal. 463

CITY OF LOS ANGELES v. KYSOR. (L. A. 512.)

(Supreme Court of California. July 26, 1899.)

DEDICATION—EVIDENCE.

Defendant contracted with a railway company to sell it certain land, and the railway company took joint possession of the property under the contract. It divided the land into lots and blocks, and placed them upon the market for sale, and filed a map in the recorder's office showing the subdivisions, and having a tract marked off and labeled as "Central Park." Subsequently defendant and the railroad company contracted to sell the park to one G. in consideration that he would keep it open as a public park for 25 years. This agreement was canceled. Subsequently the railroad company quitclaimed to defendant. Defendant had sold many lots to purchasers with reference to this map. During all this time the park was open to the public. *Held*, that these facts are sufficient to support a finding that the park was not dedicated and accepted by the public.

Department 1. Appeal from superior court, Los Angeles county.

Action by the city of Los Angeles against E. F. Kysor. From a judgment for defendant, plaintiff appeals. Affirmed.

W. E. Dunn, for appellant. Bicknell, Gibson & Trask, for respondent.

GAROUTTE, J. This action is brought to quiet title, and the city appeals. It is claimed that the tract of land involved is a public park of the city, and made so by dedication. The trial court, after hearing the evidence, made a finding of fact to the effect that there had never been a dedication of the land to public use, and this appeal is mainly directed to an attack upon that finding. The salient facts are, briefly, these: The defendant was the owner of a large tract of land adjoining the city of Los Angeles. He entered into a contract to sell this land to the Vernon Street Railway Company. Under this contract the railway company took a joint possession of the property. This land was to be immediately subdivided into lots and blocks, and placed upon the market for sale. Thereafter the parties filed a map of the tract in the recorder's office, showing a subdivision thereof into blocks and lots and streets. The tract involved in this litigation was marked upon the map as "Central Park." Thereafter the defendant and the railway company entered into a contract with Gillis and others, whereby they agreed to sell to Gillis and others the tract marked "Central Park," in consideration that said Gillis and others should keep "said premises as a public park for a period of not less than twenty-five years." Shortly thereafter this agreement was canceled. Subsequently the railway company quitclaimed to defendant all its interest in and to the tract. Both prior to this deed and subsequent thereto defendant conveyed many lots in said tract to purchasers by reference to the aforesaid map. This tract was located upon the line of the road of the railway company, and during all these times was open to the public. There are various small matters of evidence bearing upon the question of dedication, which we pass by without detailed mention. It is said in City and County of San Francisco v. Grote, 120 Cal. 62, 52 Pac. 128: "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest." In the face of the rule here declared, we are asked to reverse a finding of fact to the effect that no dedication took place, upon the ground that there is no material evidence to support it. We cannot reverse this finding of "no dedication" if there is a substantial conflict in the evidence. We cannot set aside the finding even though the evidence should be found to largely preponderate against it. As said in City of Sacramento v. Clunie, 120 Cal. 32, 52 Pac. 45: "Even conceding this evidence sufficient to support a finding of dedication, still it is not sufficient to reverse a finding of 'no dedication.'" In all those cases where it is claimed that a dedication is created in pais it may be said that there is no amount of evidence which will justify a court in instructing a jury that dedication is conclusively shown. The owner's intention is the all-important element in creating a dedication, and that intention is a question of fact. It never can be a matter of law. Hence, when the person's intention in doing an act is the all-important element involved in the trial of a question of fact, it is peculiarly the province of the jury or the trial court to say what that intention is; and here this court, in view of the test which must be applied, cannot say that the solution made of this question of fact by the trial court was wrong. Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication,—the owner, upon the one side, and the public, upon the other. There can be no dedication without the participation of both, and no dedication can be stronger or more binding by the participation or intervention of others. The offer of the owner to dedicate may be manifested in a hundred different ways, and the acceptance of the offer by the public may be manifested in a like number of ways. Again, the fact that the owner sells lots by reference to a map of the tract, duly recorded, is not at all conclusive evidence of a dedication to the public of the streets and parks platted upon the map. It is but some evidence of dedication,—evidence weak or strong, according to the circumstances of each particular case. It is said in Prescott v. Edwards, 117 Cal. 301, 49 Pac. 178: "There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitute a dedication of the streets in favor of the purchasers of these lots, even though the dedication to the public is not perfected and completed. The statement is not correct as a legal principle, as may be seen from what has already been said."

Whatever may be the legal rights of the purchasers from defendant of the lots marked upon the recorded plat, by reference to the plat, is a matter not before us. It is said in City of Sacramento v. Clunie, supra: "In the consideration of the question here presented it must be borne in mind that the litigation is alone between the owner and the city. The question is purely one of dedication. The respective rights of the owners of the blocks who may have purchased from the parties filing the map are not involved. Such sales may be some evidence of intention to dedicate, but nothing more. The respective rights of owners rest upon other and different principles of law." As conclusively demonstrating that the filing of a plat in the recorder's office, exhibiting upon its face blocks, lots, and streets, followed by sales of lots according to the plat, does not necessarily dedicate the street marked upon the plat to public use, we have but to cite cases like Schmitt v. City and County of San Francisco, 100 Cal. 307, 34 Pac. 963, where Archer v. Salinas City, 93 Cal. 53, 28 Pac. 841, is quoted with approval to the following effect: "The owner, after selling some of the lots according to such map, might, either with the consent of the purchasers, or if he should himself repurchase all of the lots so sold, withdraw such offer at any time before the public had acquired any interest in the streets, either from formal acceptance or by actual user." Of course, if the aforementioned acts had constituted a dedication of the streets to public use, there could be no such thing as a revocation of that dedication by the owner. Conceding that the acts done by the defendant and the railway company in making and recording the plat constitute an offer of dedication, still there is evidence of revocation of that offer, and also but slight evidence of the acceptance of the offer. As we have heretofore shown, an intention to dedicate must be plainly manifest, or there is no offer. In this case the particular tract of land in dispute is designated upon the plat as "Central Park." If it had been designated thereon as "Private Park" it could not be claimed for a moment that an intention to dedicate it to the public was plainly manifest by the filing of the plat. Again, if it had been designated upon the plat as "Public Park," the intention to dedicate would be quite apparent. Now, in the present case it is designated as "Central Park." Certainly, under such designation, the intention of the owner is not as plainly manifest as in either of the illustrations we have cited. Yet, assuming an offer to dedicate this tract as a public park was made by the owner, still the finding of "no dedication" should be sustained. The act of defendant and the railway company in contracting a sale of this park tract to Gillis and others was evidence strongly tending to show a revocation of the offer to dedicate. No evidence of any act of acceptance by the city of the offer to dedicate can be found in the record anywhere, either prior or subsequent to this contract of sale. A portion of the grounds was used by the public for picnics and other pleasure purposes, and this was all. The city bases an acceptance of the offer largely upon this ground; but such use was entirely consistent with the ownership by the defendant and the railway company. Indeed, all and every kind of ownership was exercised over this tract by defendant, the railway company, and Gillis and others, during all these years; and nothing was ever done by the city to indicate a claim of interest upon its part. While an acceptance of an offer to dedicate may be presumed or implied in many cases, yet a finding of fact that there never was an acceptance would rarely be set aside by an appellate court where such claim of acceptance is based upon presumption or implication alone. There are a few other matters of evidence which we have not stated in detail, some looking favorably to a dedication, and others looking the other way. They do not change the result, and the finding of no dedication to public use by the owner of the tract marked "Central Park" will not be set aside. The evidence is ample to sustain that finding. We have carefully examined the errors of law relied upon by appellant but find nothing suggested therein demanding a new trial of the cause. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; McFARLAND, J.

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129 Cal. 68

WESTERFELD et al. v. NEW YORK LIFE INS. CO. (S. F. 1,573.)

(Supreme Court of California. Aug. 1, 1899.)

LIFE INSURANCE—DECEIT IN COMPROMISE—RESCISSION OF COMPROMISE—TENDER OF BENEFITS UNDER COMPROMISE—ACTIONS FOR RESCISSION OF COMPROMISE.

1. In an action against an insurance company for the difference between the face of a policy and a sum accepted under compromise, the complaint alleged that plaintiffs had repudiated the compromise on the ground of fraud, and demanded the balance due. The case was submitted under a charge that, if the jury believed the averments to be true, they should find for the plaintiff for the difference between the amount received and the face of the policy, with interest. *Held*, that this was an action based on the policy, not an action in tort for the deceit.

2. Where an insurance company, by fraudulent representations, effects a compromise with a beneficiary, and pays the agreed sum, the beneficiary cannot rescind the contract, and recover on the policy, without giving up what he has received under the compromise.

3. An action by a beneficiary under a life insurance policy for the difference between the face of the policy and a sum accepted in compromise, wherein the complaint does not offer to restore the sum paid in compromise, the court submits the case to a jury, and rescission is not touched on in the judgment, cannot be regarded as a suit for rescission.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Pauline Westerfeld and others against the New York Life Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Page, McCutchen & Eells, for appellant. Van Ness & Redman, for respondents.

BRITT, C. Plaintiffs sue as executors of the last will of one William Westerfeld, late of the city of San Francisco. Defendant is an insurance corporation of the state of New York. Plaintiffs allege in their complaint, among other things, that on April 19, 1890, the defendant issued to their testator a policy of insurance upon his life in the sum of $10,000, which policy included a provision that at the expiration of five years from its date the insured might surrender the policy, and receive its "then cash value"; that, after Westerfeld had paid four annual premiums thereon, an arrangement was effected between him and the defendant whereby the latter executed to him a new policy, of date February 19, 1894, for the same amount as the former, but on a different plan, and promised that it would compute the surrender value, in cash, of said first-issued policy, and apply the surplus thereof above the fifth premium, to become due the following April, in payment of premiums on said second policy, Westerfeld agreeing on his part to give up the first policy as soon as the company should have determined its value as aforesaid, and given him credit therefor on its books; that Westerfeld died February 18, 1895, having yet in his possession both said policies, and having received from defendant no notice of the cash surrender value of the first policy, which, however, was a sum more than sufficient, after deducting the fifth premium on the first policy, to pay the first premium on the second. Plaintiffs further allege that, as executors aforesaid, they afterwards demanded of defendant the payment of the amount of said second policy; that defendant refused to pay any part thereof, and by false and fraudulent representations (to the general effect that the policy of February, 1894, never was in force, but had been delivered to Westerfeld for examination only; that he never accepted it, nor paid any premium thereon, and had been notified to return it to defendant; also that the first policy had become void by failure of Westerfeld to pay the fifth annual premium) the defendant inveigled plaintiffs into a compromise, whereby they surrendered both said policies, and gave a release of all demands thereunder, in consideration of the sum of $2,666.66, then paid to them by defendant; that, but for the said representations, the falsity of which was then unknown to plaintiffs, they would not have accepted less than the face of the last policy; and that prior to the commencement of this action plaintiffs notified defendant that they "repudiated said settlement upon the ground that it was procured by fraud," and demanded payment of the difference between the sum paid as just mentioned "and the amount due them under the terms of said policy issued February 19, 1894." The prayer of the complaint was for judgment in the sum of $7,333.33, and interest from March 27, 1895, the date of proofs of death. For defense to the action, defendant admitted making the representations alleged by plaintiffs; but denied their falsity, and averred that they were true. It contested its liability on the policy of 1894, and claimed that, if its local agents (with whom alone Westerfeld dealt) made any arrangement looking to the application of a surrender value of the first policy in payment of premiums on the second, they violated the provisions of the first policy, which allowed a surrender value to the same only after it had been in force for five years, and exceeded their powers, and that their acts were never ratified. Defendant also contended that plaintiffs could not maintain the action without rescinding the contract of compromise, and restoring or offering to restore the money they then received as the fruit thereof. The trial was by jury, and resulted in a verdict and judgment for plaintiffs for the sum demanded in their complaint.

The decision of but one of the several questions debated by counsel will suffice for the disposition of the case. Notwithstanding the elaborate and very able argument with which plaintiffs' counsel have supported their contention that no restoration or offer of restoration of the money received by their clients upon the compromise was necessary to the success of this action, we are unable to accept that view. It is said, in the first place, that the action is to be treated, not as founded on the policy, but as in tort for deceit, and to recover damages for the fraud practiced by defendant. The complaint, however, was not drawn upon that theory. It is, of course, true that a party who has been led by fraud into a settlement whereby he accepted less than is justly due him in extinguishment of legal claims may, on discovering the fraud, sue for the damage he has sustained without taking any steps to rescind the settlement. The law allows such an action, although, as has been said here, "even in that case great wrong is sometimes done when rescission is not required" (Bancroft v. Bancroft, 110 Cal. 379, 42 Pac. 897); but it proceeds on the assumption that the plaintiff affirms the contract of compromise,—abandons the cause of action which it superseded,—and claims damage for the fraud which induced the new contract. In the present instance the plaintiffs distinctly aver in their complaint that they "repudiated said settlement upon the ground that it was procured by fraud upon the part of defendant," and demanded payment of the difference between the sum they had received and the "amount due them under the terms of said policy issued February 19, 1894." The frame of the complaint shows that the action is bottomed on the policy itself as a subsisting contract, and that, in consequence of the fraud charged, the release is treated as simply void. This is contrary to the rule of our statute. A consent to a contract procured by fraud "is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." Civ. Code, § 1566. The like view of the plaintiffs' cause of action was submitted to the jury at the trial. The court instructed them, in substance, that, if they believed the averments of the complaint to be true, their verdict should be for plaintiffs; not for such amount of damage as they might find to have been caused by the alleged fraud, but "in the sum of $7,333.33, with interest thereon from March 27, 1895, at seven per cent. per annum," which was the exact amount of the policy less the compromise payment, with interest on the difference. Plaintiffs maintain that this statement of the measure of damages was appropriate to an action sounding in tort for the fraud, but it seems to us to proceed on an unwarranted assumption, viz. that the jury must necessarily find that plaintiffs sustained the same damage by release of the policy, on which defendant denied any liability, and which might have been the subject of possibly doubtful litigation, that they would have sustained if the policy had been wholly undisputed. There was evidence in the case from which the jury might have concluded that, without regard to the false representations, plaintiffs could better afford to accept less than the face of the policy than to sue on it; but the instruction took this question from their consideration, and so was not a correct statement of the law if the case is to be regarded as in tort. This subject has been considered by the court of appeals of New York in an action for obtaining by fraud a compromise of a disputed contractual liability. The court said that the measure of damages "is not the extinguished balance, and cannot be without making the rule as to rescission an idle and useless formality, [but] its measure is indemnity for the real loss sustained, which may very well prove to be less, and even much less, than the contract balance. * * * What the plaintiff sold and what the defendant bought [the court thus describing the effect of the compromise agreement] was not a conceded, but a disputed, claim; worth, therefore, ordinarily, something less than its face for purposes of sale, transfer, or cancellation; how much less depending upon the continuing solvency of the debtor, and the probability of its successful enforcement, and that upon the underlying facts of the case, and depending also upon the probable extent and expense of the expected litigation." Gould v. Bank, 99 N. Y. 333, 2 N. E. 16. Plaintiffs inveigh strongly against the doctrine of that case, but, in our opinion, it is correct.

It is also contended that the case is within the rule that one who seeks to rescind a compromise on the ground of fraud is not required to restore the money or other benefits he has received from his adversary, if, whatever might be the result of his action, he would be entitled to keep what he has obtained. Cases of that nature arise when a party has been led by fraudulent contrivance to accept less money than was due him on an undisputed claim, as in Mining Co. v. Gilson, 47 Cal. 597, and in some other instances not necessary to be illustrated now. But in the present case, assuming, as plaintiffs did, that the bar to the action arising from the compromise settlement and release was avoided by allegations of fraud in the procurement of the same, then, of course, both parties were relegated to their original situation where plaintiffs asserted and defendant contested the liability of the latter on the policy. Kley v. Healy, 149 N. Y. 346, 44 N. E. 150. Suppose plaintiffs should fail to establish such liability, it would then appear that they had $2,666.66 of defendant's money to which—the compromise under which it was paid being void, and the consideration moving to defendant for such payment, viz. immunity from suit on the policy, having failed—they could show no right, and it seems quite elementary to say that in such event they could not lawfully keep what they had obtained. It is no answer to say that plaintiffs did prove to the satisfaction of the jury that the policy they surrendered was an enforceable obligation in their favor; or, what is much the same thing, that the judgment, by which the plaintiffs recover only the difference between the face value of the policy and the sum paid by defendant on the compromise, is a sufficient restoration of such payment. These things were problematical until judgment rendered; and to adopt such a test for determining whether restoration was necessary before suit is to say that the plaintiffs could gain their right of action—to wit, of recovery on the policy, which was barred by the compromise—as the result of the action; whereas the settled rule is that the right must exist when a plaintiff commences his action. As remarked by Mr. Bigelow (1 Bigelow, Fraud, p. 82): "The compromise is a binding contract until rescinded. It is binding then when he brings his suit." And so, Civ. Code, § 1566; Morrison v. Lods, 39 Cal. 381; Bohall v. Diller, 41 Cal. 532; Herman v. Haffenegger, 54 Cal. 161; Wainwright v. Weske, 82 Cal. 193, 23 Pac. 12.

Another contention is that the action may be regarded as one for a rescission of the compromise by judgment of the court, and that in cases of that character no attempt at rescission by the plaintiff himself before suit brought is necessary. Rescission by the court in this case necessarily involved the setting aside of the compromise, and cancellation of the release,—powers exercisable only by the court in equity, and not by a jury. Mesenburg v. Dunn (Cal.; filed June 23, 1899) 57 Pac. 887. Such jurisdiction of the court below was neither invoked nor exerted, and the judgment is wholly silent touching a rescission. It is therefore erroneous in any aspect. But, aside from considerations arising from the practice at the trial, the complaint is insufficient, treated as a bill in equity for rescission. It is the law of this state (except under circumstances which, it is believed, we have sufficiently shown do not attend the present case) that the offer to restore what has been received under the contract impeached is a condition precedent to maintaining an action for a judicial rescission, as well as an action founded on the assumption that rescission has been accomplished by simple act of the party. Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, and 52 Pac. 797, citing most of the previous cases on the subject. Plaintiffs lay stress on Watts v. White, 13 Cal. 321. That was a suit between partners, plaintiff seeking to set aside a deed of his interest in partnership property procured by fraud of defendant, and to enforce an accounting. The court said that plaintiff risked his case on the result of the accounting, and, since he alleged that a greater sum was due him than he had received for the deed, no offer to restore the consideration for the deed was necessary before suit. We may observe that in such a case the money received by the plaintiff becomes part of the subject of the accounting. In any possible event, he has an interest in it, and until the adjustment of the accounts is, it would seem, as much entitled to its possession as the defendant. Other distinctions might be drawn. As pointed out in a recent text-book: "Tender in a case of rescission between parties to the sale of a partner's interest in business stands upon a footing of its own." 1 Bigelow, Fraud, p. 426. Watts v. White does not aid the plaintiffs' case here.

Some other points made by plaintiffs in this connection do not require special notice. We must hold that the compromise was a good contract until rescinded, and, not having been rescinded when plaintiffs sued, it was a bar to the action, not removed by the subsequent verdict of the jury or judgment of the court. Civ. Code, §§ 1566, 1567, 1689, 1691; Dobinson v. McDonald, 92 Cal. 33, 27 Pac. 1098; Jurgens v. Insurance Co., 114 Cal. 161, 45 Pac. 1054, and 46 Pac. 386; Hill v. Den, 121 Cal. 42, 53 Pac. 642; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, and 52 Pac. 797, and cases cited. See, also, the following, most of which are quite in point: Gould v. Bank, 86 N. Y. 75; Graham v. Meyer, 99 N. Y. 611, 1 N. E. 143; Yeomans v. Bell, 151 N. Y. 230, 45 N. E. 552; Potter v. Insurance Co., 63 Me. 440; Brown v. Insurance Co., 117 Mass. 479; Moore v. Association, 165 Mass. 517, 43 N. E. 298; Ewing v. Shoe Co., 169 Mass. 72, 47 N. E. 241; Insurance Co. v. Howard, 111 Ind. 544, 13 N. E. 103; Harkey v. Insurance Co., 62 Ark. 274, 35 S. W. 230; Och v. Railway Co., 130 Mo. 27, 31 S. W. 962; 1 Bigelow, Fraud, p. 82. The authorities cited by plaintiffs, so far as pertinent to this question, are in the main distinguishable from the case at bar either for the reason that they treated the release as wholly void, which it cannot be under the statute of this state, or that the plaintiffs, suing in disregard of the release, had been fraudulently led to compromise an undisputed demand, and so were in any case entitled to keep what they had received. Admitting that there is some conflict of authority, we are yet satisfied that the conclusion we have reached accords with the strong preponderance of adjudication both in this state and elsewhere. The judgment and order denying a new trial should be reversed.

I concur: CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

125 Cal. 580

BAXTER et al. v. GILBERT et al.

(L. A. 505.)[1]

(Supreme Court of California. Aug. 12, 1899.)

DIVISION OF SURPLUS WATERS—FINDING OF FACTS.

Plaintiffs were entitled to all the water which naturally flowed in a certain creek. The source of this creek was a lake. Defendants, claiming to appropriate the surplus only, took a ditch out of the lake, several feet lower than the natural channel of the creek at the point of outlet, led water through into the creek at a point far enough down the creek to obtain the necessary fall, thereby creating an overflow, and then out by another ditch. There was never any overflow above this latter ditch. *Held*, that a finding that the act of defendants deprived plaintiffs of water flowing in the natural channel was supported.

Department 1. Appeal from superior court, Inyo county.

Action by John Baxter and others against A. D. Gilbert and others. From a judgment and decree largely in accordance with plaintiffs' demands, defendants Gilbert and Maiers appeal. Affirmed.

R. S. Miner, for appellants. Reddy, Campbell & Metson, for respondents.

GAROUTTE, J. This action was brought to test the respective rights of plaintiffs and defendants to the waters of Little Pine and Pinyon creeks, and also the waters of certain lakes situated high up in the mountains, and forming in a great measure the source of supply of Little Pine creek. Judgment was rendered largely in accordance with the claims of plaintiffs, decreeing that defendants Maiers and Gilbert had no rights in such waters, and perpetually restraining them from any interference therewith. Maiers and Gilbert claimed to be appropriators of a certain quantity of the waters, and appeal from the order denying their motion for a new trial. Plaintiffs are riparian owners on Little Pine creek, and also appropriators. The position of appellants is not sharply defined by their briefs, and we are not entirely satisfied whether their main contention here rests upon the claim of the insufficiency of the evidence to support the findings of fact, or upon erroneous conclusions of law made by the trial court, based upon these findings. It appears to be conceded that the plaintiffs and the nonappealing defendants are entitled to all the waters of Little Pine creek and its tributary, Pinyon creek, which naturally flow within the banks of Little Pine creek. But these appellants insist that there is a surplus of water at certain seasons of the year, which arises from the overflow of Little Pine creek, and they claim this surplus. The modus operandi for the creation of this surplus water is as follows: Appellants filed three appropriation notices of location of waters. By their first notice they claimed 5,000 inches of water, measured under a 4-inch pressure, of a certain lake (describing it), and stating that said waters would be diverted from said lake "by means of an open cut about three hundred feet long by six feet wide and ten feet deep, and will be thus turned into, and mingled with, the waters of Kersarge creek [Little Pine creek], to be diverted therefrom at a point * * * by a ditch four feet deep by seven feet wide, and about two miles long, into the tract of land hereinbefore named." By their second notice of location they likewise claimed 5,000 inches of water, under the same pressure, of a certain lake (describing it), and stating that said waters would be diverted "by means of an open cut about three hundred feet long by six feet wide and ten feet deep, and will be thus turned into, and mingled with, the waters of Kersarge creek [Little Pine creek], to be diverted therefrom at a point * * * by a ditch. * * *" By their third notice of location they claimed 10,000 inches of surplus water of Little Pine creek, measured under a 4-inch pressure. "Said waters will be diverted from said creek at the point where the notice is posted, by means of a ditch four feet deep and ten feet wide, and about three miles long. * * *" It will be conceded that these two aforesaid lakes largely form the reservoirs from which Little Pine creek is fed. It is also a fact that the point of appropriation upon Little Pine creek, located by appellants, is some distance above the point of plaintiffs' appropriation. There is no overflow of the waters of Little Pine creek above the point where appellants tap the creek with their ditch. The evidence is all one way upon this question. It necessarily follows that it was not the overflow of the creek that appellants sought to appropriate, but a certain amount of water in these two aforesaid described lakes. If such appropriation of waters does not interfere with the usual and ordinary quantity of water flowing down the creek, the right of appellants to appropriate is undoubted; but otherwise, if there be an interference with the quantity of water flowing down the stream. If the tapping of these lakes by appellants reduces the amount of water to which plaintiffs are entitled, or shortens the period of time in which they might otherwise secure water from the creek, then the acts of appellants clearly are a trespass upon plaintiffs' rights,—exactly the same kind of trespass as though the creek was tapped, and that amount of water directly taken therefrom, without any molestation of the lakes. Upon this point the trial court made the following finding of fact: "The defendants A. D. Gilbert, O. I. Maiers, and A. F. Maiers, by making the ditch and openings into East lake as herein in these findings described, have lowered and drained said lakes to such an extent as to prevent the water from flowing into the natural channel in said Little Pine creek, and, by doing the work as in these findings described on said East lake, have allowed the water thereof to escape therefrom, and to divert it from the natural channel in said Little Pine creek." There is an abundance of evidence to support this finding of fact. Indeed, it is substantially conceded that appellants have tapped East lake some feet below the natural channel of Little Pine creek, and under those conditions it is self-evident that such an act would materially affect the amount of water flowing down the natural channel of the creek. Upon a careful examination of the record, we are satisfied the evidence is amply sufficient to support the findings of fact made by the trial court, and we are also satisfied that the conclusions of law based thereon find full support in the evidence.

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[1] For opinion in bank, see 58 Pac. 374.

Appellants rely upon various alleged errors of law committed by the trial court. Many of the questions raised under this head are not material, as the rulings, even if erroneous, do not go to the merits of this appeal. We find no error in the record demanding a reversal of the order. For the foregoing reasons, the order denying the motion for a new trial is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(125 Cal. 530)

HAMILTON v. SMITH. (S. F. 1,023.)[1]

(Supreme Court of California. Aug. 7, 1899.)

ERRONEOUS FINDINGS OF FACT—HARMLESS ERROR.

Where the defense made to an action to recover a balance due on a lease was that the lease had been procured by fraudulent representations, and the amount of damages attempted to be proved by defendant was remitted by plaintiff from his judgment as a condition for refusing a new trial, defendant is not injured by erroneous findings of fact as to some of his allegations in the answer.

Department 2. Appeal from superior court, Alameda county.

Action by W. H. Hamilton against F. M. Smith to recover a balance due on a lease. From a judgment in favor of plaintiff, and from the refusal of a new trial, defendant appeals. Affirmed.

Chickering, Thomas & Gregory, for appellant. John C. Hughes, for respondent.

TEMPLE, J. This action was brought to recover a balance due on a lease. The defense is fraud in procuring the lease. Defendant rented a house from plaintiff's assignors, in Chicago, for one month, during the World's Fair. Defendant was a resident of Oakland, where the lease was entered into. He had never seen the house, as the lessors knew, but relied solely upon their representations. They represented that it contained eight bedrooms. Defendant avers that in fact there were but four bedrooms. He found it difficult or impossible to get other accommodations for his family in Chicago at that time, and so did put up with the house he had rented. Beds were placed in the parlor and diningroom, and, although put to much inconvenience, the house was made to answer his purpose. His lease was in writing, and in it no mention is made of any bedrooms. It is not charged that there was any violation of its terms, but defendant seeks to recoup for damages for the false representations by which he was induced to enter into the contract. The court found that the plaintiff's assignors did represent that there were eight bedrooms, but finds that the representation was not fraudulent. In fact, it was found that there were eight bedrooms; for it is found that all the other allegations of the answer, except as to the representations regarding the number of the bedrooms, were untrue. The appeal is from the judgment, and from the refusal of a new trial.

Appellant contends, and the contention is well founded, that as to some of the allegations the finding is against the evidence. But, if all had been found for the defendant he could not have had judgment allowing a recoupment for more than $75, and, as a condition for refusing a new trial, plaintiff was required to, and did, remit that amount from his judgment. This was all the damages he attempted to prove. He now says he was entitled to the difference in the rental value of such a house as they represented it to be and such as it in fact was. But, conceding that rule, there was no evidence even tending to show the difference. His inconvenience is not shown to have cost him anything, except the $75 which he paid for other rooms. It appears, therefore, that he is not injured by the erroneous findings of fact. Order and judgment affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(125 Cal. 563)

JACK v. SINSHEIMER. (L. A. 467.)

(Supreme Court of California. Aug. 10, 1899.)

DAMAGES—AGREED PENALTY FOR BREACH OF CONTRACT—GUARANTY TO PAY SUCH PENALTY—SUFFICIENCY OF PLEADING.

1. Under Civ. Code, §§ 1670, 1671, providing that a contract by which the amount of damage to be paid for a breach of obligation is determined in anticipation thereof, is to that extent void, except where, from the nature of the case, it is impracticable, or extremely difficult, to fix the actual damage, a clause in a lease binding the lessee to pay $1,000 penalty in case of breach of his contract is void.

2. Under Civ. Code, §§ 1670, 1671, making void contracts which fix the amount of damages for breach, a contract of guaranty by defendant to pay the penalty prescribed for the breach of a lease is void, and does not bind defendant to pay even the actual damages incurred by such breach.

3. Where defendant contracted to pay a penalty incurred if lessee should be legally evicted for nonpayment of rent during the term of the lease, or if he voluntarily surrendered the premises, a pleading not stating that the lessee voluntarily surrendered the premises, nor that the eviction was during the term of the lease, is not sufficient to show liability on defendant's part.

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[1] Rehearing denied September 6, 1899.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action to quiet title by R. E. Jack against B. Sinsheimer. From a judgment for plaintiff, defendant appeals. Affirmed.

Wilcoxon & Bouldin, for appellant. W. H. Spencer, for respondent.

COOPER, C. This is an action brought by plaintiff to quiet his title to a certain tract of land described in the complaint. The defendant answered, and in his answer set forth a certain mortgage made by one Cheda, which mortgage was claimed to be a valid lien upon the premises in favor of defendant. The plaintiff demurred to the answer upon the ground that the facts therein stated did not constitute any defense to the action. The demurrer was sustained, and, defendant declining to amend, judgment was rendered against him. This appeal is by defendant from the judgment and for the purpose of reviewing the order sustaining the demurrer. It appears from the answer that on June 19, 1891, one Andrews, as lessor, leased to one Cheda, as lessee, certain premises in San Luis Obispo county for the period of five years from and after October 1, 1891, at an annual rental of $2,000, one-third of the annual rent payable every four months in advance. This lease contained the following covenant: "And the said party of the second part (Cheda) does hereby covenant, promise, and agree to pay to said party of the first part (Andrews) the said rent in the manner hereinbefore specified, * * * and, upon his failure to pay said rent, he shall vacate said premises upon receiving thirty days' notice from the party of the first part, and shall pay to him the sum of one thousand dollars, as settled and liquidated damages." At the time of making the said lease the defendant signed an indorsement thereon in the following language: "In consideration of the making of the foregoing lease or agreement, and for the purpose of securing the penalty of one thousand dollars therein provided for, I hereby guaranty the payment of one thousand dollars unto said Truman Andrews, whenever, at any time during the term therein limited and provided for, the said J. A. Cheda shall be legally evicted from said premises for nonpayment of rent therein provided for, or whenever he voluntarily vacates the same, upon ten days' notice. Dated June 19, 1891. B. Sinsheimer." On January 25, 1894, the said Cheda was the owner in fee of the property described in the complaint in this action, and while such owner, on said last-named day, he made to the defendant a mortgage thereon, which mortgage was duly acknowledged and recorded, and which was given for the purpose of securing defendant "against all cost, damages, and expenses incurred, suffered, or accruing to said mortgagee by reason of a certain written guaranty made by him upon the part of and for said J. A. Cheda upon and about a certain lease this day executed between Truman Andrews and J. A. Cheda, to which lease reference is hereby made." On September 1, 1896, the said Cheda was in default for rent under the terms of said lease, and thereupon proceedings were commenced to evict and eject him from the leased premises. Afterwards judgment was duly given and made against said Cheda, and he was legally evicted from the said premises, and he has never paid the rent so due, or the said $1,000. Notice of the nonpayment of rent and of the default of Cheda was given to defendant, and demand made upon him for the payment thereof. Defendant has not paid the same, but claims that he has a right to the security given by the mortgage until he is fully released from said guaranty.

The principal question in this case is as to whether or not the clause in the lease fixing the sum of $1,000 as liquidated damages in case of the premises being vacated by the lessee is void. The rule that a guarantor is never implicated beyond the strict terms of his contract must be applied to defendant in this case. His guaranty was "for the purpose of securing the penalty of one thousand dollars, * * * whenever, at any time during the term therein limited and provided for, the said J. A. Cheda shall be legally evicted from said premises for nonpayment of rent, or whenever he voluntarily vacates the same." The guaranty was, therefore, by its terms, to secure a penalty of $1,000, which, by the lease, was fixed as liquidated damages in case the lessee should be evicted from the said premises, or voluntarily vacate the same. The provisions of our Code are as follows (Civ. Code, § 1670): "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Section 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

We think, under the provisions of the Code quoted, that clause of the lease as to the penalty of $1,000 is void. It does not occur to us that upon the failure of a tenant to pay rent, and upon his eviction after notice and demand, the actual damage would be extremely difficult to fix or impracticable of estimation. It is provided in our Code (Code Civ. Proc. § 1174) that in summary proceedings for obtaining possession of real property after default of the tenant in the payment of rent the judgment or verdict shall find the amount of damages occasioned to the plaintiff, and for the amount of rent due, and shall be rendered against the defendant for three times the amount so found.

If the lessor had brought an action against the lessee under the above section and the preceding sections of the Civil Code of Procedure, the rule laid down in section 1174 would be applicable. We not only have a rule laid down in Code Civ. Proc. § 1174, for the wrongful holding over of a tenant after failure to pay rent, but we have rules laid down in Civ. Code, §§ 3335, 3344, 3345, and finally we have the rule laid down in Civ. Code, § 3334, that, with the exceptions of the rules stated in Code Civ. Proc. § 1173, and Civ. Code, §§ 3335, 3344, 3345, the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation, and the costs, if any, of recovering the possession. The above sections seem to provide rules for ascertaining the damages in all kinds of actions for the recovery of real estate. When a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage. In Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890, it was held that a stipulation by the contractor in a building contract to pay the owner a specified amount as liquidated damages for each day's delay in completing the building is not sufficient evidence of itself to entitle the owner to recover the amount stipulated for as liquidated damages. In Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, it was held that, where a written agreement was made between a vendor and purchaser for the sale of certain real estate, and $1,000 was paid down by the purchaser, and the contract contained a provision that in case of a breach thereof by the purchaser the $1,000 should be taken by the vendee as liquidated damages, that the provision was void. In the opinion it is said: "It appears, from the nature of the contract under consideration, that it would not be impracticable, or at all difficult, to fix the actual damage in this case, since section 3307 of the Civil Code provides a rule by which the damage in all cases of this kind may be measured, and definitely fixed." In Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36, a contract had been entered into between plaintiff and defendant for the delivery of a large number of grain bags. The contract contained a clause to the effect that the defendant would pay to plaintiff three cents for each bag which he refused or neglected to deliver, and also contained the express agreement that it was understood between the plaintiff and defendant that, owing to the nature of the case, it would be impracticable and extremely difficult to fix the actual damage. It was held that, notwithstanding the provision in the contract that the parties understood that it would be impracticable and extremely difficult to fix the actual damage, the provision was void under sections 1670, 1671, Civ. Code. In Transportation Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705, the contract sued upon contained a provision for the hiring of a lighter, and for the payment of a fixed sum in case of loss or irreparable damage to the lighter. It was held that the stipulation was in the nature of a penalty, and that the plaintiff, in suing upon the contract, should have alleged and proved actual damage. Applying the rule as laid down in the above cases, the stipulation in the lease as to $1,000 penalty was void, and the demurrer properly sustained. It is said by appellant that, even if the penalty is void as to the amount, the stipulation is binding upon the lessee for the actual damage. This would be true without any such provision in the lease. In case the lessee failed to pay rent, or vacated before the end of his lease, he is liable to his lessor for the actual damage sustained, without any covenant to that effect, or any bond or guaranty. That, however, is not this case. The defendant did not guaranty the rent, nor agree that under any circumstances he would be responsible for it. He guarantied the penalty of $1,000 in case the lessee was legally evicted for nonpayment of rent, or voluntarily vacated the premises. The penalty being void, the guarantor is not liable. It is alleged in the answer that Cheda became indebted for rent under said lease, but no statement is made as to whom he so became indebted. It is stated that Cheda was legally evicted from the leased premises for nonpayment of rent, but it is not alleged that by reason of such eviction the lessor, or any one else, suffered any damage. The answer may be true, and yet the lessor may have been greatly benefited by evicting the lessee, as he may have leased the premises immediately for a much greater rent, or otherwise received profit by obtaining possession thereof. In the case of Factor Co. v. Adler, supra, the plaintiff introduced in evidence its contract containing the provision that defendant would pay to plaintiff three cents for each bag which he refused or neglected to deliver under the contract, and, after showing the number of bags which defendant failed to deliver, rested, without any proof of damage. Defendant moved in the court below for nonsuit upon the ground, among others, that no proof of actual damage was offered. The nonsuit was granted, and this court affirmed the judgment. The guaranty as to the penalty only made defendant liable in case, during the term of the lease, the lessee should be legally evicted from the said premises for nonpayment of rent, or should voluntarily vacate the same. There is no allegation in the answer that the lessee ever voluntarily vacated the premises, and no allegation that he was legally evicted during the term of the lease. The rule that a pleading will be construed most strongly against the pleader must be applied to the answer in this case. Tested by the demurrer, the statements of the answer must be taken as true; yet, for the purpose of holding the guaranty of defendant binding, we cannot presume any facts outside of those stated in the answer. We advise that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

125 Cal. 560

PEOPLE v. NEBER. (Cr. 527.)

(Supreme Court of California. Aug. 10, 1899.)

BURGLARY—CHARGE TO JURY.

In a prosecution for burglary, the court charged that the fact that a person is found in possession of property recently stolen, "if such be the fact, and established by the evidence beyond a reasonable doubt," is not sufficient to warrant conviction, but where the evidence establishes the fact, beyond a reasonable doubt, that the person who had recent possession of stolen property gives a false account of how he came by possession, it is a circumstance to be considered, and that the jury should not understand him as expressing any opinion on the facts or the weight of the evidence. *Held* not objectionable as a charge as to matters of fact.

Commissioners' decision. Department 1. Appeal from superior court, Napa county.

August Neber was convicted of burglary, and appeals. Affirmed.

Webber & Rutherford, for appellant. Atty. Gen. Ford, for the People.

BRITT, C. Defendant was convicted in this action of the crime of burglary in the second degree, perpetrated by entering a certain building with intent to commit larceny therein. The charge of the judge to the jury at the trial included the following matter: "The mere fact that a person is found in the possession of property recently stolen, if such be the fact, and established by the evidence beyond a reasonable doubt, is not, in and of itself, sufficient to warrant a conviction of the party either of larceny or burglary. There must be evidence outside of or beyond or independent of the fact of the possession of the property recently stolen, in order to warrant a jury in convicting a party. But where the evidence establishes the fact beyond a reasonable doubt that the person who had the recent possession of stolen property gives false, contradictory, or inconsistent accounts of how he came by that possession, that is a circumstance that the jury should consider in arriving at a verdict; and they can and should consider the fact that the party has the possession of property recently stolen, in connection with all the other circumstances in the case, in arriving at their verdict." On appeal, defendant does not deny that there was evidence before the jury tending to show that certain personal property was stolen from the building aforesaid at or about the time of the burglary alleged against him, and was found soon afterwards in his possession; but he contends that the effect of said instruction was to say that those things were established as true, and so the court charged the jury as to matter of fact. At the outset of the instruction complained of, the judge stated the condition upon which his remarks were founded to be hypothetical only "if such be the fact, and established beyond a reasonable doubt." It is incredible that the jury, as men of ordinary intelligence, did not understand that the same qualification accompanied the immediately succeeding references to the same circumstance, although the condition was not repeated. Each sentence of the charge is not required to contain "all the conditions and limitations which are to be gathered from the entire text." People v. Doyell, 48 Cal. 85; People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Worden, 113 Cal. 569, 45 Pac. 844. If a suspicion remain that the jury might have misunderstood the language of the court, it is removed by the part of the charge subsequently occurring, as follows: "Do not understand me as intimating any opinion on any fact in this case. Whether the defendant is guilty or innocent of this offense is for you to determine from the evidence. You must distinctly understand that the court in no manner or form is expressing or intends to express or intimate any opinion upon the weight of the evidence, * * * or that any fact in the case is or is not proven," etc.

Other points made by appellant are without merit, and are not of importance to require separate notice. The judgment should be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

125 Cal. 521

PEOPLE v. CASTRO. (Cr. 511.)

(Supreme Court of California. Aug. 1, 1899.)

CRIMINAL LAW—CONFESSION — SUFFICIENCY OF OBJECTION—ADMISSIBILITY.

1. Where proper objection is made by defendant to evidence of a confession on the ground that defendant was in custody, and that it is incumbent on the state to show that promises had not previously been made to induce such confession, and the objection is overruled, and exception taken, it is not necessary that the same objection should be repeated to evidence of other confessions to entitle defendant to have all such evidence excluded on its subsequently appearing that such inducements were offered.

2. A confession obtained from a prisoner charged with a crime, which he had previously denied, by means of a statement by the sheriff that they had a sure case against him, and a promise by the sheriff to use his influence in the prisoner's behalf if he would admit his guilt, is not admissible in evidence against him, nor are repetitions of such confession, made to other officers, though without further inducement.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county.

Prosecution of Andreas Castro for cattle stealing. Defendant was convicted, and appeals. Reversed.

C. F. Carrier and W. G. Griffith, for appellant. Atty. Gen. Ford, for the People.

HAYNES, C. Appellant was tried upon an information charging him with having stolen a cow, was found guilty, and sentenced to imprisonment in the state's prison for the term of 10 years. Mr. Rice, the owner of the cow, testified that it was in the pasture on the 25th of February, 1898, and on the 26th he found it in the slaughter pen of Metcalf & Gehl, and that it was taken from the pasture and placed in the pen without his permission. Mr. Baker testified that on the morning of the 26th he went to the pasture, and found that the fence had been taken down, his cow taken out, and the fence put up again, and saw the tracks of three cows and two horses, which he followed to said slaughter pen, and there found three cows, one of which was his and one Mr. Rice's. At this stage of the evidence the prosecution called Thomas B. Hicks, who testified that he was the jailer of the county jail; that he had known the defendant two years, and saw him at the jail on February 26th. He was then asked, "Did you hear him make any statement in regard to his guilt or innocence in this matter?" The defendant objected to the question, "and asked leave to introduce testimony to show that the admissions sought to be elicited were made by the defendant under promises of exemption, and that a lesser penalty would be imposed if he pleaded guilty, and that the case was a foregone one against him." The court denied the motion, and the defendant excepted. The witness testified that the conversation was had in the district attorney's office a short time after the defendant's arrest. "There were two conversations at which I was present. There were four of us present the second time,—Andreas Castro, Ed. Burke, and myself and my father. When you [the district attorney] took him to your office, you simply asked him whether he did or not, and you never told him that you would help him, or you never made any threat to him. You asked him two or three times if he did the deed, and he set back in his chair, and kind of studied. There were not any inducements held out to him to answer. Q. Now, what did he say at that time?" The defendant objected to the question upon the ground that there was no sufficient basis for proving a confession; that he was imprisoned, and under duress; and that the state must do something more than show that at this particular conversation no inducements were held out to him. This objection was overruled, and the defendant excepted. The witness then testified: "Mr. Storke then asked him if he knew anything about this cattle stealing, and he hung back. No, he didn't know. And finally he began to get uneasy in his chair, and finally says: 'Yes, I do. My brother and I took the cows, and drove them to the slaughter house.'" Upon cross-examination the witness testified that there was a conversation with the defendant at the jail, at which the witness' father (the sheriff), Mr. Burke, and himself were present; that he could not say positively whether it was within a day or two after his arrest. Mr. Shoup, the deputy sheriff who made the arrest, but who was not present at either of the conversations above narrated, testified that on the day of the arrest the defendant denied the charge; that afterwards he had another conversation with defendant, but did not fix the date, either in relation to the arrest or to the other conversations above referred to, further than that it was a few days after he put him in jail, and was "at the bars of the jail." The witness said: "He commenced talking to me about the matter, and admitted that he and his brother, Frank, took the cows, but said he made his brother take them,—made his brother go with him. He said he took three cows out of Scull's pasture, and put them in Metcalf's slaughter pen;" and that no threats or inducements were made at any time so far as he knew. Mr. Burke, one of the persons present at the conversation in the district attorney's office, and who acted as interpreter on that occasion, was called by the prosecution, and testified that no inducements or threats were used, or any influence exerted, to induce the defendant to make any confession. Upon cross-examination he testified as follows: "This was not the first time that I acted as interpreter with the defendant, but it was the first and only time with the district attorney. Before that I had acted as interpreter for Sheriff Hicks while he talked with him in the office of the jail. The sheriff and Tom Hicks, the jailer, were there. Mr. Hicks, the sheriff, started in by informing the defendant that he had a bad case against him,—had a sure case against him,—and it would be best for him to make a clean breast of the whole affair, and relate all the circumstances in regard to it. Of course, the defendant argued about the matter to some extent. At first he stoutly denied having anything to do with it, and then asked the sheriff to promise him to help him out of the scrape, do all he could for him, if he should make a full confession in regard to it. The sheriff assured him that he would do everything in his power to help him. And in fact the prisoner went to such an extent as to make the sheriff shake hands with him, as pledge of good faith. The promise that the sheriff made to him, though, was in this way: He said, 'I may be able to induce the court or jury to give you a light sentence,—go as easy as possible with you.' That was the substance of it. Of course, some months have elapsed, and I do not remember very well. The defendant made no admission of guilt until after receiving these assurances. The defendant's knowledge of English is very slight." Counsel for defendant then moved "to strike out the evidence that has been introduced of this statement made by the defendant, the evidence of T. B. Hicks and E. M. Burke, on the ground that the statement made by the defendant, as testified to by those witnesses, was involuntary, and induced by hopes of reward." The court ruled that the testimony of the confession made in the district attorney's office be excluded, and added: "If there is any other, it remains in. Mr. Storke: What becomes of the Shoup testimony? The Court: Well, this motion does not extend to that; that remains. Mr. Griffiths: We covered all the evidence as to confessions, I think. The Court: I did not so understand it. If it does extend to that, the only testimony that will be excluded is that of the conversation in the district attorney's office; the other remains. If your motion extends to that portion of it, it is denied. Mr. Carrier: We except to the ruling of the court in so far as it refers to the Hicks testimony and the Shoup testimony."

We have given a very full statement from the record, in view of respondent's contention that proper objections were not seasonably made, and exceptions taken. This contention cannot be sustained. Conceding that defendant's request to be permitted to show that the alleged confessions were secured through promises of influence in his behalf was somewhat premature, it does not appear that it was denied upon that ground, and counsel doubtless understood the ruling as a denial of his right to make such showing; but, be that as it may, when the witness, who was then testifying as to what was said at the district attorney's office, was asked the question, "Now what did he say at that time?" the defendant objected, and, among the grounds of objection, stated "that the state must do something more than show that at this particular conversation no inducements were held out to him." That objection was overruled, and an exception taken. These two objections and exceptions were sufficiently specific to advise the court and the district attorney of the points made by the defendant, and it was not necessary that they should be repeated upon the examination of subsequent witnesses, in order to justify his motion, afterwards made, to strike out the testimony of said confessions. The colloquy between the court and counsel after the ruling upon the motion to strike out said testimony shows that counsel for defendant intended their motion to cover all the testimony as to defendant's confessions, and, after the court had been so informed, the ruling was repeated with the statement by the court that, if the motion extended to other confessions than that made in the district attorney's office, it is denied as to such other confessions, and that ruling was excepted to. I think it does not sufficiently appear that the confession made to Shoup was not induced by prior representations and inducements made by the sheriff to justify the ruling of the court. The time at which these statements were made does not appear, but it does appear from the testimony of Mr. Burke that at the conversation held by the sheriff, the jailer Hicks, and the witness with the defendant, prior to the interview at the district attorney's office, that at first the defendant "stoutly denied having anything to do with it"; and it is not reasonable to suppose that prior to that time he had voluntarily and without solicitation or inducement admitted to another officer that he was guilty. The burden being upon the prosecution to show that the confession was made voluntarily, and without inducement on the part of the officer, the condition imposed by the law as to its reception was not complied with, and it should have been stricken out. The testimony of Mr. Hicks was as to the confession made in the office of the district attorney, and was therefore excluded; but the ruling left with the jury evidence that a confession of guilt was made to the sheriff, the jailer, and Mr. Burke in the sheriff's office, prior to the confession made in the district attorney's office, though the latter confession was excluded because the former was obtained by improper representations, as clearly appears from the testimony of Mr. Burke.

Appellant discusses some instructions requested by the defendant to be given to the jury, but, in view of what has been said, they need not be specially noticed. I advise that the judgment be reversed, and the cause remanded.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

(6 Cal. Unrep. 316)

WATSON v. MILLER et al. (S. F. 1,281.)

(Supreme Court of California. Aug. 3, 1899.)

APPEAL—HARMLESS ERROR.

1. In an action against an administrator, it is not reversible error to overrule a demurrer by plaintiff to the complaint of intervening heirs, when the issues presented are the same as those raised by the answer of the administrator, and judgment must be the same as though the demurrer had been sustained.

2. In a suit for $30,000 against an administrator for services performed for testator, a finding that plaintiff performed work, the value of which did not exceed $500; that the deceased did not promise to pay for the services, but they were understood to be gratuitous; and that plaintiff was paid and received the sum of $500 in full payment,—is sufficient to support a judgment against plaintiff.

3. In an action against an administrator for services performed for deceased, where the complaint alleges that deceased promised to pay for such services, and the answer denies the promise, a finding that deceased did not promise is not outside the issues.

4. In an action against an administrator, a former administrator of the same estate was introduced as a witness. In cross-examination

the decree of revocation of his letters of administration was introduced, and objected to as not being proper cross-examination and as irrelevant and immaterial. No part of the evidence in chief was set out, and the bill of exceptions did not set out the decree of revocation. *Held*, that the appellate court cannot pass upon this exception.

5. In an action against an administrator for compensation for services performed for testator, evidence that testator had expressed himself as not wishing to go away owing any man anything is immaterial.

6. Where, on objection to testimony, counsel introducing it explains that it is part of a conversation introduced by opposing counsel, and the court admits it, and it subsequently turns out to be immaterial, if no motion to strike it out is interposed the prejudiced party cannot complain.

7. In an action against an administrator for compensation for services performed for testator, a partner of plaintiff testified that plaintiff told him that he was attending to testator's affairs. Testator was not present when this statement was made. Defendant's counsel objected to the evidence, and questioned the witness with the object of showing that he was an interested party, following it by an objection to the testimony, which the court sustained. The testimony already given was not stricken out, nor did plaintiff's counsel offer any further testimony by this witness. *Held*, that the appellate court will not reverse, even though the objection was erroneously sustained, as the evidence of the witness was retained, and it cannot be assumed that any further facts would have been proven by him.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Peter W. Watson against Eliza M. Miller, as administratrix of the estate of A. P. More, deceased. Certain heirs intervened. From a judgment for defendants, plaintiff appeals. Affirmed.

Reel B. Terry, for appellant. John B. Mhoon and C. A. Storke, for respondents.

PER CURIAM. The plaintiff brought this action against the administrator of the estate of A. P. More, deceased, to recover the sum of $30,000, claimed to be the reasonable value of work, labor, and services alleged to have been performed by him, for and at the request of said A. P. More, within two years prior to his death. A complaint in intervention was filed by two of the heirs of the deceased, and the plaintiff's demurrer thereto was overruled. Upon the trial of the cause the court rendered judgment against the plaintiff, from which, and from an order denying his motion for a new trial, he has appealed.

1. Appellant contends that the court erred in overruling his demurrer to the complaint of the interveners; that an heir is not entitled to intervene in an action brought against the administrator to recover a claim against the estate. It is not necessary, however, to determine this question upon the present appeal, since the issues presented by the complaint in intervention were the same as those presented by the answer of the administrator, and the findings of the court against the allegations of the complaint, as well as the judgment thereon, must have been the same had the plaintiff's demurrer to this intervention been sustained. The order overruling his demurrer is not, therefore, a sufficient ground for reversing the judgment.

2. It is next urged as a ground for reversal that the findings of fact are insufficient to support the judgment, in that there is no finding that plaintiff did not perform the services alleged in the complaint to have been rendered, and that it is not found that such services as alleged were not of the value of $30,000. The court found "that the plaintiff, within two years prior to the death of A. P. More, deceased, performed work, labor, and services for and at the request of said A. P. More, which said work, labor, and services did not exceed in value five hundred dollars; that said A. P. More, deceased, at no time promised and agreed to pay the plaintiff for any services mentioned in the complaint any sum whatever, but that all services which plaintiff performed for decedent during said two years were mutually understood and agreed between plaintiff and defendant to be gratuitous, and to be rendered without charge, and were such services as a broker usually renders gratuitously to a customer who is doing other business with him; that, for such services found to be performed as aforesaid, plaintiff was paid and did receive the sum of five hundred dollars in full for such services, and gave his receipt in full therefor." These findings might have been greatly condensed, but they are clearly sufficient to support the judgment. It is said, however, that the finding that More did not promise to pay plaintiff for said services is outside of the issues. The answer denied that More ever promised or agreed to pay plaintiff for said services, thus raising an issue upon the allegation of the complaint that he did so promise and agree. But, if it were otherwise, it would not affect the judgment, since it was found that his services were worth no more than five hundred dollars, and he was paid that sum, and received it in full.

3. It is further contended that the court erred in certain rulings upon the trial. J. F. More, who was the administrator of said estate at the time this action was commenced, was called as a witness for the plaintiff. Upon cross-examination he testified that he did not know whether he was then the administrator of said estate or not; that his letters were revoked, but he could not give the reasons why they were revoked. The defendant offered in evidence the findings and decree revoking the letters of the witness as administrator of said estate, and plaintiff objected that it was not cross-examination, and was irrelevant and immaterial. As no part of the evidence of the witness in chief is set out or stated, we cannot say that it was not proper cross-examination; and as the bill of exceptions neither sets out said findings and decree, nor gives any statement of the facts shown thereby, we cannot say that plaintiff was prejudiced, even if its irrelevancy and immateriality were conceded. Cer-

tainly we are not able to say that it tended to discredit the witness.

W. H. Chickering, called by the plaintiff, was asked upon cross-examination, "Did you have any conversation with Mr. More with reference to his indebtedness to anybody?" Plaintiff objected that it was incompetent, immaterial, and irrelevant. Counsel for defendant explained that it was part of a conversation put in by the plaintiff. The court thereupon overruled the objection, and the witness answered: "It was a few days before Mr. More went away. I was at his room in the Palace Hotel at his request, and as I went away he asked me whether he owed me anything, and I told him no. And then he said that, if he did, he wished I would send him a bill and let him pay it, as he did not propose to go away owing any man anything." In view of counsel's explanation, the ruling was proper. The evidence given was, however, incompetent for the purpose of proving that More denied any indebtedness to the plaintiff, if it could be so construed, and would doubtless have been stricken out if counsel for plaintiff had requested it. He cannot, therefore, complain, even if he was prejudiced by the answer. But we do not see any reason to suppose that the court gave it any consideration, or that plaintiff was in any way prejudiced.

Henry Marx, called by the plaintiff, testified that he and the plaintiff were partners in the wool business, and that he was in the fur business with his brother; that he knew A. P. More; that he had seen him and Watson together a great deal; that Watson made out his shipping and consignment papers and wrote his letters for him; that was in the spring of 1890; that witness had no interest in this suit; that plaintiff's services to More were rendered for himself. The witness was then asked: "Did you and Mr. Watson ever have any understanding as to his being allowed to attend to this business, and as to what you could be allowed to do in relation to your fur business? If so, state it. A. Well, now, Mr. More was around the office a great deal, and I asked Mr. Watson what business he had with Mr. More, and he told me he was attending to his business." Counsel for defendant objected to the answer "as being a declaration in his own interest not made when Mr. More was present." Counsel for plaintiff repeated that he wished to show that plaintiff and Marx had an understanding that plaintiff was allowed to do this business for More, and the witness Marx could attend to his fur business. Defendant's counsel then asked the witness: "Did the firm of Watson & Marx receive pay for handling and scouring the wool of A. P. More? A. Yes, sir. Q. Did you get your share of it? A. Yes, sir. Q. You got your share of all the money paid to paid to Watson & Marx for doing the business and handling the wool of A. P. More, did you not? A. Yes, sir." Counsel for defendant then said: "Now, I think the witness has clearly shown that he is interested in all the business done for A. P. More, and that he ought not to be allowed to testify to anything that happened prior to the death of A. P. More." The court sustained the objection, to which ruling plaintiff's counsel duly excepted. There was no motion to strike out the testimony given by the witness, nor any offer to prove by him any additional fact tending to establish plaintiff's cause of action. The plaintiff therefore had the benefit of the testimony already given, and, in the absence of any offer to prove additional facts, we cannot assume that other facts were within the knowledge of the witness which would have tended to the benefit of the plaintiff. The judgment and order denying a new trial are affirmed.

(125 Cal. 513)

ASHER v. YORBA et al. (L. A. 456.)[1]

(Supreme Court of California. July 31, 1899.)

NOTICE OF PROCEEDINGS FOR APPOINTMENT OF GUARDIAN—POWER OF COURT AS TO NATURE OF SUCH NOTICE—NOTICE TO FATHER WHEN AN APPLICANT FOR THE POSITION OF GUARDIAN—BURDEN OF SHOWING INVALIDITY OF PROCEEDINGS—NOTICE OF HEARING IN DISTRIBUTION PROCEEDINGS.

1. Under Code Civ. Proc. § 1747, providing that, before making appointment of a guardian, the court must cause such notice as it deems reasonable to be given to the person having care of the minor, and such relatives as the court may deem proper, posting of notice for 10 days in three public places, under direction of the court, is sufficient.

2. Under Code Civ. Proc. § 1747, providing that, before the appointment of a guardian, notice shall be given to such relatives of the minor residing in the county as the court may deem proper, the court has authority to give notice by posting for 10 days in three public places.

3. In proceedings for the appointment of a guardian, where the father has custody of the minor, and asks to be appointed guardian, notice to him of such proceedings is unnecessary.

4. After a decree appointing a guardian, and directing a sale of the minor's land, the burden of proof is on any one attacking the validity of such decree; and the fact that the affidavit of notice does not show the date of posting is not sufficient to establish invalidity.

5. The final account and petition for distribution of an estate were filed on January 2d. The court fixed January 11th as the date for hearing, and ordered 10 days' notice of the hearing to be given by posting. Code Civ. Proc. § 1634, provides that notice of a hearing in proceedings for the distribution of an estate must be given by posting or publication as the court may direct, and for such time as may be ordered. *Held*, that the notice for the 9 days preceding the hearing was sufficient, and that the mistake of the court in directing an impossible period of notice was immaterial, in view of his discretion under the statute.

Department 1. Appeal from superior court, Orange county.

Action by J. M. Asher, as administrator of the estate of Frank Stone, deceased, against Vicente Yorba, Mary A. Flinn, and others. From an interlocutory decree in partition, defendant Mary A. Flinn appeals. Affirmed.

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[1] Rehearing denied August 31, 1899.

Withington & Carter and D. M. Hammack, for appellant Flinn. R. Y. Williams, for respondents Yorba and Botiller. Oscar A. Trippet, for respondent Asher.

GAROUTTE, J. This appeal is by Mary A. Flinn from an interlocutory decree in partition. She claims as the successor in interest of Felipe Ames. To support her claim, she first insists that a certain sale of real estate by the guardian of Felipe Ames, minor, was void; and, second, that a decree of distribution rendered in the administration of the estate of the mother of Felipe Ames was also void.

It is insisted that the guardian of Felipe Ames was appointed without any notice as required by statute, and therefore his appointment was void, and his acts in making the sale were also void for that reason. The statute as to the appointment of guardians, among other matters, provides: "Before making such appointment the court must cause such notice as such court deems reasonable to be given to any person having the care of said minor, and to such relatives of the minor residing in the county as the court may deem proper." Code Civ. Proc. § 1747. Upon the filing of the petition for the appointment of a guardian the judge made an order that he deemed a 10-days notice by posting in three public places in the county would be a reasonable notice. Thereafter the clerk, as appears by his affidavit attached to a copy of the notice, posted a notice of the hearing for December 18th in three public places in the county (naming the places). The notice is dated December 8th, and the affidavit fails to state the particular day when the notice was posted. It is claimed that, under the section of law quoted, notice of the hearing must be personally served by citation upon the relatives of the minor residing in the county. We fail to see that the statute makes such a demand. The statute does demand that the relatives living in the county, if the court deem proper, must be given such notice as the court deems reasonable. If the court deems a notice for 10 days, by posting in three public places, a reasonable notice to them, it would seem within the power of the court to so declare. The statute clearly implies that the kind or character of the notice to be given is a matter for the judge to determine, and that a personal notice is not absolutely demanded by the provision quoted. Burroughs v. De Couts, 70 Cal. 373, 11 Pac. 739, was decided at a time when the statute as to notice was similar to that now found on the statute books. In that case it is said, "The manner in which the notice shall be given to the relatives of the minor residing in the county is left to the judgment and reasonable discretion of the probate judge;" citing Gronfier v. Puymirol, 19 Cal. 629. In the case cited it was decided that a publication in a newspaper for 5 days was a sufficient notice under a statute allowing the judge to fix the manner of the notice. Aside from these facts, upon a careful reading of the statute it will be found that it is a matter of discretion upon the part of the court to give any notice whatever to the relatives residing in the county. The statute says the notice is to be given to those relatives of the minor residing in the county, "as the court may deem proper." If the court has the power to say what particular relatives shall be given notice, it has the power to say that notice by posting shall be given those relatives. It will be borne in mind that in this case the father had the custody of the child, and asked to be appointed guardian of her estate. Necessarily a notice to him was not required. Smith v. Biscailuz, 83 Cal. 353, 21 Pac. 15, and 23 Pac. 314.

Many technical objections are made to the validity of the appointment of the guardian; as, for example, that the affidavit of posting does not show when the notices of the hearing were posted. It must be borne in mind that this appellant is here making a collateral attack upon the judgment decreeing a sale of the minor's land, and, consequently all the rules of law hedging about the validity of such decrees are to be invoked against her. The order of sale in this case is presumed to have been a valid one. It behooves her to show to the contrary. The burden is upon her to show a void sale. The absence of evidence in this record showing the jurisdictional facts may be taken as evidence against her. If the posting of these notices was not performed according to the requirements of the statute, it was for her to show that fact. If the evidence does not show how it was done and when it was done, it will be presumed that it was done in the proper manner and at the proper time. Of course, we are not even intimating that appellant would be allowed to go outside of the record of the proceedings, and by extrinsic evidence attack the validity of the guardian's sale.

It is claimed that the decree of distribution in the estate of Christina Ames, deceased, mother of Felipe Ames, predecessor in interest of this appellant, is void by reason of a want of notice of the hearing at the time the decree was made. Upon January 2, 1890, the final account and petition for distribution in the estate were filed, and the court fixed the 11th day of January as the time for hearing the account and petition, and ordered 10 days' notice of the hearing to be given by posting Section 1634 of the Code of Civil Procedure provides that "notice of the hearing must be given by posting or publication, as the court may direct, and for such time as may be ordered." Here it was impossible to post the notice of the hearing for 10 days, for only 9 days intervened prior to the date set for the hearing. But in view of the fact that the statute does not require 10 days' notice, and that it rests solely with the court to fix the day for hearing and the time of notice to be given, we see nothing here which renders the decree of distribution void. The date set for the hearing must control when an inconsistency is presented such as we see before us, and, if this notice were posted for every day prior to the time of hearing, there was no lack of jurisdiction in the court to make the decree. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(125 Cal. 491)

REED v. SMITH et al. (S. F. 1,388.)

(Supreme Court of California. July 28, 1899.)

GIFT—DELIVERY OF DEED—ADVERSE POSSESSION.

1. When defendant, then an unmarried woman, was living with her father, and keeping house for him, he executed a deed to her conveying the home place. She testified that he handed her the deed, telling her it would secure a home for her if anything should happen to him; that she placed it with other papers, both of her father's and her own, and afterwards it could not be found. After her father's death it was found by a third person in a place containing papers of both father and daughter. *Held*, that such evidence warranted a finding that the deed had been delivered.

2. The fact that a father, after having executed a deed to his daughter of his homestead, continued to occupy the place with her, will not afford ground for a claim that his possession was adverse to the daughter, when he had indicated no intention to repudiate the deed.

Department 2. Appeal from superior court, Mendocino county.

Action by Ezra Reed, executor of Samuel Piercy, deceased, against Elizabeth I. Smith and J. D. Smith. Judgment for defendants, from which, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Henry L. Ford and J. A. Cooper, for appellant. T. L. Carothers, for respondents.

McFARLAND, J. This is an action to quiet title to certain lands described in the complaint. The defendant, Elizabeth, is the daughter of the deceased, Piercy, and the other defendant, J. D. Smith, is her husband. Judgment went for the defendants, from which, and from an order denying the motion for a new trial, the plaintiff appeals.

The court found that in 1887, at which time the decedent was the owner of the premises, he made, executed, and delivered to the defendant Elizabeth a deed conveying to her the property here involved. Such a deed, purporting to convey the property to her, and dated June 21, 1887, was introduced in evidence; and it is not disputed that it was signed by the decedent, or that it was duly acknowledged before a notary public on June 28, 1887. It is denied, however, by appellant, that the deed was ever delivered to Elizabeth; and the main question, and substantially the only one, in the case, is whether the finding of delivery is supported by the evidence. The real question to be determined here is whether or not the evidence of the delivery was so slight as to require us to overturn the finding on the ground that there was no sufficient, material evidence to support it; and we cannot come to that conclusion. Aside from the presumption which arises from the possession of a deed by the grantee, we cannot say that the testimony of the defendant Elizabeth, taken with certain declarations of the decedent, and other matters in evidence, did not warrant the court in finding the fact of delivery. The land in contest contains about 88 acres, and was the "home place," where the decedent and the defendant Elizabeth lived. She did all the housework, and, as one of the witnesses said, did a man's work about the place, taking care of the stock, etc. She testified that her father made the deed to her on July 10, 1887; that he had previously told her that he had made the deed to her; that when he came back (from a certain Fourth of July celebration) "he gave me the deed; that was on the 10th of July, 1887"; that "father handed me the deed, and stated that it would be a home for me if anything happened to him. He never said anything to me contrary until I got to going with Mr. Smith. He did not like Mr. Smith"; and that afterwards the deed became lost and could not be found. She further testified that her papers and those of her father were kept together, and that the deed was first put into a trunk where both of them had papers, and was afterwards put into a valise which belonged to her, but in which her father also had papers, and that afterwards it could not be found. It was discovered after the father's death by the witness Alfred Cyphers in a valise in which were papers of both the defendant and the decedent, and given by the witness to his father, Dan Cyphers, who gave it to the said defendant. Plaintiff's witness, Butler, testifies that the decedent "spoke of a deed that he had made of the place, his home place, to Lizzie," and "said that he had made a deed to Lizzie of the house place because he wanted her to stay there with him"; and plaintiff's witness, Yates, testified: "I heard Mr. Piercy speak of having deeded the land to his daughter, Lizzie. It must have been six years ago." It seems that some time after the father had given the deed to his daughter —probably several years afterwards, although the record throughout is very indefinite as to time—she commenced to receive attentions from the defendant J. D. Smith, who is now her husband, and that then the father, who was much opposed to her marrying Smith, became angry with her and demanded the deed, and would not believe her when she said it could not be found. We cannot say that the above evidence was not sufficient to warrant the court in finding that there had been a delivery. The main objection to its sufficiency is that the deed was kept where there were also some papers of the father; but that was the usual way in which she kept all her papers; and if, as she testified, her father "gave" the deed to her,—"handed" it to her, put her in possession of it,—the manner, as above stated, in which she afterwards kept it is not sufficient to overthrow the finding of delivery. There was little else to contradict defendant's testimony. It is to be observed that the testimony of the plaintiff's witness, Mrs. Butler, is not about anything which Elizabeth said to her, but is composed entirely of what was told her by the decedent. The fact that the defendant did not set up any claim to the property when the will was read is fully explained by her inability at that time to find the deed, and her supposition that without its production it would be useless for her to set up her claim.

Appellant's contention that he showed title by adverse possession during the statutory period of limitation cannot be maintained. Waiving the question whether one claiming title under the statute of limitations must plead it, whether plaintiff or defendant (see Woodward v. Faris, 109 Cal. 12, 41 Pac. 781), there is no evidence that the decedent held the property, claiming it as his own adversely to the defendant, during the statutory period of limitation. After he made the deed to his daughter, the mere fact that he remained on the land, occupying it with her, did not constitute an adverse holding as against her prior to the time when, by act or declaration, he assumed a position hostile to her title; and it nowhere appears in the record when he first assumed that hostile position. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

125 Cal. 569

REDLANDS HOTEL ASS'N v. RICHARDS et al. (L. A. 541.)

(Supreme Court of California. Aug. 11, 1899.)

CHATTEL MORTGAGES — DEFICIENCY JUDGMENT—POWER OF COMMISSIONER APPOINTED TO MAKE SALE.

A deficiency judgment, based on the return of a commissioner appointed to make a sale of mortgaged chattels under a decree of foreclosure that the property was covered by a first mortgage to its full value, is wholly unauthorized, as such commissioner is clothed with executive power only, and cannot judicially determine the value of the property, or that plaintiff is entitled to a deficiency judgment except by a sale of the property.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Redlands Hotel Association against J. R. Richards and others to foreclose a chattel mortgage. A deficiency judgment was entered in favor of plaintiff, and execution issued thereon. From an order quashing the execution and vacating the deficiency judgment, plaintiff appeals. Affirmed.

Frank C. Prescott, for appellant. L. H. Valentine, for respondents.

HAYNES, C. The Redlands Hotel Association, a corporation, brought an action to foreclose a chattel mortgage made by Richards upon certain hotel furniture to secure a promissory note made by him and one David Weh to the plaintiff, and indorsed before delivery by John M. Jones (both of whom were made defendants), and which, as was alleged in the complaint, was subject to a prior mortgage made by Richards to said Jones upon the same furniture. The court found for the plaintiff, and entered judgment directing a sale of said property to pay the amount found due to the plaintiff, and appointed a commissioner to make such sale, but further found and decreed that all of the mortgaged property was subject to a first and prior chattel mortgage given by defendant Richards to defendant Jones. It was also provided that, if the proceeds should not be sufficient to satisfy the amount found due to the plaintiff, the deficiency should be docketed against all the defendants. An order of sale was issued to the commissioner on November 29, 1897, and on December 1st he made a return thereon to the effect that he made an attempt to levy on the property described in the order of sale for the purpose of selling the same, but found that it was subject to a prior mortgage found in the decree to be a prior lien upon the property directed to be sold; that the amount secured by said prior mortgage exceeded the value of the property, and, if sold, would not pay the first chattel mortgage; that he was unable to take possession of the property, for lack of the necessary money to pay the lien of the first mortgage, and therewith returned said writ wholly unsatisfied, and certified the deficiency to be $870.23. And for said sum a deficiency judgment was thereupon docketed against all the defendants. Afterwards an execution was issued upon said deficiency judgment, and levied upon other property of defendant Richards, who thereupon procured an order against the plaintiff to show cause why said deficiency judgment should not be vacated, and said execution quashed. The application was heard upon affidavits setting out the foregoing and other facts, and upon the files and records in said cause, and upon the hearing an order was made quashing the execution and vacating the deficiency judgment, and from that order the plaintiff appeals.

The affidavits, so far as they relate to the value of the mortgaged property, are conflicting; that of defendant Richards alleging upon information and belief that plaintiff's mortgage is not valueless as a security, but that, if a sale had been made, "some money could have been realized from such sale to apply" upon plaintiff's judgment, while the affidavit on behalf of plaintiff is to the effect that the mortgaged property is not worth $2,000 (the amount of the prior mortgage), and would not bring said sum either at private sale or a sale under execution. The commissioner appointed to make the sale of the mortgaged property under the decree of foreclosure was clothed with executive powers only, and could not judicially determine the value of the property, or that the plaintiff was entitled to a deficiency judgment, otherwise than by a sale of the property as directed. Toby v. Railroad Co., 98 Cal. 490, 33 Pac. 550, cited by appellant, is not in point. In that case a receiver was appointed pendente lite, and after trial and order for judgment, upon a showing to the court that the property was deteriorating in value, and large expense in keeping was being incurred, the receiver was ordered by the court to sell the mortgaged vessel as perishable property. It is true it was there said: "The contention of appellant that there can be no deficiency judgment without a sale and formal return by the sheriff seems to me too technical to give effect to the evident intent of the lawmakers in many cases. Suppose, in the present case, the steamship mortgaged had been lost by the perils of the sea, pendente lite; would the plaintiff have been without remedy? Or can it be claimed that the court would have been forced to the useless expedient of foreclosing the mortgage, ordering a sale, and awaiting the return of the sheriff, before a deficiency judgment could be docketed? Would it not rather be said that the court, having obtained jurisdiction of the parties and of the subject-matter, would, under the rules of equity, proceed under the altered circumstances, and, in view of the fact that the security was exhausted, to do justice by the entry of judgment for what would then become the deficiency, viz.

the full amount due?" Under the equitable construction thus given to the statute, it may be that the court, upon proper proof that plaintiff's mortgage was valueless because the property was insufficient to pay and discharge the prior mortgage, could have found that fact, and directed a deficiency or personal judgment against the defendants, without selling the mortgaged property; but it must be apparent from the reasoning of that case that the commissioner had no such power, and that the deficiency judgment based upon his return was wholly unauthorized, and the writ of execution issued thereon must fall with it. What course the plaintiff should have pursued, or what remedy it may have in the present situation, are moot questions, upon which no opinion is expressed. I advise that the order appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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125 Cal. 539

In re BELL'S ESTATE. (S. F. 1,970.)

(Supreme Court of California. Aug. 8, 1899.)

EXECUTOR'S SALE—CONFIRMATION—APPEAL—NOTICE TO VENDEE.

Where a vendee in an executor's sale appears in the proceedings upon the sale, as a party adverse to the interests of the heirs, he is entitled to notice of an appeal by one of the heirs from a decree confirming the sale, as his right to the property is threatened by the appeal.

Department 1. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Thomas Bell, deceased. From a decree confirming a sale by the executor to H. M. A. Miller, Theresa Bell, an heir, appeals. Motion by Miller to dismiss the appeal. Granted.

R. M. T. Soto (Noble Hamilton, of counsel), for appellant. Sidney V. Smith, for respondent.

PER CURIAM. Motion to dismiss the appeal. The superior court for San Francisco made an order in the above-entitled estate confirming a sale by the executor of certain personal property to H. M. A. Miller, and directing the executor to execute to him an assignment and transfer of the interest of the estate therein. From this order Theresa Bell, one of the heirs of the deceased, has appealed, serving the notice of her appeal upon the executor alone. A motion is now made on behalf of Miller to dismiss the appeal for want of the service of this notice upon him. The interest of Miller in the confirmation of the sale was adverse to that of the heirs, and, as this interest is shown in the decree itself, it appears by the record that he was an "adverse party," and the notice of appeal should have been served upon him. By the decree of confirmation he became vested with the right to the property purchased by him, upon the payment of the purchase price, and by such payment he has become entitled to a transfer thereof from the estate of the decedent. As a reversal of the decree would deprive him of this right, it was essential that he should be brought before this court before it could have any jurisdiction to make such reversal, or to entertain the appeal. See Eckstein v. Calderwood, 34 Cal. 658. The motion is granted.

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125 Cal. 613

RIGBY v. LOWE. (L. A. 560.)

(Supreme Court of California. Aug. 8, 1899.)

AGENT—POWER TO TRANSFER CLAIMS FOR COLLECTION.

The power of a local or district manager of a corporation to collect in the ordinary way or by suit, if necessary, in the name of his principal, the demands of the company against debtors in his district, does not include the right to transfer any such demands to a third person, though for the purpose only of qualifying such person to sue on the same.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by W. Rigby, Jr., against T. S. C. Lowe, on a check. From a judgment in favor of defendant, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

W. Rigby and L. R. Hewitt, for appellant. Miller & Brown, for respondent.

BRITT, C. The General Electric Company is a corporation, and had, at the time of the transactions presently to be mentioned, its main office and place of business at Schenectady, in the state of New York. It had also an office at the city of San Francisco, in this state, in charge of one Thomas Addison, who was its "local or district manager" on the Pacific coast. Said corporation sold merchandise of some sort to a certain railroad company at Los Angeles, Cal., of which the defendant, T. S. C. Lowe, was president. The goods thus sold were shipped, and bills for the same were rendered, to Lowe from the said San Francisco office. Thereupon Lowe drew his check for the amount of the bills—$412.16—in favor of said General Electric Company, and (it seems) sent the same to the payee, at Schenectady. Payment of the check was refused for want of funds by the drawee therein named, and, after protest thereof, the Electric Company forwarded it to said Addison at San Francisco for collection. Said company was accustomed to collect through its main office at Schenectady some of its bills for goods sold in California, and others—probably the majority—were collected at the San Francisco office. Addison indorsed the check as follows: "General Electric Company. Thomas Addison, District Manager," and delivered it to Rigby, the plaintiff here, with instructions to sue thereon. Accordingly, plaintiff brought this action to enforce the liability of Lowe as drawer of said check. The court found that the assignment of the check attempted by Addison to plaintiff was in excess of Addison's authority as agent for the electric company, and that plaintiff is not the owner or holder thereof; and on this ground denied a recovery on the check. The complaint in the case contains a second count, setting forth a separate and independent cause of action, on which judgment was for plaintiff, and which is not involved in the appeal.

The foregoing statement comprises the substance of all the evidence at the trial touching the power of Addison to transfer the check to plaintiff, and, consequently, the right of the latter to maintain the action thereon. It does not follow, as matter of law, from the mere circumstance that Addison was the company's "local or district manager," that he possessed the power to assign his principal's chose in action. That designation of his position implies some measure of inferiority to a distant or general authority. Obviously the scope of the powers of such an agent must depend on the character and necessities of the business, and the degree or extent of control over the same committed to him by the principal. See Mechem, Ag. §§ 395, 398. There is here extremely scant evidence of the nature of the business carried on by the General Electric Company. It seems, however, to have consisted in selling tangible chattels of some kind, and we may perhaps conjecture that Addison had the management of such sales in this state; if so, the extent of his implied authority to deal with the proceeds of a sale was "to receive the price." Civ. Code, §§ 2019, 2325. He had also been specially directed to collect on this check. Therefore, viewing the evidence in the light most favorable to plaintiff, it shows no more than that Addison had full power to collect in the ordinary way (by suit, if necessary, in the name of his principal) the demands of the electric company against debtors in his district; but this power did not of itself include the right to transfer any of such demands to a third person, although for the purpose only of qualifying him to sue on the same. That would result in taking the collection from Addison, with whom it was lodged by the company, and placing its control in the hands of a stranger. Dingley v. McDonald (Cal.) 57 Pac. 574. The cases relied on by plaintiff (McKiernan v. Lenzen, 56 Cal. 61; Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913) were instances of an assignment by the general managing agent of a corporation, who was shown expressly or by fair implication to have a control of its affairs virtually co-extensive with its ordinary business. No such authority was proved to reside in Mr. Addison. The judgment and order denying a new trial should be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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125 Cal. 508

FRENCH v. McCARTHY et al. (No. 15,551.)

(Supreme Court of California. July 29, 1899.)

CONTRACTS — PLEADING—AMENDMENT—TENDER—EVIDENCE—RELEASE OF ONE DEFENDANT.

1. Where defendant appears and answers in an action on a contract, the terms of which are set forth in the complaint, and there is a want of conformity between the prayer of the complaint and the facts set forth, the court is authorized to permit an amendment at the trial by inserting a larger sum in the prayer.

2. A failure to make an amendment formally on the record does not necessitate a reversal of the judgment, as the record may be corrected to conform with the order permitting such amendment.

3. Under the allegation of defendant, in an action on a contract, that plaintiff had accepted certain stock in payment of defendant's obligations under the contract sued on, an inquiry into the value of such stock is immaterial.

4. Where certain stock is held by plaintiff as collateral security for a contract, he may maintain an action on such contract without any tender of the stock, and may retain the same until the judgment in his favor is satisfied; nor is it necessary that the judgment should contain a provision that the stock should be surrendered on such satisfaction.

5. Under Civ. Code, § 1543, providing that a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors, the release of one of two defendants from the obligations of a contract for a certain sum, under an agreement providing that the release should not operate in any way to discharge the other, does not release such other defendant from the same obligations.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by John D. French against James P. McCarthy and another on a contract. There was a judgment for plaintiff, and defendant McCarthy appeals. Affirmed.

O'Byrne & Peixotto, for appellant. Chickering, Thomas & Gregory, for respondent.

HARRISON, J. The parties to this appeal entered into a contract December 23, 1890, by which the respondent agreed to purchase from the appellant an undivided twentieth of a tract of land in San Francisco for the sum of $20,000, of which he paid $5,000 to the appellant. The appellant was to retain the title to the land and make sales thereof, and the other three-fourths of the purchase price was to be paid out of the proceeds of these sales. On the 30th of December the defendants herein—the appellant and one Joost—made a contract with the respondent, by which, after reciting the aforesaid agreement, and that they "are desirous of obtaining an interest in said contract and the benefits to accrue therefrom," they agreed with him that if he should not, within one year from January 10, 1891, receive back the money paid by him under said contract, they would pay or cause to be paid to him all sums of money that he had already paid, together with the sum of $5,000 in addition thereto. In consideration thereof the plaintiff agreed that the defendants should be entitled to receive all moneys to which he might be entitled by virtue of said contract of December 23d, above the sum of $5,000, that he had already paid. It may be inferred from the record, although there is no direct evidence of that fact, that the land involved in the agreement was conveyed to the Sunnyside Land Company; and on or about January 27, 1891, the respondent, being about to convey his interest in the contract of December 23d to that company, at the request of the defendants, and to receive certain shares of stock in lieu of the contract, or of his interest in the land, the parties to the agreement of December 30th made a supplemental agreement providing that the said transfer should not affect their obligations thereunder, but that the stock should take the place of the contract, and thereupon 100 shares of the capital stock of the company were issued to the plaintiff. The plaintiff, not having received back any of the money that he had paid under the contract of December 23d, brought the present action March 17, 1892, upon the contract of December 30th, to recover from the defendants the amount therein agreed by them to be paid. The appellant, in his answer thereto, alleged that he had fulfilled all the obligations and conditions of the contract of December 23d to be performed by him, and that the plaintiff had received the above-named 100 shares of capital stock for the amount paid by him thereunder, and had accepted said stock in "payment" of all obligations on the part of the defendants, or by virtue of the agreement of December 30th. After the action had been commenced, the plaintiff, under an agreement made by him with Joost, received the sum of $4,500, and released him from the obligations of the agreement of December 30th, but provided in the release that it should not operate or be construed to release or in any way discharge the appellant. At the trial of the cause the court, upon the request of the plaintiff, granted him leave to amend his complaint by inserting therein the sum of $10,000, in the place of $5,000, in the prayer for relief. The trial proceeded without any formal amendment having been made, and at its close the court rendered judgment in favor of the plaintiff and against the appellant for the sum of $5,500.

The instrument of December 30th was an agreement on the part of the defendants to purchase from the plaintiff his interest in the contract of December 23d, by which they agreed to pay him the sum of $5,000, and also whatever portion of the $5,000 which he had paid to the appellant should not be received back by him prior to January 10, 1892. It was evidently in the contemplation of the parties to each of the contracts that large profits were to be received from the sales of the lands described therein, and the defendants agreed to make this payment to the plaintiff in consideration of his agreement therein that they should be entitled to all of these profits. The provision in the agreement for the payment of $5,000 in addition to the amount paid by the plaintiff was in no respect a penalty or liquidated damages. No breach of obligation, or damage sustained thereby, was contemplated or provided for, but the entire transaction was an original contract for the purchase of the plaintiff's interest in the agreement of December 23d, for which he was to receive $10,000,—$5,000 from the defendants in any event, and, in addition thereto, such portion of the $5,000 which he had already paid as should not be returned to him under the terms of his original purchase.

The court did not err in permitting the amendment to the complaint. The action is upon a contract, and its terms are set forth in the complaint. The appellant had appeared and answered, and, if there was any inconsistency or want of conformity between the prayer of the complaint and the facts set forth therein, the court was authorized to permit the amendment. The failure to make it formally upon the record does not necessitate a reversal of the judgment. The record can still be corrected to conform with the order permitting the amendment. Alameda Co. v. Crocker (Cal.) 57 Pac. 766.

There was no issue before the court which authorized an inquiry into the value of the stock of the Sunnyside Land Company. Under the allegation of the appellant that the plaintiff had accepted this stock in "payment" of his obligations under the agreement of December 30th, such inquiry was immaterial. The finding of the court against this defense left the plaintiff's relation to the stock to be determined according to the terms under which he received it. The agreement of January, 1891, that the stock should take the place of the contract of December 23d, was equivalent to an agreement by the defendants to purchase the plaintiff's right to the stock that the Sunnyside Land Company might issue. The record does not show when or under what conditions the plaintiff received the stock; but if, as claimed by the appellant, it is held by the plaintiff as collateral security for the agreement of December 30th, he is entitled to maintain the action without any tender of the stock, and may retain the stock until the judgment in his favor is satisfied. Bank v. Hill, 59 Cal. 107. Nor is it necessary that the judgment should contain a provision that the stock should be surrendered upon such satisfaction. See Allin v. Williams, 97 Cal. 403, 32 Pac. 441.

The release of Joost did not have the effect to release the defendant from the same obligation. Civ. Code, § 1543; Insurance Co. v. Potter, 63 Cal. 157.

The judgment and order are affirmed, with directions to the superior court to cause the complaint to be amended in accordance with its order made at the trial, and as of the date when said order was made.

We concur: GAROUTTE, J.; VAN DYKE, J.

(129 Cal. 497)

PEOPLE v. VERENESENECKOCKOCKHOFF. (Cr. 453.)

(Supreme Court of California. Aug. 1, 1899.)

MURDER—INSTRUCTION ON FORCE OF EVIDENCE—UNINTELLIGIBLE INSTRUCTION—REVIEW OF INSTRUCTION—MOTIVE—RELATIVE VALUE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE.

1. An instruction that it is against all experience and reason to suppose that a man will imperil his own life, and inflict on another a brutal crime, without a motive, and in the mere wantonness of depravity, and that the question of motive is of great importance, when the question is as to whether defendant committed the crime, was properly refused, as involving a question as to the probative force of certain evidence.

2. An unintelligible instruction is properly refused.

3. An instruction as to the value and effect of the evidence can be reviewed, though the evidence has not been brought up by a bill of exceptions, as the court will presume that there was evidence of some character to which the instruction would apply; and where the instruction would be erroneous, as applied to all possible evidence to which it would be applicable, error has been shown.

4. In a prosecution for murder, an instruction discussing the importance of the proof of motive, and stating that it may be in many cases impossible to show a motive, for the reason that we cannot fathom the mind of the accused, and, though the prosecution might not be able to prove it, defendant may have had such desire of vengeance or passion to be gratified, is improper, being a charge with respect to matters of fact, and in violation of Const. art. 6, § 19, providing that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

5. An instruction as to the relative value of direct and circumstantial evidence, stating that circumstantial evidence had this great advantage: that various circumstances from various sources are not likely to be fabricated, and that this species of evidence is not entitled to an inferior degree of credit, is improper, as the credit to be given to the evidence is to be determined by the jury.

McFarland and Garoutte, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

One Vereneseneckockockhoff was convicted of murder in the first degree, and appeals. Reversed.

Wm. H. Schooler and R. L. Simpson, for appellant. Atty. Gen. Ford, for the People.

TEMPLE, J. The defendant was convicted of murder in the first degree, and judgment of death was pronounced upon him. He appeals from the judgment, without a bill of exceptions. The rulings complained of all relate to giving or refusing to give instructions.

The defendant asked the court to instruct the jury as to the probative force to be found in the fact that, as was claimed, there was no apparent motive for the commission of the offense. The court was asked to say that "it is against all experience and reason to suppose that a man will imperil his own life, and inflict upon another a brutal crime, without a motive, and in the mere wantonness of depravity," and, further, when the question is as to whether defendant committed the crime, it is of great importance. The instruction was properly refused. It involved no rule of law, but only a question as to the probative force of certain evidence.

Instruction 3 asked by the defendant was properly refused, for the reason given. It was unintelligible. I think counsel meant to ask an instruction to the effect that, if the circumstances were consistent with some theory under which defendant could be innocent, such theory should be preferred to an hypothesis equally consistent with the circumstances proven, but by which guilt would be established. But, it is added, "unless the hypothesis of which the construction of guilt is based upon is proven beyond all reasonable doubt." Waiving the imperfect expression, I do not understand this in connection with what precedes it, and that leads me to doubt whether I have understood any part of it. I think it may be assumed that the jury could not have received enlightenment from it.

But, while the court correctly declined to charge the jury at the request of the defendant as to the value and effect of the evidence, it proceeded to do the same thing of its own motion. The attorney general suggests that the instruction cannot be reviewed, because the evidence has not been brought up, and we cannot know that it could have been injurious. But, even in the absence of a bill of exceptions, we may presume that there was evidence of some character to which the instruction would apply; and where the giving of such instruction would be erroneous, as applied to all possible evidence to which it would be applicable, then error has been made out. Here the court tells the jury that there are two main facts to be made out by the prosecution: First, that a crime has been committed; and, second, that the defendant committed it, —and then proceeds to discuss the importance of the proof of motive. It is recognized that motive is not the ultimate fact to be proven, but the proof or disproof of any motive or inducement to commit the crime is merely evidentiary in its character, but is an important consideration, especially in a case depending upon circumstantial evidence. The only matter of law in all this is that the motive is not the ultimate fact to be proven, and, of course, it would follow from this that, if the commission of the crime by the defendant be sufficiently proven, it does not matter whether there appears to have been a motive or not.

This is certainly true in this class of cases. The presence or absence of motive is matter of corroboration, or, rather, it makes other evidence more or less persuasive. It increases or diminishes the presumption of innocence, and in this case it could have had no other function. And this is recognized in the charge, which nevertheless proceeds to tell the jury how difficult it is to prove motive, and states that: "It may be in many cases impossible to show or establish a motive, for the reason that we cannot fathom the mind of the accused on trial, and ascertain if there is not a hidden desire of vengeance or some passion to be gratified. Besides, there is no rule of law which determines what is or what is not an adequate motive, even if it were necessary to show one." Applying this to the case, the jury were told that, although the prosecution might not be able to prove it, the defendant may have had a "hidden desire of vengeance or some passion to be gratified." This was not the statement of a rule of law, but an argument against the defendant on the facts. And the court proceeded at some length with this argument to the jury, claiming that it is often impossible for the prosecution to prove the motive, though one existed. Now, the court stated to the jury that one issue submitted to them was whether the criminal act was committed by the defendant, and it is assumed that the question of motive bears upon this. The defense doubtless argued that, in the absence of direct proof that the crime was committed by the defendant, the absence of any apparent or imaginable inducement to the crime was a strong circumstance in his favor. The entire charge on this subject had the effect, and no doubt was designed to have the effect, to diminish the force of this argument. Certainly such was its natural effect, and if, as the charge correctly assumed, it is entirely evidentiary,—a circumstance affecting the proof of the ultimate fact, that defendant committed the act,—then it must be held to be a charge with respect to matters of fact, and a violation of section 19, art. 6, of the constitution. In giving the charge the learned judge stated to the jury that the language of this part of the charge had been approved by the supreme court. The case alluded to is the case of People v. Durrant, 116 Cal. 179, 48 Pac. 75, where the charge was given. In that case it is stated in the opinion of the court that the appellant did not make serious complaint that any of the instructions were erroneous in point of law, but only that in some instances the propositions which he sought to have laid before the jury were not adequately presented. An examination of the record in the Durrant Case shows that the point was not made nor argued that by giving the instructions the court invaded the province of the jury. As here, counsel sought to have the court charge in its favor on this point, and did not complain that it exceeded its power. The point would not have been noticed here but for the necessity of reversing the case for the giving of another instruction where an objection is made, and also to decide as soon as possible that such instructions should not be given. Section 19, art. 6, of the constitution, reads as follows: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." What are matters of fact referred to in this section? Undoubtedly reference is made to the familiar proposition that it is the province of the jury to determine all matters of fact, and for the court to declare the law. In this case the learned judge, at some length, defined the respective functions of the court and jury. The judge said: "It is my duty to state to you the law applicable to the case, and it is your duty, unaided by any suggestion from me, to pass upon all questions of fact. Neither the judge nor jury may trespass upon the province of the other. Our provinces are entirely distinct and separate. You should receive the law as I state it to be, notwithstanding you should firmly believe I am wrong, and the law is, or should be, otherwise. * * * With the questions of fact, the weight of the evidence, the credit you should give to any witness sworn in the case, the court has nothing to do. These are matters entirely within your province, and which you, as jurors, must determine for yourselves." This is correct and well expressed. This distinction between the respective functions of the court and jury is an old one, and is plainly recognized in the constitutional provision above quoted. It was and is the practice in the English courts and in the federal courts, and also in many of the states, for the judges to charge the jury as to matters of fact; but it has always been understood that such charge was only in aid of the jury, but that they were not bound by it. The right of the court, however, to declare the law, has always been deemed absolute. A general verdict consists of both law and fact. The jury were bound to find the facts from the evidence which was submitted to them under the supervision of the court. Its competency and relevancy were for the court. But, while formerly the court could aid the jury by discussing the evidence,—that is, could consider it in its charge as to it,—the function of the jury was supreme. The law the court must determine and declare, and the jury was bound absolutely by this determination. The verdict is the application of the law declared by the court to the facts so found. In the constitutional provision this distinction is recognized. The court must not "charge" with respect to matters of fact, but may "declare" the law. If the negative word had been omitted, the use of the different terms would have been significant, and it would have been said that the charge was not as authoritative as the declaration. This adds much force to the inhibition. The court must not even "charge"—that is, advise—with respect to matters of fact. And this is further emphasized when the constitution proceeds to state affirmatively what the court can do in respect to the evidence. It may state the testimony. "Expressio unius est exclusio alterius." The prohibition is plainly co-extensive with the exclusive province of the jury. If there are rules of law to control and guide, then these may be declared authoritatively. Beyond this the court cannot go without violating this plain inhibition. The court cannot argue to the jury the relevant importance of evidence, except as that is settled by some rule of law. For instance, it is for the court to determine the admissibility of evidence, and evidence may be admitted for a limited purpose, and the jury may be limited in their consideration of it. Certain rules have become rules of law for the consideration of circumstantial evidence, and such rules were properly declared by the court in this case. Except so far as may be indicated by these rules, there is no law or legal principle that I am aware of which determines the relative probative force of direct and circumstantial evidence.

These maxims or rules are all founded upon the fact that circumstantial differs from direct evidence in this: that circumstantial evidence tends to prove facts not in issue, but from which the fact in issue may be inferred. The special rules lay down the conditions which will warrant the inference. But the law declares nothing as to the relative probative force. Both are admitted, and the jury are required to render their verdict in accordance with their convictions. We all know that testimony may be unreliable, whether addressed directly to the fact in issue or to proof of circumstances, and that in some cases positive evidence has been overcome by circumstantial evidence. The case of an alibi may be of that character. In such cases it is often simply a question as to the veracity of two sets of witnesses. If both kinds are in the same case, and they conflict, it is wholly for the jury to determine which is most convincing. In fact, I think circumstantial evidence is more often resorted to by the defense than by the people. Besides the case of an alibi, circumstances are often shown by the defense tending to make probable the innocence of the accused, or which tend to raise doubts as to truthfulness of witnesses for the prosecution; but I have never known the court to deliver a long address to the jury in the interest of such defense, to disabuse the minds of the jury of supposed prejudices against such evidence. Now, why did the court in this case deliver a long charge to the jury as to the relative value of direct and circumstantial evidence? The reason is plainly stated. No one saw the act of killing, and the proof that defendant is the guilty party is entirely circumstantial. The court enlarged upon the necessity of a resort to such evidence in order to punish crime and to protect the community, and said: "Providence, the laws of nature, and the relation of things are so linked and combined together that a medium of proof is often furnished leading to conclusions as strong as those arising from direct testimony." And again: "Circumstantial evidence has this great advantage: that various circumstances from various sources are not likely to be fabricated." This is a possible case. Was it so in this case? And, as instructions should be pertinent to the evidence, was it telling the jury that in this case there were various circumstances against the defendant, derived from various sources, which were not likely to be fabricated? That circumstances are not likely to be fabricated may be the opinion of the learned judge, and it may be sound philosophy. It is not, however, a maxim of law, although it has often been said by learned judges, and, in my opinion, it is not generally true. The fact that the circumstances may be exceedingly various and come from unexpected sources, and are generally in themselves trifling affairs that would not impress the minds of observers, makes them easy of fabrication, and renders them difficult to disprove. A community excited by a great and mysterious crime is naturally eager to see the perpetrator punished. Many of its members are soon found with theories, and anxious to show their ability as detectives. The circumstances, when numerous, never constitute a chain in which each is a necessary link, but many may be disbelieved and yet the theory persist. In fact generally there is no hypothesis or theory save that the defendant is guilty; and the case is an assemblage of suspicious circumstances, which may all be true, and yet the defendant be innocent, but which prevail by mere number. The court told the jury that this species of evidence was not entitled to an inferior degree of credit, and to so convince the jury was evidently the purpose of this long charge. Whether it is entitled to such credit or not is a question in each case to be determined by the jury from the evidence. This charge was plainly an argument for the prosecution.

Instructions have undoubtedly been given, and have to some extent been sanctioned by this court, where the question of the limitation upon the right of the judge to charge the jury as to questions of fact was not raised. The case most often referred to as sanctioning discussions of this kind is People v. Cronin, 34 Cal. 191. A very able opinion was rendered by Chief Justice Sanderson, who entirely disregarded this provision of the constitution. Probably it was not called to his attention. He expressed the opinion that, in reply to an argument of the defense as to the alleged danger of acting upon circumstantial evidence, "it was competent for the court to caution them against the alleged dangerous tendency of circumstantial evidence claimed by counsel to be demonstrated by these cases." That is, he could answer the argument or counsel for the defense as to the weight and value of evidence, and he gives as authority for the proposition the case of Tom Jones, 2 Wheeler, Cr. Cas. 461, in the circuit court of the United States, where there is no such restriction, showing plainly that the learned justice did not have this restriction in mind. He proceeds expressly to approve of the action of the judge in replying to the persistent attack of counsel for the defense on this class of evidence, directly and expressly declaring that the court may and should charge the jury as to facts, and going so far as to say that the court could properly single out a particular witness and charge the jury as to his credibility. But even Judge Sanderson did not say that as a general rule circumstantial evidence was as satisfactory proof of a fact as positive evidence. He said, on the other hand, that in the nature of things it was not, but that in some cases it was as satisfactory and would produce the same degree of conviction, and might in particular instances be superior. No one ever disputed this last proposition. A case may be completely made out by circumstantial evidence, and positive and direct testimony may be false. But is it proper, under our constitution, for the judge, in his charge to the jury, to answer the argument of counsel for the defense on the facts? Such it admittedly was in the Cronin Case, which is the father of the whole errant brood. The constitutional inhibition is too plain to admit of discussion, and such a charge is necessarily a charge with respect to matters of fact, if the domain of fact was correctly defined by the learned judge in his charge. That distinction is older than the courts of the United States, and, so far as I am aware, has never been criticised. There are a few other cases in which the Cronin Case has been blindly followed, all ignoring this constitutional inhibition. The constitution is too plain to be disregarded on such authority. The cases do not attempt to construe the inhibition or to reconcile it with such instructions, and I think the attempt would necessarily have failed, had it been made. The judgment is reversed, and a new trial ordered.

We concur: BEATTY, C. J.; HARRISON, J.; HENSHAW, J.

McFARLAND, J., dissented.

GAROUTTE, J. (dissenting). In the past no member of this court has been more zealous than myself in guarding the right of defendants which is granted to them under that provision of the constitution which forbids trial judges from charging jurors upon the facts. See People v. Gordon, 88 Cal. 422, 26 Pac. 502; People v. Choynski, 95 Cal. 640, 30 Pac. 791; People v. Hertz, 105 Cal. 660, 39 Pac. 32. And in the future, whenever error of that kind presents itself in this court, it shall be promptly stamped with my condemnation. But in this case, after careful examination of the record, I fail to see any material error, and must dissent from the conclusion declared by a majority of the court.

As to the instruction upon motive, I find but a single objection to it, and that objection is not one as to the law there stated. My objection is that it is too long. There is too much of it. It is too minute. But this is simply a matter of taste and expediency, and furnishes no ground for a new trial of the cause. The instruction presents no ground for a second trial for many reasons: First, defendant's counsel do not attack it in their brief as being unsound; secondly, it was given in the Durrant Case, and upon appeal affirmed by this court; and, thirdly, upon careful examination, I find no valid legal objection to it.

As to the instruction upon circumstantial evidence, I see nothing therein furnishing legal justification for a new trial of this case. One or two isolated excerpts are taken from the instruction, quoted in the opinion of the court, and declared objectionable. Such a test is hardly a fair one. The instructions should be taken together, and, when so taken and construed, it seems impossible that the jury could have been misguided by them. I deem the charge fair as an instruction of law to the jury, and find in it nothing violative of that constitutional inhibition to which reference has already been made, and which courts should strictly enforce.

In conclusion, I can only reiterate my views of these and similar questions, as expressed in People v. Dole, 122 Cal. 500, 55 Pac. 587: "While the defendant has the constitutional right to appeal, he must show upon his appeal some substantial violation of the law in the trial of his case. Some material right must be taken from him, or his conviction must stand. If judgments of conviction in hotly-contested, complicated criminal trials are to be set aside for every technical violation of the law occurring during the progress of those trials, it might almost be said that no conviction would stand the test of appeal. If, in the multitude of rulings upon the admission and rejection of evidence, and upon the procedure of the trial in general, a judge does not make some mistake, it would be a wonder indeed. Only a few men possess that amount of legal wisdom. The constitutional right of appeal granted a defendant does not contemplate that this court should find grounds for a new trial in any and every mistake the trial court may make." I think the judgment should be affirmed.

125 Cal. 544

TIBBET v. SUE et al. (L. A. 498.)

(Supreme Court of California. Aug. 10, 1899.)

APPEAL—FINDINGS OF COURT—STATEMENT MADE IN PRESENCE OF DEFENDANT—CONFIDENTIAL COMMUNICATION—NEW TRIAL—DISCRETION OF COURT.

1. It is the peculiar province of the lower court to pass on the credibility of testimony, and, where findings are based on substantial testimony, the court on appeal has no power to disturb them.

2. Where the issue in an action on a note is as to the execution of, and consideration for, the note, and it is shown that defendant took the money and walked away without saying anything, a statement made at the time by plaintiff, and in the presence of defendant, that he was loaning defendant the money which he was counting out to him, is admissible, under Code Civ. Proc. § 1870, which provides that evidence may be given of an act or declaration of another in the presence and within the observation of a party, and the conduct of the party in relation thereto.

3. Where objection is made to testimony on certain grounds, other grounds cannot be considered on appeal.

4. Where defendant on cross-examination testifies that he did not tell his attorney at the time he was sued of certain facts which he had testified to on direct examination, a question asking when he told his attorney is not objectionable as asking for a confidential communication.

5. A motion for a new trial on the ground of newly-discovered evidence rests in the discretion of the trial court, and, unless there has been a clear abuse of discretion, the rulings of the court will not be interfered with.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by George A. Tibbet against Tom Sue and Ham Gee on a note. From a judgment in favor of plaintiff, and an order denying a motion for new trial, defendant Tom Sue appeals. Affirmed.

Wm. J. Hunsaker, for appellant. R. A. Ling, J. E. Patten, and McKinley & Graff, for respondent.

COOPER, C. Action to recover on a promissory note for $500 and accrued interest. Judgment for plaintiff. Defendant Tom Sue appeals from the judgment, and from an order denying his motion for a new trial. The appeal comes here on the judgment roll and a bill of exceptions. Findings were filed by the court below, and it is conceded that the judgment is the legal conclusion from the facts found.

It is claimed that the evidence is insufficient to justify the decision of the court. The argument in appellant's brief is mainly directed to the improbability of the truth of the testimony of the witnesses for respondent. As the witnesses appeared before the learned judge of the court below, where he could view them as the words fell from their lips, it was his peculiar province to pass upon their credibility; and after he has found the facts as stated by them, and indorsed their testimony as true, we have no power to disturb his findings, when based upon substantial testimony.

The real issue between respondent and appellant was as to the execution of, and consideration for, the promissory note described in the complaint. One Bustillos was called as a witness by plaintiff, and testified that he was present in the early part of January, 1896, in the restaurant of one Dock, in Bakersfield, and saw plaintiff come in, and also saw two Chinamen there; that plaintiff had some money, and was counting it out; that one Mefford, who was in company with witness, asked plaintiff what he was doing with the money. The witness was allowed, under the appellant's objection, to testify that the plaintiff said, "I am loaning these Chinamen this money." Appellant's counsel says, "This action of the court constitutes the principal error of law relied upon for a reversal of the judgment." The evidence was objected to upon the ground that it was hearsay and incompetent. After the testimony was in, a motion was made to strike it out, but no grounds of said motion were stated. It is now urged that the ruling was reversible error, for the reasons that the conversation was not with appellant, that it does not appear that he understood what was being said, and that there is no evidence of his conduct in regard to the statement. It is shown by the evidence that appellant was present, that he can speak English imperfectly, and that he took the money and walked away. The objection to this testimony was made solely upon the grounds that it was hearsay and incompetent, and no other grounds can now be considered. We think the court did not err in admitting the testimony. The statement was made in the presence and hearing of defendant, and his silence and taking the money and walking away with it was evidence sufficient as to his conduct. Our Code (Code Civ. Proc. § 1870) provides that, among other things, evidence may be given at the trial of "an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." It is said in 1 Rice, Ev. p. 468: "Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have spoken, the presumption of acquiescence arises. In this sense, admissions may be implied from conduct." In Corser v. Paul, 41 N. H. 24, a note purporting to be signed by a party was shown to him, with a request to pay it. It was held that his silence was competent evidence as to the genuineness of his signature. The court, in the opinion, said: "No principle is better settled than that a man's silence upon an occasion where he is at liberty to speak, and the circumstances naturally calling upon him to do so, may be properly considered by the jury as tacit admissions of the statements made in his presence, or of the claims there made upon him." In People v. Young, 108 Cal. 13, 41 Pac. 281, it appeared that the defendant, after his arrest, was brought into the presence of the wounded man, and a conversation then occurred between the wounded man and a third party as to the ownership of a certain purse found upon the defendant at the time of his arrest. The conversation was not addressed to defendant, but he was present at the time, and in a position to hear all that occurred, and neither affirmed nor denied the statement of the deceased to the effect that the purse was his property. It was held that his silence under the circumstances was a fact to which the jury were entitled. So, in People v. Mallon, 103 Cal. 514, 37 Pac. 512, two witnesses were allowed to testify to statements made by one Foran in the presence of defendant. It did not appear that the conversation was addressed to defendant, or that he made any reply thereto; but this court held the evidence competent, and in the opinion said: "It is established law that, while a statement made in the presence of the accused is not admissible as being itself evidence of any fact narrated in such statement, it is admissible, primarily, for the purpose of showing that the accused acquiesced in the statement, either by express assent, or by silence, or by such conduct as fairly implied assent." The ruling appears to be within the rule as laid down in the cases cited, and we are not prepared to say that it would be reversible error, even if not within the rule, in view of the other testimony in the case. The declaration of itself was of little importance; and, particularly as the case was being tried before the court without a jury, we cannot see that a different result would have been at all probable if the evidence had been excluded.

The appellant was a witness in his own behalf, and it did not appear, by his testimony or otherwise, that he did not understand the English language. While the appellant was on the stand as a witness, he testified that about the 1st of April, 1896, he was keeping a dry-goods store in Los Angeles; that at that time, while he was eating supper, Bustillos came into appellant's place of business with a letter written in Chinese, and with the sum of $5, and presented the note described in the complaint to appellant, and asked him to sign it, as a receipt for the money; that he thought Bustillos was the agent of Wells, Fargo & Co., and the note a receipt for the $5; and that under this belief he signed it. In cross-examination appellant testified that he never told of the fact of signing the receipt and receiving the $5 to any one until he was sued, and that he did not tell his attorney about it at that time because he did not know what the suit was for. Then he was asked the following question: "Q. When did you tell your attorney?" This question was objected to by appellant's counsel on the ground that it involved a confidential communication. The objection was overruled, and the ruling is now claimed to be error. The appellant, in answer to the question, said that, when he went to employ his lawyer, he imagined the cause, and told his lawyer so. The question related to the time when appellant told his attorney certain facts which he had fully testified to in his examination in his own behalf. He had said of his own volition that he did not tell his attorney at the time he was sued; thus, in effect, stating that he had told his attorney. The question, therefore, as to the time he so told him, was not asking for a confidential communication. But, aside from this, the fact that appellant told his attorney, in preparing his defense, of the facts set up in his answer, and of the facts testified to by him, could not in any degree have injured him. It was to allow appellant to corroborate his evidence upon the trial by showing that he had before stated the same thing to his attorney. If appellant had offered to prove such statement to his attorney, and it had been objected to by plaintiff, no doubt the objection would have been sustained; but as he was allowed to state the declaration to his attorney in reply to plaintiff's question, and as the declaration was in his own favor, and in corroboration of his evidence upon the stand, it could not possibly have injured him.

One of the grounds of appellant's motion for a new trial was newly-discovered evidence, but he has not seen fit to argue the point in his brief. The record shows that appellant, in support of his motion upon said ground, read some 9 affidavits, and the respondent, in opposition thereto, read some 19. The greater portion of the affidavits was directed to the credibility of the witnesses for plaintiff. Motions of this kind rest much in the discretion of the trial court. The moving party must make a clear case showing due diligence on his part, and the truth and materiality of such evidence. Newly-discovered evidence after defeat is looked upon with suspicion, and this court is always reluctant to interfere with the ruling of the trial court on a motion for a new trial on that ground, and will not do so unless there has been a clear abuse of discretion. Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342. There was no such abuse of discretion in this case. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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125 Cal. 549

LASAR et al. v. JOHNSON et al. (L. A. 497.)

(Supreme Court of California. Aug. 10, 1899.)

SUBSCRIPTIONS—CONSIDERATION — NONJOINDER OF PARTIES—DEMURRER—MEANING OF "ENTERTAINMENT."

1. Where defendants in an action on a subscription to a social and benevolent organization requested the subscription committee to re-

gard their subscription as cash, and to go on and make arrangements, and obligations were incurred by the committee on the faith of such request, there was a sufficient consideration to make defendants liable on their subscription, though such request was not made at the time of the subscription.

2. Where defendants in an action on a subscription to a charitable purpose, being proprietors of a hotel, agreed with the subscription committee to pay the sum subscribed, on condition that a ball or banquet should be given at their hotel, and a ball was given pursuant to this agreement, there was a good consideration for the promise to pay the sum subscribed.

3. Where a complaint in an action on a subscription to a charitable purpose shows that plaintiffs are trustees of an express trust, and states for whom they are trustees, it is sufficient, and the cestuis que trustent need not be joined.

4. Where a defect of parties appears on the face of the complaint, the objection should be taken by demurrer.

5. The word "entertainment," as used in a subscription for the purpose of entertaining a large number of strangers, constituting an organized body, by the residents and business men of a city, is not synonymous with "board," and limited to the ordinary necessaries of life.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by Isaac Lasar and others against C. O. Johnson and others on a subscription. From a judgment in favor of plaintiffs, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Wilcoxon & Bouldin, for appellants. Graves & Graves and F. A. Dorn, for respondents.

HAYNES, C. The complaint alleges that plaintiffs constitute the subscription committee of Los Osos Parlor, No. 61, of the Native Sons of the Golden West, a social and benevolent organization in the city of San Luis Obispo, who, for the purpose of entertaining the grand parlor of said organization at their meeting in said city from April 26, 1896, to and including May 1, 1896, procured the signature of the defendants to a subscription paper, of which the following is a copy: "San Luis Obispo, Cal., January 1, 1896. We, the undersigned citizens and business men of the city of San Luis Obispo, do hereby agree to pay the amounts set opposite our respective names to the subscription committee of Los Osos Parlor, No. 61, N. S. G. W., on or before the fifteenth day of March, 1896, at the city of San Luis Obispo. The money so paid to be used in entertaining delegates to the grand parlor of the N. S. G. W. during their stay in the city of San Luis Obispo. Jack & Johnson, Ramona Hotel, $500.00." The complaint further alleged that "defendants signed, executed, and delivered to plaintiffs said instrument upon the express condition, and the consideration therefor, and the promise contained therein, was that said committee should entertain the delegates to the grand parlor of the N. S. G. W. during their visit and stay in the city of San Luis Obispo with social pleasures and entertainment, and that a ball or banquet should be tendered and given said delegates at defendants' hotel"; that said grand parlor was convened and held during the time stated; that the delegates were entertained by social pleasures and amusements; that a ball was given at defendants' hotel; that, relying upon the promise of defendants, plaintiffs expended large amounts of money, and incurred liabilities which remain unsatisfied, and which would not have been incurred but for such promise of defendants to pay said subscription. The jury returned a verdict for the plaintiffs, and defendants appeal from the judgment entered thereon, and from an order denying their motion for a new trial. The defense to the action will sufficiently appear from the discussion of the points made by defendants for reversal.

The statement on motion for a new trial specifies as errors several rulings admitting and excluding evidence, and giving and refusing to give certain instructions, and also specifies several particulars in which it is claimed the evidence is insufficient to justify the verdict. Appellants, however, do not discuss, nor even allude directly to, any of these specifications, but discuss the broad and material questions involved in the case; and to these we will direct our attention.

It is contended that the performance of gratuitous promises depends wholly upon the good will of the promisors, and will not be enforced at law, unless the promisee has accepted and acted upon the same by incurring some obligation or expending money on the strength of it; citing Cottage Street Church v. Kendall, 121 Mass. 528. Accepting this as a correct statement of the law as applied to the facts of that case, no principle there stated is violated by the verdict and judgment in this case. By the terms of the subscription, it was payable March 15th, while the grand parlor was not to be held until April 26th. Mr. Lasar testified, in substance, that before the meeting of the parlor the committee requested payment of defendants' said subscription; that defendants said they could not pay it at that time, but would pay on April 24th, that it was as good as cash, and to go ahead and make all their arrangements; that in making their preparations they took the amount of the subscriptions in the aggregate, and considered said subscription as cash, and incurred obligations and expenses on the faith of it; that the amount of subscriptions collected was $1,914.60, and the total amount expended for the entertainment was $2,507.98, leaving a deficiency of $593.38; and that, after the grand parlor adjourned, defendants refused to pay their subscription. The request of the defendants to the committee to regard their subscription as cash, and to go on and make all their arrangements, and the action of the committee in incurring obligations on the faith of this request, was a sufficient consideration to fix the liability of the defendants upon their subscription, and it is not necessary that such request should have been made at the time of the subscription. In Presbyterian Church v. Cooper, 102 N. Y. 524, 20 N. E. 354, it was said: "There is, we suppose, no doubt that a subscription, invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited [Barnes v. Prine, 12 N. Y. 18, and Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500], as we understand them, were supported on this principle. There was, as held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request of the promisor." Another fact showing a consideration for the promise to pay the amount sued for appears in the evidence. The defendants were the proprietors of a large hotel. At the time the subscription was made, the committee was considering the matter of giving a ball or banquet, or both, to the delegates to the grand parlor; and, defendants desiring it, it was agreed between the committee and the defendants at the time the subscription was made, or immediately thereafter, that, if the ball and banquet were given, one of them should be given at defendants' hotel, and, in case neither was given at that hotel, defendants' subscription should be reduced to $250. This agreement converted the subscription, which upon its face was originally one to a charitable purpose simply, into a contract to pay to the committee the sum so subscribed, upon condition that a ball or banquet should be given to the grand parlor at the defendants' hotel, and a ball was given at said hotel pursuant to this agreement. This was a good consideration for the promise to pay the full sum sued for, and it is therefore not necessary to consider whether the defendants' liability should be reduced to its proportion of the expense incurred in entertaining the grand parlor measured by the entire amount subscribed; the amount subscribed exceeding the expenditures by the sum of $241.52, but the amount of subscriptions collected being $593.38 less than the amount expended.

Defendants objected to the introduction of any evidence on the part of the plaintiffs, upon the ground that the complaint does not state a cause of action; and this objection to the complaint was also repeated upon defendants' motion for a nonsuit, where it was specified "that the plaintiffs sue as individuals, and seek to recover in an individual capacity as trustees of an express trust." The subscription was on its face made payable "to the subscription committee of Los Osos Parlor," and the complaint alleges that the plaintiffs constituted said committee, and as such committee entertained said delegates, etc. Trustees of an express trust need not join the cestuis que trustent as parties, though the title of the cause should state that they sue as trustees of the person or association for whom they are acting. If, however, the body of the complaint shows that they are trustees of an express trust, and for whom they are such trustees (Spear v. Ward, 20 Cal. 659, 676; Wise v. Williams, 72 Cal. 544, 547, 14 Pac. 204), it is sufficient; and these facts appear in the complaint. Besides, the objection should have been taken by demurrer, as the alleged defect appeared upon the face of the complaint.

Appellants contended, however, that expenditures were made which did not come within the purview of this subscription for "entertainment," which, they say, is synonymous with "board," and includes the ordinary necessaries of life. The distinction between entertaining a friend at one's home, or a hotel keeper entertaining a traveler at his hotel, and entertaining a large number of strangers, constituting an organized body, by the residents and business men of a city, is quite apparent; and, as to the latter, what may be included in the entertainment of the visiting body is usually limited by the amount of money available for the purpose, and the ingenuity of the entertainers in devising sources of enjoyment. I think the record does not show that any of the money was expended for purposes not fairly within the meaning and intent of the subscription paper in that regard.

It is also contended by appellants that all the expenses of the entertainment have been fully paid, and that, therefore, they are not liable. It is shown, however, that the deficiency of $593.38 was met by borrowing that sum from one of the funds of Los Osos Parlor, which was not a fund intended to be used for the entertainment.

The supposed insufficiency of the evidence to justify the verdict appears to be based upon the alleged want of consideration for the promise, and has been sufficiently noticed. None of the alleged errors of law specified in the statement on motion for new trial are noticed in appellants' brief, and we have not discovered any that would justify a reversal of the judgment or order. I therefore advise that the judgment and order should be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

125 Cal. 472

LONDON & S. F. BANK, Limited, v. PARROTT et al. (S. F. 1,167.)

(Supreme Court of California. July 28, 1899.)

GUARANTY—NOTICE OF ACCEPTANCE—DISCHARGE OF GUARANTOR BY ACCEPTANCE OF SECURITY—AGREED CASE—APPLICATION OF PAYMENTS—LIMITATIONS—LIABILITY OF STOCKHOLDERS WHO ARE ALSO GUARANTORS.

1. Under Civ. Code, § 2795, providing that an absolute guaranty is binding on the guarantor without notice of acceptance, a guaranty stating that the signers "do hereby severally guaranty said credits" is an absolute guaranty, and becomes binding without notice of acceptance.

2. Civ. Code, § 1565, providing that the consent of parties to a contract must be communicated to each other, does not apply to a contract of absolute guaranty for the debt or default of a third person.

3. While a guarantor is entitled to stand upon the strict terms of his contract, yet, for purposes of construction, the same rules are applicable as to other written instruments.

4. Where the language in a guaranty is susceptible of two interpretations, the guarantor cannot deny the right of the person to whom it is given to act upon either interpretation.

5. Defendants guarantied all credit by a bank given to, and future liabilities of, a corporation up to a certain amount. After the bank had given credit to an amount less than the limit, the corporation gave its note to the bank for the amount, which was not given or accepted in payment of the sums advanced, and was not delivered until after its date, and did not preclude the bank from suing immediately for such sum. *Held*, that the note did not discharge the liability of the guarantors.

6. In an action on a guaranty, a statement in the agreed case that "after September 6, 1893, no further credit was asked or given" thereunder, does not mean that no credit was given after that time, but that no credit was given to an amount greater than had been given before that time; the word "further" being equivalent to "additional."

7. Defendants guarantied the payment of all advances made by a bank to a certain corporation. After considerable advances had been made, and a note had been given by the corporation to secure their payment, the corporation made frequent deposits, and checked against them. None of these deposits were applied to the payment of the debt. *Held*, that the bank was under no obligation so to apply them, as defendants' guaranty covered all advances for an indefinite time, and up to an amount which had not been exceeded.

8. Where the stockholders of a corporation enter into a personal guaranty for advances made to the corporation, but do not therein limit their liability to that of stockholders, they will be liable both as stockholders and as guarantors.

9. Where guarantors are liable both as guarantors of a corporation and as stockholders, while they cannot be held liable for more than the corporate liability in either or both capacities, yet where the judgment against them is less than their liability as stockholders, it is immaterial in what capacity it was recovered.

10. Where a corporation, having borrowed money, gives a note acknowledging its liability, and promising to pay the amounts, it prevents the bar of the statute of limitations, and preserves the liability until the maturity of the note.

11. Civ. Code, § 1479, provides that payments shall be applied, first, to interest due at the time of payment, and, second, to principal due at that time. A corporation, having borrowed money at various times from a bank, made payments on the debt. If such payments were applied to the preceding loans, the subsequent ones would be barred by the statute of limitations, but, if applied to subsequent loans, they would be paid, and the preceding ones would be barred. *Held*, that such payments should be applied to the debts due at the time, and not to ones contracted subsequently.

12. Defendants had guarantied payment of loans to be made by a bank to a certain corporation. To support the claim that some of the loans were barred by the statute of limitations, defendants questioned the right of the bank to apply payments to the earlier loans, because they were made in the form of deposits, and checks were drawn on the same day. *Held*, that this did not show that they were transactions independent of those which defendants had guarantied.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by the London & San Francisco Bank, Limited, against Louis B. Parrott, Abby M. Parrott, and others. From a judgment for plaintiff, defendants Abby M. Parrott and others appeal. Affirmed.

Robert Y. Hayne, for appellants. Page, McCutchen & Eells, for respondent.

HARRISON, J. The defendants in the above-entitled cause with others executed and delivered to the plaintiff September 30, 1891, the following instrument: "To the London & San Francisco Bank, Lt'd, San Francisco, California: You will please give credit to the Capitol Packing Company for a sum of money in United States gold coin not exceeding the amount of one hundred thousand ($100,000) dollars; and, as said packing company contemplates a course of future dealing with you, you will please continue the said credit, or, if it should be reduced or satisfied by payments made by said packing company, renew the same from time to time for said amount, or any less sum, or otherwise keep the said credit permanently up to the limit, as aforesaid, or any less amount. And these presents shall be deemed to be, and shall constitute to you, a continuing guaranty by each of us in the several proportions stated below, in reference to, and embracing, the original credit hereby authorized and all future liabilities of said packing company to you under said original credit, and under such successive transactions with you as shall either continue its liability, or from time to time renew it; and such guaranty shall remain and be operative until all present or future credit or credits given by you, as aforesaid, not exceeding the said limited amount, shall be fully paid, subject to our legal right to revoke the same in writing at any time as to any transactions occurring after such revocation. The subscribers hereto do hereby severally guaranty the said credits to the amount of one hundred thousand ($100,000) dollars, in the following proportions, namely: * * * Thomas Cole, for another twenty-five six-hundredths ($^{25}/_{600}$) part thereof; Abby M. Parrott, for another one hundred and sixty-five six-hundredths ($^{125}/_{600}$) part thereof. This guaranty shall bind each subscriber for his said proportion of said total credit until after such revocation by him, notwithstanding some part of said total credit shall not be hereby guarantied. Dated San Francisco, September 30, 1891." October 5, 1891, the Capitol Packing Company opened an account with the plaintiff, and thereafter, until August 30, 1894, made deposits of moneys for its said account, drew checks against the same, and received advances by way of loans from said bank, which said advances were, by the said packing company's agreement with said bank, to draw interest, payable monthly, at the rate of 7 per cent. per annum. In July, 1893, the San Francisco Clearing House, of which the plaintiff was a member, promulgated a rule for the government of its members, that they should not allow overdrafts on the part of their customers; and, for the purpose of complying with this rule, the Capitol Packing Company, at the request of the plaintiff, delivered to it on the 6th day of September its promissory note for the sum of $73,000, bearing date August 31, 1893, and payable one day after date. At that time the books of the bank showed an indebtedness on the part of the packing company of $72,899.61. This note was not accepted by the bank as payment, but its amount was placed upon the credit side of the packing company's account, and was so entered for the purpose of closing on its books the overdraft of the packing company, under the aforesaid rule of the clearing house. A balance was struck in the account, and the difference, viz. $100.39, was carried to the credit column of the account, the account was continued upon the books, and the packing company continued to make deposits and draw checks against the same until August 30, 1894, when it was finally closed. On July 31, 1895, the total amount due to the bank, as shown by the accounts upon its books, was $78,110, being the aforesaid sum of $73,000 and interest thereon for one year. An agreed case, containing the above facts and others hereinafter named, was submitted to the superior court for its determination; the plaintiff claiming therefrom a right of recovery against the defendants, and they claiming to be under no liability by reason thereof. The superior court rendered its judgment in favor of the plaintiff, from which the present appeal has been taken.

1. The instrument of September 30, 1891, is both a letter of credit and a guaranty. The first portion thereof is a written instrument addressed by the appellants to the respondent, requesting the latter to give credit to the Capitol Packing Company, and thus falls directly within the terms of section 2858, Civ. Code; and in the subsequent portion thereof they guaranty the said credit to the amount of $100,000, in certain specific portions, and declare that the same shall be a continuing guaranty by each of them in these proportions until the credit that may be given shall be fully paid. Regarded as a letter of credit, the terms of the instrument do not require any notice of the credit thereafter given, nor can the necessity of giving such notice be implied from its terms; and, under section 2865, they became liable for such credit without notice to them. Their guaranty of the credits that might be given thereafter contains no limitation, and is unconditional. It is not an offer to guaranty, its language being that they "do hereby severally guaranty the said credits," but is an absolute guaranty, and, under section 2795, Id., became binding upon them without any notice of acceptance. The provisions of section 1565, Id., cited by the appellants, requiring the consent of parties to a contract to be "communicated by each to the other," has no application to a contract by which one person makes an absolute guaranty to another of the debt or default of a third person. It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which that subject belongs. End. Interp. St. § 399. Section 1565, Civ. Code, refers to contracts in general, and is found in title 1 of part 2 of that Code, while the sections relating to "Guaranty" are contained in title 13 of part 4 of the same Code. Section 4481 of the Political Code declares: "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title."

It is claimed by the appellants that the acceptance by the bank of the promissory note for $73,000 was such an alteration of the relation between it and the packing company as to discharge the guarantors, and in support thereof they invoke the oft-cited rule that a surety or a guarantor is entitled to stand upon the strict terms of his contract. When it is said that a guarantor is entitled to stand upon the strict terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained; that his liability is not to be extended by implication beyond these limits, or to other subjects than those expressed in the instrument of guaranty. But, for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation, for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied. If his language is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he is not at liberty to say that the person to whom it is given was not justified in acting upon either, or that he should have acted upon one rather than the other. Civ. Code, § 1654;

Bell v. Bruen, 1 How. 169; Lawrence v. McCalmont, 2 How. 426; Gates v. McKee, 13 N. Y. 232; Powers v. Clarke, 127 N. Y. 417, 28 N. E. 402; Pratt v. Matthews, 24 Hun, 386; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; Lafargue v. Harrison, 70 Cal. 380, 11 Pac. 636.

The taking of the note by the bank did not discharge the appellants from their liability upon the guaranty, unless the obligation which they had guarantied was thereby changed. By the terms of the instrument, the bank was to give to the packing company "credit" to the amount of $100,000, and to "continue the said credit," or, if it should be "reduced or satisfied by payments," renew the same, or otherwise keep the said "credit" permanently up to the limit aforesaid, or any less amount; and the signers thereof agreed that the instrument should be a continuing guaranty in reference to and embracing the original credit thereby authorized, "and all future liabilities of said packing company under said original credit," and under such successive transactions as shall either "continue its liability, or from time to time renew it," until all present or future credit or credits "shall be fully paid." The instrument does not designate the form in which the credit should be given, and its language is broad enough to embrace any form of credit which might be agreed upon between the bank and the packing company; nor is there any language therein which limits the guaranty or the credit to be given to the form which might be originally adopted, or to preclude the bank and the packing company from the right to change the form of such credit, or from adopting at the same time different forms of credit without impairing the guaranty. It may be conceded that if, after the bank had given credit to the packing company by way of an open account for its overdrafts, payable on demand, it had accepted a promissory note therefor by which its right to demand immediate payment would be postponed to a future day, the guarantors would have been discharged, since in that case the contract guarantied by them would have been changed by giving time to the debtor, and preventing them from taking up the debt and immediately suing the packing company. It is stated, however, in the agreed case that the note was not taken by the bank as payment, and therefore the original credit given to the packing company was not thereby "reduced or satisfied." In the absence of an agreement to that effect, or evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt. Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Bank v. Shuey (Cal.) 55 Pac. 682. In the present case the note was not delivered to the bank until after its date, and was therefore payable immediately, and the bank could at any time bring its action upon the original overdrafts. The giving of the promissory note was a transaction between the bank and the packing company, which at least had the effect to "continue" its liability for the amount of its previous overdrafts, and was within the express terms of the guaranty. It was evidence of the extent of the credit existing at that time, but did not change the amount or character of the liability. If, instead of taking the note, the bank had at that time sued the packing company, and obtained judgment against it for the amount of its overdrafts, the guarantors would not have been thereby discharged, and the taking from it of a written agreement to pay the amount of the overdraft can have no greater effect in discharging them. There was but one account opened with the bank by the packing company, and this account was not finally closed until August 30, 1894; and the entry of the amount of the note to the credit of the packing company upon this account was made merely for the purpose of closing the "overdraft" upon its books, but did not change the liability of the packing company, or reduce the amount of the credit which it had received from the bank. An account is not closed at each time a footing is made and the balance carried to another column. These views are sustained by the following authorities: Bush v. Critchfield, 5 Ohio, 109; Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218; Bank v. Woolsey, 31 App. Div. 61, 52 N. Y. Supp. 827; Norton v. Eastman, 4 Greenl. 521; Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644; Bank v. Bandmann, 120 Cal. 220, 52 Pac. 583.

It is stated in the agreed case, after reciting the making of the aforesaid note, and crediting its amount against the overdraft: "After that time, viz. on and after September 6, 1893, the company continued to make deposits and to check against the same, as is shown by the statement hereto annexed marked 'Exhibit 2.' But after September 6, 1893, no further credit was asked by or given to the packing company. All deposits so made were applied by the bank to the checks drawn after the date last mentioned, until August 30, 1894, when the said account was finally closed." Upon this statement it is contended by the appellants that their liability as guarantors ceased September 6, 1893; that, as after that date the bank gave no further credit to the packing company, the liability of the guarantors ceased at that date. We cannot assent to this construction of the above clause. The argument of the appellants is drawn from what we deem a misconstruction of the language used in the agreed case. The statement that after September 6th no further credit was given to the packing company is not equivalent to a statement that credit was not given to it after that date. The word "further," as here employed, is an adjective used in the sense of "additional," limiting "credit," and is not to be construed as an adverb of time, qualifying the verb "given"; and the phrase is to be construed as meaning that after that date the bank gave no credit to the packing company beyond, or in addition to, the amount of the note. The sentence itself is introduced by the restrictive connective "but," and its apparent purpose is to limit the statement in the previous sentence that after that date "the company continued to make deposits and to check against the same," by declaring that, notwithstanding the checks drawn against the deposits, they did not, of themselves, result in giving any credit to the packing company. This construction is consistent with the fact appearing upon the face of the account, which is referred to in the sentence that after that date there were no further overdrafts, the deposits being at all times in excess of the checks, and also harmonizes with the effect which we hold is to be given to the transaction of accepting the note, and placing its amount to the credit of the packing company's account.

Permitting the packing company to draw checks against the deposits made by it after September 6, 1893, did not affect the liability of the guarantors. The moneys so deposited were not directed to be applied as payments upon the note, and, in the absence of any direction, the bank was not required to make such application. A bank which holds the note of its customer is not required at its maturity, or thereafter, to apply thereon moneys subsequently deposited by the customer, and an indorser or surety upon the note is not discharged by its omission to make such application (Morse, Banks, § 562; Bank v. Peltz, 176 Pa. St. 513, 35 Atl. 218; Bank v. Peck, 127 Mass. 298; Strong v. Foster, 17 C. B. 201); and, if the bank was not required to make such application, its payment of checks drawn subsequent to the deposits was not a reloaning to the packing company of money that should have been applied towards the payment of the note. As we hold that the "credit" which was guarantied did not cease on the 6th of September, but continued from the time it was opened with the bank in October, 1891, it is immaterial, so far as the guarantors are concerned, whether the deposits made after that date were applied in reduction of the amount of the note, or in payment of checks subsequently drawn. The liability of the packing company which they guarantied was whatever amount of credit less than $100,000 might at any time exist in favor of the bank, whether in the form of an open account for overdrafts, or in the nature of bills receivable. As between the bank and the packing company, all the payments of its checks by the bank upon overdrafts constituted "credit," and all of the deposits by the packing company were payments to be applied in "reducing or satisfying" that credit, and whatever amount of such credit remained unpaid was within the terms of the guaranty.

2. The Capitol Packing Company is a corporation organized under the laws of this state, with a capital stock divided into 600 shares, of which 590 were issued, and during all the times in which the aforesaid liability of the corporation was incurred the appellant Abby M. Parrott was the owner and holder of 165 shares of said stock, and the appellant Thomas Cole of 25 shares. The plaintiff claims, in addition to a recovery upon the guaranty of the appellants, the right to recover from them, respectively, as stockholders, their proportion of the aforesaid corporate obligation, and the superior court rendered judgment in its favor in accordance with this claim. The appellants contend that their guaranty was only a collateral security for their liability as stockholders, that their liability thereon was commensurate with their liability as stockholders, and that the court was not authorized to render judgment against them in their double capacity. In the agreed case the liability of the packing company to the plaintiff is stated to be $78,116, and it is stated that the plaintiff claims the right to recover from Mrs. Parrott upon her stockholder's liability the sum of $21,844.32, and upon her liability as guarantor the sum of $10,922.16, and from Mr. Cole upon his liability as stockholder the sum of $3,309.75, and upon his guaranty the sum of $1,323.89. The aggregate amount of the judgments against the defendants is less than the agreed amount of the corporate liability, but they do not specify the amounts thereof rendered against the appellants upon their respective liabilities as guarantors and as stockholders. No exception, however, is made upon this ground, nor do the appellants claim that the judgment against them is incorrect in amount, their claim being that by reason of the guaranty they are not liable in any amount as stockholders. The guaranty does not, however, contain any reference to the liability of the signers as stockholders, and, inasmuch as such liability is distinct from that arising upon their contract, if they had intended not to be bound as stockholders, they should have caused words of release or discharge to be inserted in the guaranty. Their liability as stockholders existed by virtue of the statute, while their liability as guarantors was purely a matter of contract between them and the plaintiff, and the plaintiff had the right to demand the guaranty, in addition to their liability as stockholders, as a condition upon which it would give credit to the corporation. There was no connection between the two, or dependence of one upon the other, and, in the absence of any agreement to that effect, the plaintiff is not to be deprived of the right to enforce their statutory liability. No inference of this nature is to be drawn from the similarity between the number of shares of stock held by the appellants and the proportion of the credit which they guarantied. In fact, their liabilities under the two obligations are not the same,—that as guarantors being for a certain number of six-hundredths of the credit, while as stockholders they were liable for that number of five hundred and ninetieths.

The plaintiff is, of course, not entitled to recover from the defendants, whether as guarantors or as stockholders, or in both capacities, more than the amount of the corporate liability; but, as it appears from the record that the aggregate amount of the judgments is less than the agreed amount of the corporate liability, we cannot say that the record discloses any error in this respect. It is also stated in the agreed case that some stockholders did not sign the guaranty, and that some of the guarantors were not stockholders. The case also shows that the defendants in the action had 290 shares of the stock, but it does not appear that any of the guarantors, other than the defendants, were stockholders.

It is stated in the agreed case that the defendants shall be considered as having pleaded the statute of limitations upon any other matter than the guaranty, and appellants contend that their liability as stockholders is barred by this statute. The liability of a stockholder is an obligation created by statute, and, under section 359, Code Civ. Proc., is barred unless the action thereon is commenced within three years after the cause of action accrues. Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Wells v. Black, 117 Cal. 157, 48 Pac. 1090. It is unnecessary to consider the proposition presented by the appellants that, if the liability of a corporation is barred by the statute, the stockholders may avail themselves of that fact as a defense to their own liability, since in the present case the liability of the packing company was not barred. Before the statute had run against its liability, it made its written acknowledgment thereof, and promised to pay the same, and thus prevented the bar of the statute. The giving of this note had the effect to preserve its liability until the maturity of the note. The plaintiff's claim against the appellants as stockholders is not upon the note, but upon the liability originally created by reason of the advances made to the corporation. We have seen that the giving of this note did not affect the liability of the appellants upon their guaranty, since it did not affect the original liability of the corporation, and for the same reason it did not affect their liability as stockholders.

Neither is their liability as stockholders barred by the three-year statute. The account with the packing company was opened October 5, 1891, and from that date until September 5, 1893, deposits were made by the packing company, from time to time, and its checks paid by the bank. Section 1479, Civ. Code, providing for the application of payments, declares: (3) "If neither party makes such application within the time prescribed herein, the performance (i. e., the payment) must be applied to the extinction of obligations in the following order: 1st. Of interest due at the time of performance; 2nd. Of principal due at that time." The superior court acted in accordance with this rule, and held that the deposits of the packing company should be applied, first, to the interest due at the time of making the several deposits, and next to the payment of the checks earliest in time, and that the application should be made as of the date of the several deposits, irrespective of the time that had elapsed between the earliest items and the commencement of the action. The appellants claim that the court thus acted in disregard of their plea of the statute of limitations; that under this plea the court was not at liberty to apply any of the deposits in discharge of advances made more than three years prior to the time the application was made; that the application of the deposits, whether made by the court or the creditor, cannot be made after three years from the time that the liability accrued. We cannot assent to this proposition. Under section 462, Code Civ. Proc., the plea of the statute of limitations is to be deemed "controverted" by the plaintiff, and whatever will defeat its effect may be shown upon the trial. The right to a correct application of payments is one of the elements in the plaintiff's right of action, and he is not to be deprived of the exercise of that right by a delay in bringing his action on for trial. The application of payments which is made by the court is to be made "in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties." Murdock v. Clarke, 88 Cal. 390, 26 Pac. 603. The circumstances which are to guide the court may have arisen since the payment was made, but the application when made relates to the time of the payment. There could be no propriety in applying a payment to the discharge of an obligation incurred subsequent to the time when the payment was made.

It is next contended by the appellants that, under their plea of the statute, their liability as stockholders is limited to that portion of the corporate liabilities which were incurred subsequent to August 16, 1892, the agreed case having been filed August 15, 1895. At the time of the execution of the note of September 5, 1893, the statute of limitations had not run against any of the items of the account, and the parties thereto could at that time agree upon the mode and extent to which the previous deposits by the packing company should be applied in the extinction of its liability for the advances; and the making and acceptance of the note for an amount agreed upon between them must be regarded as an agreement or acquiescence on the part of the packing company in their application to the extinction thereby of so much of the liability theretofore incurred as was not included in the note. The appellants urge, however, that the plaintiff had, prior to that date, made an appropriation of a portion of the deposits to the payment of interest at the end of each month, and that, the appropriation having once been made, it was irrevocable, and that a different appropriation thereafter was unauthorized. This claim rests upon these facts: At the opening of the account, the packing company agreed to pay interest upon the advances made to it monthly, at the rate of 7 per cent. per annum. This interest upon overdrafts was, according to the usual course of business, paid by a memorandum check signed by the bank itself, and a list of the checks so drawn was handed to the packing company whenever its book was balanced. In the account upon the books of the bank these items of interest appear under date of the last day of each month, and amount to a little over $7,000. It is claimed that by this mode the bank elected to allow the interest to compound, and not to apply any subsequent deposits to its payment. Instead, however, of being an application of the deposits, this action of the bank was in the nature of an additional loan to the packing company. It was equivalent to advancing to it the amount of the interest for the previous month upon its check therefor, in the same mode that it would advance money upon its check for any other purpose. Deposits subsequently made were not applied by the bank to the payment of this interest, but were placed to the general credit of the packing company in its account upon the books of the bank. From the copy of the account annexed to the agreed case, it appears that upon many occasions the amount of the deposits and of the checks drawn by the packing company upon the same day were identical, and from this fact the appellants contend that it should be held that these deposits and checks were parts of the same transaction, and were transactions independent of the general account between the packing company and the bank, and consequently the deposits so made should not be applied to the discharge of any of the earlier items of the account. There is nothing, however, in the record tending to show that these were independent transactions except the identity of amount and date, and these items only constitute evidence from which an inference might be drawn that they were parts of separate transactions. They are not conclusive of the fact, and as the superior court has not drawn this inference, but its judgment has impliedly found the contrary, we must accept its finding as conclusive. It may be added that in the dealings between a bank and its customer the deposit is usually made before the checks are drawn, and, in the absence of some specific direction, there would be no presumption that a deposit was intended to be applied to a check that might be thereafter drawn. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

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125 Cal. 501

SALTZMAN v. SUNSET TELEPHONE & TELEGRAPH CO. (S. F. 1,164.)

(Supreme Court of California. July 29, 1899.)

MISCONDUCT OF JURY—MOTION FOR NEW TRIAL BASED ON STATEMENT OF CASE—COMPETENCY OF AFFIDAVIT OF DISSENTING JUROR—DEPOSITION OF DEPUTY SHERIFF—NECESSITY OF EXCEPTION TO SPECIFIC RULINGS—PRESUMPTION OF MISCONDUCT.

1. Under Code Civ. Proc. § 658, providing that a motion for a new trial on the ground of misconduct of the jury shall be made on affidavits, a motion made on a statement of the case is unauthorized.

2. Under Code Civ. Proc. § 658, providing that a motion for a new trial on the ground of misconduct of the jury shall be based on affidavits, where a deputy sheriff having charge of the jury refuses to make an affidavit his deposition in open court must be taken as equivalent to such affidavit.

3. In an appeal from an order denying a motion for a new trial on the ground of misconduct of the jury, it is not necessary to except specifically to the rulings of the court excluding evidence of such misconduct, as all such errors are included in the appeal from the order.

4. Const. 1879, art. 1, § 7, providing that the concurrence of nine jurymen is sufficient for a verdict, does not alter the rule that a juryman cannot impeach his own verdict, and consequently affidavits by the dissenting jurors are not competent evidence to show misconduct.

5. Where a juror has been separated from the jury against the order of the court, and undue influence might have been brought to bear upon him, the burden is upon the party seeking to sustain the verdict to show that no such attempt was made.

6. Where a juror was permitted to go to the telephone and communicate with persons unknown to the deputy in charge of the jury, evidence that the communication was very brief and that the deputy heard what the juror said, and the affidavit of the juror himself setting out the nature of the communication, are sufficient to rebut the presumption that undue influence was brought to bear on him.

Department 2. Appeal from superior court, Santa Clara county.

Action for personal injuries by Edward Saltzman against the Sunset Telephone & Telegraph Company. Verdict for defendant. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

C. M. Jennings (Thos. V. Cator, of counsel), for appellant. Van Ness & Redman, for respondent. Jackson Hatch, for receiver.

TEMPLE, J. Action for damages for personal injuries received by plaintiff while in the employment of defendant. Verdict was rendered for the defendant by a divided jury. The motion for a new trial was based upon the point of alleged misconduct of the jury. Such alleged misconduct was made to appear by the affidavits of the dissenting jurors, and upon one charge of misconduct by the affidavit of the deputy sheriff who had charge of the jury. The notice of motion for a new trial stated that the motion would be made on a statement of the case and upon affidavits. The Code provides that when the motion is made upon the ground of misconduct it shall be made on affidavits. Section 658, Code Civ. Proc. The statement was therefore unauthorized. On the hearing the court refused to consider certain affidavits, and denied the motion. Plaintiff then prepared a bill of exceptions, which was settled by the court, which included all the affidavits and the ruling. This was proper, and no injury was done by the statement. The record here seems sufficient if that be excluded. The deposition of the deputy sheriff, taken in open court, must be regarded as an affidavit. If he refused to make an affidavit, no other course was open to plaintiff, who should not be deprived of his testimony because of his unwillingness.

We are not called upon to review the action of the court in refusing to hear read the affidavits of the dissenting jurors which tended to impeach the verdict, except so far as it becomes necessary to determine the competency of such evidence in considering the final order of the court in denying a new trial. It was not necessary that the ruling in regard to the evidence should have been specifically excepted to or appealed from. It is all involved and included in the appeal from the order refusing a new trial.

One matter of alleged misconduct consists of the charge made in the affidavit of a dissenting juror that one of the jurors who assented to the verdict stated, in substance, that he wanted his pay; that they would receive no pay unless they brought in a verdict; and he would agree to anything rather than not be paid. There were three dissenting jurors out of twelve, so that a change of one vote from the majority would have defeated the verdict. The trial court concluded that the verdict could not be impeached in this way. Whether it could be so impeached is the first question for discussion here. Appellant admits that the general rule is that the affidavit of a juror cannot be used to impeach a verdict, but he contends that this rule is that the juror shall not be permitted to impeach his own verdict, and that the reason of this rule is that otherwise he may be induced by corrupt means to change his mind or to swear falsely. It is also contended that he is estopped of record by his assent to the verdict, and should not be heard to the contrary. But it is contended that the rule has no application to dissenting jurors where a valid verdict may be rendered by the concurrence of three-fourths, and since the new constitution of 1879 the rule must be understood to be that a juror shall not be permitted to impeach his own verdict, and does not apply to dissenting jurors. For nearly 20 years we have had a statute (section 657, Code Civ. Proc.) to the effect that, if the assent of one or more of the jurors has been determined by a resort to chance, the misconduct may be proved by the affidavit of any one of the jurors. This is an exception to the general rule, and proves the rule; but in such case ten jurors might be unconnected with the matter, and an affidavit on their part would not indicate a change of mind or imply corruption. The so-called estoppel is simply that public policy requires that the sanctity and stability of judicial determinations shall not be subject to the evidence of jurors who may be tampered with, and who cannot, in general, testify without accusing themselves or some member of the jury. And this last consideration is, in my opinion, not the least cogent reason for the rule. The independence of the jury and the value of their discussions would be lessened if the reasons given by any juror for his opinions or for his verdict could be reported to the court and criticised, and his motives impugned for remarks made in the jury room. And such reports would be more likely to be made by dissenting jurors who had been heated by earnest debate and defeated by the final vote. But the independence of the jury would be gone if a perfectly correct report could be made and the verdict attacked by showing that some jurors mistook the evidence or the law or were actuated by other considerations. There would be no freedom of discussion in the jury room if they were subject to a possible censorship of this character. And the stability of judicial determinations would be as much imperiled by liability to attack by dissenting jurors as by the others. Nor is it true that the reason for the rule has always been stated to be that a juror may be induced to retract. Often an attack by the affidavit of a juror would not indicate a change of views or be an attack upon his individual verdict,—if it could be so regarded. I have already shown this, but the instances may be greatly varied. He might testify that a fellow juror had his bottle in the jury room, or got drunk, or offered a bribe to a fellow member, or stated facts not in evidence. Were it not for the rule a juror would be commended for disclosing these matters, and to do so would not be self-accusation, although it might furnish ground for attacking the verdict. The main reasons, I think, are these two: (1) That the jurors, who are practically the only witnesses in regard to the matter, may not be tampered with and verdicts by these means imperiled; and (2) to secure independence and freedom from improper restraint on the part of the jury. In Wilson v. Berryman, 5 Cal. 45, the reason for the rule is given that independence of opinion would be thus secured. In Hannum v. Inhabitants of Belchertown, 19 Pick. 311, it was said: "The secrecy of the deliberations and discussions of the jury, and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions." In Woodward v. Leavitt, 107 Mass. 453, the court says: "It is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable, and to admit the testimony of jurors to what took place there would create embarrassment and uncertainty." The learned judge cites a great many cases, English and American, in support of his views, among them Cook v. Castner, 9 Cush. 266, where Shaw, C. J., said: "All communications among jurors are confidential; they are intended to be secret, and it is best they should remain so." To the same effect is Heffron v. Gallupe, 55 Me. 563. Also State v. Freeman, 5 Conn. 348, where Hosmer, J., says: "On a principle of policy, to give stability to the verdicts of jurors and preserve the purity of trials by jury, the evidence ought not to be admitted." See, also, Jones, Ev. § 784, and Thomp. & M. Jur. 440. These authorities all show that the reason given for the rule is not solely because jurors may be induced to repent of their verdicts. No doubt, also, courts more willingly and strictly enforce the rule because, if the verdict is wrong, it may be attacked and reviewed upon that ground without reference to the misconduct of the jury. I think the rule is not changed in its application by the amendment which permits a verdict by the specified majority of the jury.

The question still remains to be considered whether the communication by the juror Krumb over the telephone with some person outside was such misconduct as should induce the court to vacate the verdict. This fact is shown by the affidavit of the deputy sheriff who had charge of the jury. It is to be considered solely in connection with the facts found in this affidavit, and without knowledge of how Krumb had previously voted. The deputy, in violation of his sworn duty, permitted Krumb, while the jury were dining at a restaurant, to which he had taken them in obedience to an order of the court, to leave the table and go to a telephone receiver, which was apparently in the same room, and call some one, no doubt at the central office, which was in charge of the defendant in the case. The deputy went to the receiver with him. He heard him ask through the telephone for his father-in-law, and tell someone to have his father-in-law call him, as he would probably stay out all night,—that he was then at the restaurant. He was afterwards called up, and again went to the telephone, the deputy going with him. He heard Krumb tell his father-in-law that he would probably be kept out all night, and ask him to take care of his horse. Krumb said nothing about the case, and, though the deputy was produced for examination by the appellant, nothing was shown which was calculated to raise a suspicion that any communication was had with any one about the case. With the deputy standing by his side while giving this very short and simple message, it could easily be told whether there was further conversation. The affidavit of Krumb was also read in explanation. He says he called one Hobson to go for his father-in-law, and also to a clerk in his own store, and asked him to close up at the usual time, and that he was called up by his father-in-law, and asked him to take care of his horse and chickens, to which his father-in-law assented. He had no further communication with any one, and nothing was said about the case at all. It is agreed that, while the affidavit of a juror cannot be used to impeach a verdict, it is perfectly competent to explain or to deny alleged misconduct or interferences with the jury. It is contended that the conduct of Krumb was a separation from the jury under such circumstances, that improper communications could have been made to him, and in the nature of things there can be no conclusive evidence upon the matter save his own. Communications through a telephone, it is said, are especially dangerous. A telephone in a jury room takes the ear of the juror abroad secretly for any corrupt proposition a party may desire to send. Appellant contends that the affidavit of a juror cannot be used to show that he has not been corruptly approached where he has improperly separated himself from the jury under such circumstances that an attempt to corrupt might be made. As authority he cites People v. Backus, 5 Cal. 275; People v. Thornton, 74 Cal. 484, 16 Pac. 244, and People v. Stokes, 103 Cal. 193, 37 Pac. 207. In criminal cases our statutes have always provided, as now by section 1181 of the Penal Code, that a court may grant a new trial "when the jury has separated without leave of the court, after retiring to deliberate upon their verdict." There is no such ground for granting a new trial in a civil case, except under the ground of misconduct of the jury "materially affecting the substantial rights of a party." The force of the decision in People v. Backus has been somewhat weakened by People v. Bonney, 19 Cal. 427, People v. Symonds, 22 Cal. 349, and People v. Brannigan, 21 Cal. 338. The matter is fully discussed in a note to McKinney v. People, 43 Am. Dec. 65. The annotator says it is almost the universal rule that in order to set aside the verdict "there must be some evidence of other misconduct, in addition to the mere fact of separation, which has operated to the party's prejudice." The rule in this state I take it to be, in civil cases, that a separation, against the instruction of the court, with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption, and show that no such attempt was made. I think that was done in this case. The brevity of the communication, the presence of the deputy, who could hear what was said by the juror, and the affidavit of the juror, rebut the presumption of injury. Still, I am impressed with the argument as to the particular impropriety of allowing a juror to communicate by telephone. Both the juror and the deputy were guilty of gross impropriety. The juror should have obtained permission from the court to send a message, and the deputy should have been at the receiver. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

125 Cal. 527

DAY v. GUNNING. (S. F. 1,816.)

(Supreme Court of California. Aug. 4, 1899.)

ELECTION CONTEST—JUDGMENT—APPEAL—SUPERSEDEAS.

Code Civ. Proc. § 949, which provides that the perfecting of an appeal stays proceedings in the court below on the judgment, except where the judgment adjudges defendant guilty of usurping or unlawfully holding public office, has no application to a judgment in an election contest instituted under Code Civ. Proc. pt. 3, tit. 2, where contestee is in possession of the office, at the time of the rendition of judgment against him, by virtue of an election certificate, though such judgment contains the unauthorized declaration that contestee is unlawfully holding the office; and an appeal from it operates as a supersedeas.

In bank. Application for a writ of mandamus by Fred H. Day against S. O. Gunning. Application denied.

W. T. Phipps, for petitioner. W. H. Carlin, for respondent.

HENSHAW, J. An alternative writ of mandate was issued from this court, directed to the respondent, and ordering him to admit petitioner to the use and enjoyment of the office of auditor and recorder of the county of Yuba, or to show cause why he does not do so. At the hearing upon the return it was made to appear that at the general election held in 1898 the petitioner and the respondent were opposing candidates for the office of auditor and recorder of Yuba county. In due time the board of supervisors canvassed the vote cast at the election, and declared Gunning to have been elected to the office. A certificate of election was issued to him accordingly. Within the time contemplated by law the petitioner instituted a contest of the election under the provisions of title 2, pt. 3, of the Code of Civil Procedure. The contest was heard in the superior court, the votes were counted, and as a result the court gave its judgment that the contestor, the petitioner herein, was duly elected to the office, and "that said defendant and respondent is unlawfully holding said office; that the certificate of election to said office heretofore issued to said respondent for said office is hereby revoked, annulled, set aside, and canceled: that the clerk of the said county of Yuba is ordered to issue to said Fred H. Day a certificate of election to said office, and that, upon properly qualifying, said Fred H. Day be let into possession of said office." Thereafter, and within 10 days of the date of the judgment, Gunning appealed to this court, giving the ordinary $300 bond upon appeal. Between the date of the institution of the election contest and the date of the judgment therein the term of the auditor-elect commenced. By virtue of his certificate of election, Gunning entered the office, and discharged its duties. He was so in possession and so discharging its duties at the time when the judgment was rendered against him in the election contest. After that judgment, Day duly qualified, and made demand upon Gunning to be let into possession of the office, with which demand Gunning refused to comply. Under these facts it is seen that the legal question presented is the single one, namely, whether an appeal from a judgment such as this operates as a supersedeas. Generally speaking, an appeal to this court, accompanied by the $300 undertaking, operates to stay the execution of the judgment, save as to judgments in certain enumerated and excepted kinds of cases. As an appeal in contested election cases is accorded to either party under section 1126 of the Code of Civil Procedure, it must follow that, unless the judgment which the court is authorized to enter in such a case belongs to one or another of the excepted classes, the appeal does operate to stay its enforcement. Section 949, Id., provides that the perfecting of an appeal stays proceedings in the court below upon the judgment, excepting where the judgment "adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within this state." It is contended by petitioner that the judgment in this case is one declaring that the contestee unlawfully holds a public office, and that, therefore, the perfection of the appeal does not stay the enforcement of the judgment. But it would not matter that the judgment so declared, unless it were within the power of the court in this proceeding to pronounce such a judgment. This is an action to contest an election, the judgment in which may be one of three,—a judgment of dismissal, a judgment setting aside and annulling the election, or a judgment declaring that the contestee or some other person has received the highest number of legal votes, and is therefore elected. It was this last kind of judgment which the court gave, but it added to it the unauthorized declaration that the contestee was unlawfully holding the office. Such a judicial declaration is appropriate to the action of quo warranto, or usurpation of office, which is an entirely distinct proceeding from the one which was here employed. Section 803, Id., authorizes the commencement of an action against any person who "usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state." This language is identical with that above quoted from section 949 of the same Code, and it is quite apparent upon the reading of the two sections that it is to such a judgment in quo warranto, or for usurpation of office, that section 949 has reference. Within the reading of those sections it cannot be said that the respondent is unlawfully holding his office. Assuredly, he entered upon it lawfully by virtue of his certificate of election. If, by matters arising after his incumbency, he has lost the right to retain the office, still it cannot be adjudged in this proceeding that he is usurping, or intruding, or unlawfully holding office, within the intent and meaning of section 949. In this respect the case would be parallel with that of Covarrubias v. Supervisors, 52 Cal. 622. See, also, Morton v. Broderick, 118 Cal. 474, 50 Pac. 644. Moreover, having regard to the nature of the proceeding upon contested elections, it will be observed that it is designed as speedily as may be to determine the question—First, whether a given election was legally held; and, second, to decide which of two or more opposing candidates has been legally chosen to office. No question of usurpation, of unlawfully intruding, or of illegal holding enters into this consideration. Indeed, the time limited for the commencement of such a contest, and the requirement that the court shall sit in special session to hear and determine it, indicate that it was the purpose of the law that a judgment should be rendered before the term of office actually commenced. It is by chance, in this case, that the hearing continued after the commencement of the term, and that the determination was reached when one of the candidates had been inducted into office by virtue of his certificate. But this circumstance does not change the form of the proceeding, or authorize the entry of a judgment not provided for therein. It might be a wise provision of the law to declare that in such contests the successful party shall, by virtue of the judgment of the trial court, be immediately let into possession of the office. In some states will be found that or similar provisions. There is none such upon our own books, and in the present condition of the law it must be held that the perfecting of the appeal by the party aggrieved ipso facto operates as a supersedeas. The application for the writ is therefore denied.

We concur: TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; VAN DYKE, J.

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125 Cal. 534

CITY AND COUNTY OF SAN FRANCISCO v. SHARP. (S. F. 1,208.)

(Supreme Court of California. Aug. 7, 1899.)

SAN FRANCISCO PUEBLO LANDS—ADVERSE POSSESSION—COMPENSATION.

The ordinance of October 16, 1856, of the common council of the city of San Francisco, relating to the disposition of pueblo lands, providing that the Van Ness map be adopted in respect to the reservation of squares and lots for public purposes, on being ratified and confirmed by Act March 11, 1858, operated as a present and complete dedication of the lots, as shown by the map, to the public use; and, in an action by the city and county of San Francisco to quiet title to a tract of land designated on such map as "Hospital Lot," defendant, holding possession of a portion of such tract continuous with that of her predecessors in interest, from a date prior to January 1, 1855, is not entitled to compensation.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the city and county of San Francisco against Honora Sharp to quiet title to a certain tract of land. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Wm. B. Sharp, for appellant. H. T. Cresswell, for respondent.

BRITT, C. Action by the city and county of San Francisco to quiet title to the tract of land which was designated on the Van Ness map of 1856 as "Hospital Lot," and which was originally part of the pueblo lands of the city within the corporate limits as defined by the act of April 15, 1851. Such tract was within the scope of Ordinance No. 822 of the common council, approved June 20, 1855 (the Van Ness ordinance), and the other ordinances following thereon, relating to the disposition of said pueblo lands, all of which were ratified by the act of the legislature approved March 11, 1858 (St. 1858, p. 52). Defendant has possession of a portion of said tract, and the possession so held by her is continuous with that of her predecessors in interest, beginning at a time prior to January 1, 1855. The court below rendered judgment declaring that plaintiff is the owner of the land in suit, "in trust for the use and benefit of the people of the state of California, and the inhabitants of the city and county of San Francisco, for the purposes of a public hospital"; and that defendant has no right or interest in any part of the same.

On appeal defendant abandons sundry of the defenses set up in her answer, and admits that as a result of the legislation above referred to, and the confirmatory act of congress of July 1, 1864, the said lot was dedicated to public use for purposes of a hospital; but she claims, as we understand the argument, that she is entitled to occupy the part thereof in her possession as aforesaid until the city shall pay to her the value of the same (found by the court to be the sum of $75,000), and that the judgment was erroneous in not requiring the city to compensate her to the amount of such value as a condition precedent to quieting its title against her. The several ordinances mentioned are recited at length in the said act of 1858; and the steps taken by the common council of the city and the commission appointed by it, for the selection of public grounds to be reserved from the general granting provisions of Ordinance No. 822, have been described in a number of cases involving the effect thereof as ratified by the legislature, and need not be here rehearsed. See Hoadley v. City and County of San Francisco, 50 Cal. 265; Id., 124 U. S. 639, 8 Sup. Ct. 659; Sawyer v. Same, 50 Cal. 370; Board v. Martin, 92 Cal. 209, 28 Pac. 799. The claim of the defendant to pecuniary compensation, as above stated, rests on the provision of section 6 of Ordinance No. 822, that "the city shall not, without due compensation, occupy for the purposes mentioned in this section [which included sites for hospitals] more than one-twentieth part of the land in the possession of any one person." The court found that, at the time the said hospital lot was selected and dedicated to public use, the portion of the same then in the possession of defendant's said predecessors in interest "comprised more than one-twentieth of the lands in their possession between January 1 and June 20, 1855."

Since the persons through whom defendant claims had no estate in the land which they could assert against the United States, the state of California, or the city, they were equally without legal right to be paid for the same, when, by appropriate legislation, it was dedicated to public uses in charge of the city. The claim now made is therefore to a governmental gratuity, and the statute under which it is advanced—the act of March 11, 1858—is to be construed strictly against the pretensions of the claimant; ambiguities therein, if any, are to be resolved against the demand. City of Oakland v. Oakland Water-Front Co., 118 Cal. 160, 50 Pac. 277. Three ordinances were ratified by the act of 1858. Section 6 of the first (No. 822) contained several restrictions on the power to reserve lots for public uses. Thus, it was declared that public squares or parks "shall not embrace more than one block, corresponding in size to the adjoining blocks"; also, that the selection of lots to be reserved "shall be made within six months from the time of the passage of this ordinance"; and that the city should not occupy more than one-twentieth part of the land in the possession of any one person "without due compensation." But it is perfectly clear that the third of said series of ordinances (the order of October 16, 1856, adopting the Van Ness map) was passed in utter disregard of the said restrictions of Ordinance No. 822, relating to the time limit for the selection of the reserved lands, and relating to the size of the parks; for such limit of time expired December 20, 1855, not having been previously extended, and the Van Ness map, showing the selections made by the commissioners, was not reported to the common council until April 19, 1856, while the public squares shown on the map and dedicated by its adoption included in most instances four blocks, instead of one, as provided by Ordinance No. 822. These departures from the original scheme have been held to affect in no wise the dedication of the reserved grounds. San Francisco v. Mooney, 106 Cal. 586, 39 Pac. 852, and cases cited. The language of the order of October 16, 1856, was that the Van Ness map be adopted "in respect to * * * the reservation of squares and lots for public purposes." By the ratification of this order in the statute of 1858, it acquired the force of law, and operated immediately to dedicate the lots to public use. Hoadley v. City & County of San Francisco, 50 Cal. 265. Since, therefore, it had, and was obviously intended to have, this effect, notwithstanding that it ignored some of the most important of the conditions which, by the terms of Ordinance No. 822, hampered the right of the city to reserve land for its own purposes, it is a very natural inference that it was meant to disregard also the provision by which the city was to be required to pay the possessors of the lots dedicated for something they did not own, viz. the right to occupy the same. If this is not so, we should have the anomaly of land completely dedicated to public uses, which yet the public cannot use without paying its value to persons who have no title or estate in the land itself. While such a condition might possibly be created by statute, all intendments in the construction of the act of 1858 should, for reasons already stated, be indulged against it.

The effect of the analogies above suggested is sought to be avoided on the ground that section 6 of Ordinance No. 822 did not forbid the city to take more than one-twentieth of the land possessed by any one person, but, on the contrary, contemplated that more might be taken upon making compensation to the occupants, and that accordingly the actual dedication of more than one-twentieth of the lands possessed by defendant's grantors shows nc intent not to pay for it. This is hardly a sufficent answer. The question in one case, for example, is whether the legislature intended to dedicate finally land which, by the terms of said section 6, was not subject to reservation at all; in the other (the case here), whether it intended to dedicate finally land which the same section forbade to be occupied,—certainly an indispensable step in any effectual dedication to public use,—without paying the value to the possessors. It seems to us that the present and complete dedication contemplated by the order of October 16, 1856, confirmed by the statute of 1858, was inconsistent alike with all the restrictions of said section 6. See Sawyer v. City & County of San Francisco 50 Cal. 370; Holladay v. Same (Cal.) 57 Pac. 146. The present decision might perhaps be rested on the authority of Sawyer's Case, just cited; but defendant characterizes the view there expressed as dictum merely, and contends that for other reasons it is not controlling; and since, besides this case, there are others now pending for decision in which reliance is placed on the main contention urged for defendant here, we have preferred to respond directly to the question of the proper construction of the statute. We think defendant is not entitled to the compensation she claims, and that the judgment appealed from should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

125 Cal. 593

VERNON SCHOOL DIST. v. BOARD OF EDUCATION OF CITY OF LOS ANGELES. (L. A. 510.)

(Supreme Court of California. Aug. 17, 1899.)

STATUTES—GENERAL LAW—CONSTITUTIONALITY—ANNEXATION OF SCHOOL PROPERTY BY CITY.

1. Act 1889 (St. 1889, p. 358), relating to the alteration of boundaries and annexation of territory to incorporated towns and cities, providing that electors of the municipality may petition the municipal authorities to make the proposed annexation, is not unconstitutional, as conferring on the electors of the municipality a special privilege not conferred on the electors of the territory proposed to be annexed, as the provision applies to the electors of all towns and cities, and is therefore general, and not special.

2. Act 1889 (St. 1889, p. 358) entitled "An act to provide for the alteration of the boundaries of and for the annexation of territory to incorporated towns and cities, and for the incorporation of such annexed territory in and as part of such municipalities, and for the districting, government and municipal control of annexed territory," includes within its title the provision, "And henceforth annexed territory shall be to all intents and purposes a part of such municipal corporation, except only that no part of such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation," and makes for all municipal purposes, except as above stated, the annexed territory a part of the city, so that school property, on annexation, comes in possession and under control of the board of education of the city.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by Vernon school district against the board of education of the city of Los Angeles to quiet title. From a judgment in favor of defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

A. B. Hotchkiss, for appellant. W. E. Dunn and F. J. Thomas, for respondent.

HAYNES, C. Action to quiet title. Defendant had judgment, and plaintiff appeals therefrom and from an order denying a new trial.

In 1876 the plaintiff purchased the property in question for school purposes, and the same was conveyed to the trustees of said district for school purposes only. In 1896 certain territory was added to the city of Los Angeles, which added territory embraced a portion of said Vernon school district, including said school site and improvements. It is conceded that the proceedings for the annexation of said additional territory to the city of Los Angeles were regular, and the validity of said annexation is not questioned except by an attack upon the constitutionality of the act of 1889, under which the annexation proceedings were taken. The portion of Vernon school district not included in the annexed territory still maintains its organization and name as such district, and prosecutes this suit to quiet its title to the property formerly conveyed to it for school purposes, but which is now within the limits of the city of Los Angeles; and the question is whether said lot is now owned and should be controlled by said Vernon school district or by the board of education of said city. It is contended that the act of 1889 (St. 1889, p. 358) is unconstitutional, in that it confers upon the electors of the municipality a special privilege not conferred upon the electors of the territory proposed to be annexed, viz. that of petitioning the municipal authorities to make the proposed annexation. This provision of the statute, however, applies to the electors of all towns and cities, and is inapplicable to all those not similarly situated. The statute is therefore general, and not special, and does not confer a special privilege, since it is a privilege not denied to any elector or electors of any town or city. The residents of the territory proposed to be added are, however, fully protected, as the annexation cannot be made unless the proposition to annex shall be submitted to the electors of such territory as well as to the electors of the municipality, and authorized by a majority of the voters thereof.

Appellant also contends that, if the effect of the annexation under the act of 1889 is to make the board of education of the city the successors in office of the trustees of the Vernon school district, such purpose of the act is not expressed in its title. The title of said act is as follows: "An act to provide for the alteration of the boundaries of and for the annexation of territory to incorporated towns and cities, and for the incorporation of such annexed territory in and as part of such municipalities, and for the districting, government and municipal control of annexed territory;" and the act provides: "And thenceforth such annexed territory shall be to all intents and purposes a part of such municipal corporation, except only that no part of such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation." It is too clear to require argument or illustration that this provision in the body of the act is within its title, and that for all municipal purposes, except as above stated, the annexed territory is part of the city of Los Angeles, and subject to the same municipal control, and the operation of the same statutes, that it would have been if originally incorporated therewith. If, therefore, public schools and school property within municipalities are subject to municipal control, it follows that the school property here in question belongs to the city, and is rightfully in the possession and under the control of the board of education of said city, and is its property. Even if this territory had not been annexed to city for municipal purposes under the act of 1889, but upon petition had been annexed to the city "for school purposes only," the part of Vernon school district so annexed would have been under the sole control of the board of education of the city. Pol. Code, § 1576, as amended St. 1891, p. 157. So, in the absence of statutory provisions governing the ownership of municipal property upon the division of a municipality, municipal property, consisting of real estate, belongs to the municipality within which it is located by the division. Los Angeles Co. v. Orange Co., 97 Cal. 331, 32 Pac. 316, and authorities there cited. Any other conclusion would involve a conflict of jurisdiction not to be tolerated. I advise that the judgment and order appealed from be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(125 Cal. 540)

CLARKE et al. v. MOHR et al. (S. F. 1,771.)[1]

(Supreme Court of California. Aug. 8, 1899.)

UNDERTAKINGS ON APPEAL—WANT OF CONSIDERATION—MATERIAL ALTERATION AFTER EXECUTION—DIVISIBILITY OF OBLIGATION—NOTICE OF APPEAL.

1. Undertakings on appeal, executed between the time of the entering of judgment and the filing of a motion for new trial, cannot be made to cover the appeal from the order denying the new trial, as at the time of their execution there is no right of appeal from such order, and, consequently, no consideration for the undertaking in that respect.

2. Where an undertaking on appeal was executed between the time of the entering of judgment and the filing of a motion for new trial, and by its terms covered the appeal both from the judgment and from the order denying the new trial, but omitted the date of such order, a subsequent interlineation of the date of the order is such an alteration of the contract as to discharge the surety from all obligation.

3. Where an undertaking on appeal is executed between the time of entering the judgment and the filing of a motion for a new trial, and is designed to cover the appeal from both, the instrument is divisible, and the fact that it is invalid for want of consideration as to the appeal from the order does not affect its validity as to the appeal from the judgment.

4. Under Code Civ. Proc. § 1014, providing that, where defendant has not appeared, notice of subsequent proceedings is not necessary, defendants who have not been served with summons in an action, or appeared therein, are not entitled to notice of appeal.

Department 1. Appeal from superior court, city and county of San Francisco.

Action on a promissory note by J. F. Clarke against H. Mohr, Kate C. Byrne, Florence B. Hinckley, and others. Complaints in intervention were filed by Henry I. Kowalsky and Timothy Hurley. From a judgment in favor of the intervener Kowalsky, and an order denying a motion for a new trial, plaintiff and the intervener Hurley appeal. Motions by defendants Byrne and Hinckley and intervener Kowalsky to dismiss the appeal. Denied as to defendant Hinckley. Granted as to the intervener Kowalsky and defendant Byrne.

Alfred Clarke, for plaintiff. Wilson & Wilson and H. Wilkins, for defendants. T. J. Crowley and A. R. Cotton, for interveners.

HARRISON, J. Motions to dismiss the appeals. The plaintiff commenced this action to recover judgment in her favor upon a promissory note executed by the defendant Kate C. Byrne, and for its payment out of the sale of a certain security given therefor, and also for determining the rights of the other defendants in the proceeds of said sale. Mrs. Byrne filed an answer to this complaint, denying its several allegations. Complaints in intervention were thereafter filed by H. I. Kowalsky and by Timothy Hurley, and to these complaints answers were filed by the plaintiff and by Mrs. Byrne. The cause was tried by the court, and judgment entered June 20, 1898, "that the intervener Henry I. Kowalsky have and recover from the defendant Florence Blythe Hinckley the sum of fifteen hundred dollars, and that plaintiff take nothing by this action, and that said intervener Timothy Hurley take nothing by this action, and that this action be dismissed as to all the other defendants therein." The motion for a new trial was denied December 2, 1898. From this order and from the judgment the plaintiff and the intervener Hurley have appealed.

1. The defendants Byrne and the intervener Kowalsky have moved to dismiss the appeals, upon the ground that no sufficient undertaking on appeal has been filed in behalf of either appellant. These undertakings, for the sum of $300 each, are dated August 9, 1898, and on that day the sureties qualified as such before a notary public, but the undertakings were not filed until December 3, 1898. Each of the instruments recites that judgment has been rendered against the appellants therein "and motion for new trial was denied Dec. 3, 1898"; that the appellant is dissatisfied with said judgment "and denial of new trial," and is desirous of appealing therefrom; that in consideration of the premises and of such appeal the sureties undertake and promise, etc.

It is claimed in support of the motions that the undertakings have been altered since their execution by the insertion and interlineation therein of the above-quoted words: "and motion for new trial was denied Dec. 3, 1898," and the words "and denial of new trial," and that thereby the undertakings became invalid. There are many reasons, as well from the appearance of the undertakings themselves as from the circumstances connected with their filing, in support of the contention that the above interlineations were made after the instruments were signed and verified; but the appellants have presented affidavits by the sureties thereon, in which they state that with the exception of the words "Dec. 3, 1898," the above-quoted words were inserted in the undertakings at the time they were signed. These affidavits are not contradicted, and we must hold that the facts are as therein stated. At the time the instruments were signed the motion for a new trial had not been presented to the court for its consideration, and the order denying it was not made until December 2, 1898. There was, therefore, no right of appeal therefrom on behalf of either of the appellants at the time they were signed and verified, and consequently no consideration for the execution of an undertaking upon such appeal. The interlineation of the words "Dec. 3, 1898," after the signing of the undertaking, was such an alteration of the contract entered into by the sureties as to discharge them from all obligation thereon. It is not shown when or by whom the alteration was made, but the respondents are entitled to an undertaking sufficient in fact as well as in form, and are not to be subjected to the necessity of showing that the sureties thereon are liable by reason merely of an estoppel in pais. The undertaking upon the appeal from the order denying a new trial must therefore be held invalid.

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[1] Rehearing denied September 6, 1899.

The undertaking on the appeal from the judgment is, however, distinct from that upon the appeal from the order denying a new trial, and, although both may be included in the same instrument, the validity of each is to be determined by a reference to the appeal for which it is given. An appeal from the order is frequently dismissed, while that from the judgment is allowed to remain, and vice versa. The words in the instrument herein referring to the order denying a new trial do not affect the undertaking upon the appeal from the judgment, and may be regarded as surplusage. At the time the instrument was assigned by the sureties, the judgment had been entered, and the subsequent appeal therefrom was a sufficient consideration to make it a valid and effective obligation whenever it should be filed. The statute does not require that the undertaking shall not be signed by the sureties until after the appeal is taken, or limit any time between the two acts, but merely requires that it shall be "filed" within five days after the service of the notice of appeal. Code Civ. Proc. § 940. The undertaking has no effect until that time, but upon being filed it becomes an executed and valid obligation upon the sureties. See Wheeler v. Farmer, 38 Cal. 215.

2. A motion is also made on behalf of the respondent Hinckley to dismiss the appeal, upon the ground that the notice of appeal was not served upon certain other defendants. The record does not show, however, that either of these defendants was served with the summons in the action, or appeared therein, and consequently service upon them of the notice was not required. Code Civ. Proc. § 1014. Unless they had been brought before the superior court, they would not be affected by its judgment, or by any reversal thereof by this court. The want of a sufficient undertaking is not made a ground of the motion by this respondent, and cannot therefore be considered. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48. The respondent may have waived the giving of the undertaking.

The motions to dismiss the appeals from the judgment are denied. The appeals from the order denying a new trial are dismissed as to the respondents Kowalsky and Byrne, and the motion therefor by the respondent Hinckley is denied.

We concur: VAN DYKE, J.; GAROUTTE, J.

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125 Cal. 609

CRAWFORD et al. v. TRANS-ATLANTIC FIRE INS. CO. (L. A. 540.)

(Supreme Court of California. Aug. 28, 1899.)

INSURANCE—ACTION ON POLICY—EVIDENCE OF PAROL CONTRACT—DECLARATIONS OF AGENTS.

In an action on a fire insurance policy written before, but not delivered until after, the property covered thereby was destroyed by fire, it is material for plaintiff to show an oral contract existing before the fire, and for that purpose any statements made by the agents of defendant while engaged in the transaction with the plaintiff, and up to the time the policy was delivered, are part of the res gestæ, and competent; but declarations of such agents, made thereafter, when not acting in connection with the business with plaintiff, and which relate wholly to the past transaction, are hearsay, and their admission is error.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by E. H. Crawford and others against the Trans-Atlantic Fire Insurance Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed.

W. S. Goodfellow and Wilcoxon & Bouldin, for appellant. W. H. Spencer, for respondents.

BRITT, C. Action on a policy of fire insurance, which in terms purports to be the contract of defendant, and to insure a certain stable building, the property of plaintiff Crawford, to the amount of $1,000, for the period of one year commencing at noon of May 2, 1897. The defense is that the instrument was not executed by defendant, and never took effect as its contract. For the purposes of the trial the parties stipulated that from April 1, 1897, to May 15, 1897, one Roberts and one Barrett "were, and each of them was, the agent of the defendant, and authorized to execute said policy, if it was executed." It appeared in evidence for plaintiffs: That said Roberts was a traveling agent for defendant, and said Barrett was its local agent at the town of San Luis Obispo, where said building was situated. That, as the result of some oral negotiations between Crawford and both of said agents on April 30, 1897, Roberts on that day prepared and signed said policy, and left it with Barrett; Crawford having agreed to accept the same, and pay the premium thereon. On the following day—May 1st—Barrett sought Crawford for the purpose of delivering the policy, but, failing to find him, kept the document over May 2d, which was a Sunday; and while it was so in his possession, on Sunday night, the building was destroyed by fire. On May 3d, after the fire, Barrett delivered the policy to a certain bank as Crawford's agent. A few days later Crawford offered to pay the premium on the policy to said agents, but they declined to receive it. On behalf of defendant there was evidence tending to show that Crawford refused the proposal of said agents to insure the building and to issue said policy, and that the same was prepared without his consent, Barrett expecting to induce him to accept it; and that the delivery to the bank after the fire was, it seems, but provisional, pending other arrangements. There was a verdict and judgment for plaintiffs.

The main question for determination was whether all the acts of said agents, taken together, amounted to an execution of the policy, so that it became obligatory on the defendant. If the policy—as the evidence for plaintiffs tended to show—was the memorial of a contract, which in its essentials had been agreed upon by parol before the fire, and which the parties intended should take effect, according to its terms, on the 2d of May at noon, then certainly the subsequent delivery was sufficient to make the defendant liable on the instrument; its liability thereon probably attached even without actual delivery to the insured or his agent. Lightbody v. Insurance Co., 23 Wend. 18; City of Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa, 276; Insurance Co. v. Colt, 20 Wall. 560; Yonge v. Society, 30 Fed. 902; Harrington v. Insurance Co. (S. F. 1,658; Aug. 14, 1899), 58 Pac. 180. If, however, as the evidence for defendant tended to show, there had been, before the fire, no agreement that defendant should insure the building, and issue its policy accordingly,—such an agreement as would have made Crawford liable for the premium,—then it is equally plain that delivery of the policy after the building had been destroyed, to the knowledge of the parties, could not impart to the instrument any effect whatever. Civ. Code, §§ 2527, 2528; Clark v. Insurance Co., 89 Me. 26, 35 Atl. 1008; People v. Dimick, 107 N. Y. 13, 14 N. E. 178. It was therefore important evidence for the plaintiffs if they could show that defendant considered or admitted at any time that the contract was complete, and the risk had attached. For this purpose all the acts and declarations of either Roberts or Barrett which might characterize or explain their intent while they were engaged in the business with Crawford, and until the delivery of the policy to the bank, were part of the res gestæ, and hence admissible evidence against the defendant. Of this nature, for instance, was the testimony of the plaintiff Bush—who was named in the policy as payee of the insurance in case of loss—that Barrett said to him, at the time he handed the policy to the bank: "You are a thousand dollars better off than you thought. Here is a policy for a thousand dollars just put on your stable." Testimony such as this was plainly competent. But the plaintiffs went further. The court allowed them, over the objection of defendant, to prove as part of their case in chief a declaration made by said Roberts at a time subsequent to the delivery of the policy, and when he was not acting for defendant in any business connected therewith, that he "had received a dispatch from his company to adjust a loss on Crawford's stable, and that he had found out since * * * that his policy didn't cover." Evidence was also admitted, over like objection, of a statement made by Barrett, on the morning following the fire, that "he had issued a policy for a thousand dollars on that building to Mr. Crawford a few days before." By these rulings, and one or two others of similar character, the plaintiffs were allowed to place before the jury evidence of admissions by defendant's agents, made not as part of the transactions looking to the execution of the policy, nor while discharging any duty of their agency pertaining to their treaty with Crawford, but as mere narration or illustration of their past conduct. Such evidence was only hearsay, and was incompetent. Beasley v. Packing Co., 92 Cal. 388, 28 Pac. 485; Dean v. Insurance Co., 62 N. Y. 642; Insurance Co. v. Mahone, 21 Wall. 152; Walker v. Insurance Co., 51 Iowa, 682, 2 N. W. 583. It was material to the issue pending, and for the error in its admission the judgment and order denying a new trial should be reversed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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125 Cal. 556

ELLIS et al. v. RADEMACHER et al. (L. A. 571.)

(Supreme Court of California. Aug. 10, 1899.)

PLEADING—RELIEF INCONSISTENT WITH COMPLAINT.

Code Civ. Proc. § 580, provides that, where there is no answer, the court shall give plaintiff no more relief than he has demanded in his complaint, but in other cases may grant him any relief consistent with the case made by the complaint, and embraced within the issue. Defendant agreed to sell a half interest in a mining claim to plaintiff in consideration that plaintiff would erect a stamp mill and procure a water supply. The proceeds of the mine were to be equally divided. Defendant failed to perform, and plaintiff sued, praying for specific performance by defendant, for an injunction restraining him from carrying away the ore and from conveying the mine to any one except plaintiff, and for general relief. Defendant answered, admitting the allegations in the complaint, and praying that plaintiff might have judgment. *Held*, that a decree directing specific performance by defendant, enjoining him from selling the mine to any one other than plaintiff, and from digging the ore, that did not order plaintiff to perform the contract on his part, or pay the consideration, was erroneous, and granted relief that was not consistent with the complaint.

Commissioners' decision. Department 1. Appeal from superior court, Kern county.

Action by John R. Ellis and others against Aleck Rademacher and others. From a judgment for plaintiffs, the defendant Rademacher appealed. Reversed.

T. M. Osmont, for appellant. W. W. Middlecoff, for respondents.

COOPER, C. This is an appeal from the judgment on the judgment roll alone. The defendant Rademacher (appellant here) filed an answer, and by his answer admitted the allegations of the complaint, and prayed that plaintiff might have judgment. Findings were filed, and judgment entered for respondents. The appellant claims that the findings and judgment are too broad, and give to respondent more relief than is warranted by the complaint. It is well settled that a judgment by default cannot give any relief in excess of that demanded in the complaint. Code Civ. Proc. § 580; Raun v. Reynolds, 11 Cal. 19; Lamping v. Hyatt, 27 Cal. 102. A default admits the material allegations of the complaint, and no more. It is not necessary to determine whether there is any difference in principle between a case where the allegations of the complaint are admitted by the legal effect of the silence of a party, and where such allegations are admitted by a written answer. In either case the relief given to the plaintiff cannot exceed that which the law awards as the legal conclusion from the facts alleged. The court cannot grant any relief in either case not warranted by the averments of the complaint. Carpentier v. Brenham, 50 Cal. 551; Cummings v. Cummings, 75 Cal. 441, 17 Pac. 442; Hicks v. Murray, 43 Cal. 522. Our Code (Code Civ. Proc. § 580) provides as follows: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." It will be necessary, therefore, for us to determine whether in this case the relief granted was consistent with the complaint, as there were no issues made by the answer. The complaint alleges that on July 28, 1896, the appellant and respondent Ellis entered into a written contract by the terms of which the appellant agreed to sell and convey to said Ellis an undivided one-half of a certain mining claim known as the "Baron Mine" in consideration of the agreement of said Ellis to erect a quartz stamp mill on the nearest adjacent mill site where water can be obtained, the said mill to be erected within six months from the time that the water can be procured at some near and suitable place, the appellant reserving the surface ground upon which his cabin stands. The proceeds from the mining and milling of ores were to be equally divided. Each party was to have equal voice in determining whether or not the milling capacity of the mill so erected should be increased. Respondent Ellis further agreed to use his best endeavors immediately to secure a sufficient water supply as near said mine as possible. The complaint further alleges that the appellant interfered with and prevented respondent Ellis from performing said contract on his part, and from prospecting for water on said claim, and from taking ores therefrom, and from entering thereon for the purpose of erecting a mill, and that appellant ousted and ejected the respondent Ellis from said claim. The prayer of the complaint is for a specific performance of the contract, and that defendants be enjoined from digging up and carrying away the ores, and from interfering with plaintiffs' rights, and that appellant Rademacher be enjoined from conveying the mine to any one other than respondent Ellis, and for general relief.

The decree entered grants more relief to respondents than is authorized by the complaint in several respects. It directs appellant to specifically perform the contract, while it does not so direct the respondent Ellis, and fixes no time within which the respondent Ellis is to erect the quartz mill, or perform the conditions of said contract on his part. It makes it the duty of the appellant absolutely to perform the contract without any reference to the payment of the consideration by the respondent Ellis by performing the covenants of said contract on his part to be performed. It perpetually enjoins the appellant from conveying the said mine, or any part thereof, to any one other than the respondent Ellis. The injunction not only prevents the appellant from selling and conveying the undivided one-half of said mine, which, under the terms of the contract, he was to convey to respondent Ellis, but it absolutely prevents the appellant from conveying any part of the mine to any one other than respondents, and this without any regard to the question as to whether or not respondent Ellis ever complies with the contract on his part. It enjoins the appellant forever from digging up or carrying away any ore or gold on said premises, with no condition as to whether or not the respondent Ellis shall comply with the said contract on his part. The decree, in the respects pointed out, is erroneous, and grants relief beyond that authorized by the complaint. The appellant has the right to have respondent Ellis proceed with reasonable diligence, and in a reasonable time, to erect the said quartz mill as provided in said contract. The time fixed by the said contract for the erection of said mill is six months from the time that water can be procured at some near and suitable place. The respondent Ellis should use reasonable diligence, and within a reasonable time, to procure water, and, if he shall fail to do so, the consideration will have failed, and the appellant will not longer be bound by the contract. The decree as entered is in favor of Downing, one of the plaintiffs, and the only allegation of the complaint as to him is that plaintiffs (of whom Downing is one) are informed and believe that plaintiff Downing has, or claims to have, some interest in said mining property. The complaint, therefore, did not authorize any judgment in favor of plaintiff Downing. The contract is set forth in the complaint as "Exhibit A," and the decree enjoins the appellant "from doing any act whatever which will in any manner interfere with the rights of the plaintiffs under said Exhibit A." The decree should be definite as to the things to be performed and as to the acts enjoined. To enjoin the appellant from doing any act which will in any manner interfere with the plaintiffs' rights under a certain contract is too uncertain and indefinite to ever be enforced. The appellant is entitled to have the decree define his rights as well as the rights of the respondents, and to have it direct what specific acts appellant is to do, as well as what he is not to do. The decree should be definite and certain, and grant no greater relief than that authorized by the complaint. It should fix and define a time within which respondent Ellis shall be required to build the quartz mill upon the premises. We think the judgment should be reversed, and that the cause should be remanded, with instructions to the court below to render its judgment and decree in accordance with this opinion, and as authorized by the allegations of the complaint.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with instructions to the court below to render its judgment and decree in accordance with this opinion, and as authorized by the allegations of the complaint.

128 Cal. 531

HARRINGTON v. HOME LIFE INS. CO.

(S. F. 1,658.)

(Supreme Court of California. Aug. 14, 1899.)

INSURANCE—FORFEITURE OR LAPSE—WAIVER OF NOTICE—NOTE IN PAYMENT OF PREMIUM —WHEN POLICY BECOMES OPERATIVE—WHEN NOTICE AND PROOF SHOULD BE MADE—LIMITATIONS.

1. Under the laws of the state of New York, which provide that no life insurance company doing business in that state shall have power to declare forfeited or lapsed any policy by reason of nonpayment of premium or interest, or any portion thereof, until 30 days after the mailing of a written notice to the assured, a policy issued by an insurance company located in the state of New York, and doing business in another state, to be performed in New York, cannot be forfeited for nonpayment of premium without a written notice to the assured, though the policy contains an express waiver of such notice.

2. Where an insurance company located in the state of New York and doing business in California issued a policy to the assured in the latter state, who gave a note for the first premium, and there was no rule of the company, condition in the policy or in the application, nor any instruction to the agents prohibiting payment by note, or which rendered the policy inoperative until payment in money was made or duly waived, a contention that, to make the policy operative, delivery must have been in California, because the contract could not be in force until payment in cash was waived by an unconditional delivery, is without force.

3. Where payment of the first premium has been made to an insurance company located in the state of New York and doing business in California, for which a receipt is given providing that in the event of acceptance of the application the policy shall be in force from the date of acceptance, and the company accepts the application, and prepares a policy at its home office in New York, the policy will be deemed in force when it was transmitted from New York to the local agent, and is an instrument executed out of California.

4. Where a policy of life insurance contains a covenant to pay the legal representatives of the assured, after due notice and satisfactory proof of death and interest, in accordance with the terms of the contract, the demand, notice, and proof must be made within the period limited.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Marguerite D. Harrington, administratrix of the estate of John T. Hope, deceased, against the Home Life Insurance Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Sullivan & Sullivan, for appellant. Elliott McAllister, for respondent.

TEMPLE, J. February 20, 1888, plaintiff's intestate applied through Conway, an agent of defendant in San Francisco, for a policy of insurance upon his life for $10,000. The medical examination was had, and the risk accepted. Hope gave his note, payable to the order of Dunphy, the general agent at San Francisco, for the amount of the first premium, and received from the agent a conditional receipt. Dunphy testified: "He gave his note, and it was to show that a settlement was made at the time the application was made. We call it a conditional binding receipt." The receipt provided that, in the event of the acceptance of the application, the policy should be in force from the date of the acceptance. The application and note were placed with the general agent at San Francisco, who forwarded them to the home office at New York for its approval and acceptance. The amount of the note was charged to Conway, the soliciting agent, and was actually paid to the company by him about one year thereafter. Whether Hope paid is left as a matter of inference and presumption. A policy was issued at the New York office, which alone had authority to accept and issue policies, on the 8th day of March, 1888, was sent to the San Francisco agency, and received there March 12, 1888. Some time during the same month, and before Conway had actually paid the amount of the first premium to the company, the policy was handed to Hope, or to his father-in-law for him. It must be held that the first annual premium was paid by the promissory note, and that the delivery of the policy is evidence that payment in actual cash was waived, if it can justly be said that such payment is made a condition precedent to the delivery of the policy. Apparently Hope paid no further attention to the insurance, and died September 22, 1891, delinquent for three annual premiums. This action was commenced August 21, 1895. The defendant, among other defenses, denied the issuance of a paid policy; averred that the first premium was not paid before the delivery of the policy, and therefore, by the terms of the policy, defendant is not liable thereon; also that the policy lapsed by the failure of deceased to pay the annual premiums; and pleaded the statute of limitations. At the trial a nonsuit was granted, and a motion for a new trial was made by the plaintiff, which was denied. The appeal is from that order and from the judgment. Motion for nonsuit was based upon three grounds: (1) It does not appear that any premium except the first was paid; (2) it was proven that no premium except the first was ever tendered; and (3) the action is barred by subdivision 1 of section 339 of the Code of Civil Procedure.

It is averred in the complaint that the second premium had not been paid, and it is not contended that any part of any premium had been tendered. In fact, Hope paid no attention to it after its issuance. The insurance company is located in the state of New York, and it is agreed that the policy is a contract which was to be performed in that state. By a statute of that state then and now in force it was provided: "No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereinafter issued, or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided." Laws 1876, c. 341, as amended by Laws 1877, c. 321. It is then provided that written notice shall be mailed to the assured, and no forfeiture declared until 30 days thereafter. The policy contains an express waiver of this notice. In Griffith v. Insurance Co., 101 Cal. 627, 36 Pac. 113, this precise question was decided, and it was ruled that the statutory notice could not be waived. "The statute is a limitation upon the power of the company to do a specific thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is ultra vires and void." It is averred in the complaint, and not denied in the answer, that no statutory notice was ever mailed to Hope. It is held by the court of appeals in New York (De Frece v. Insurance Co., 136 N. Y. 144, 32 N. E. 556) that: "The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved nonpayment after due service of the notice required by law." This authority was followed in Griffith v. Insurance Co., supra.

The suit was not commenced for more than three years after the death of Hope, but was commenced in less than four years. An action upon a contract, obligation, or liability founded upon an instrument in writing executed in this state is barred in four years (section 337, Code Civ. Proc.); if founded upon an instrument in writing executed out of the state, within two years (subdivision 1, § 339, Id.). Is the policy upon which suit is based an instrument executed in this state, or was it executed, within the meaning of the statute, in the state of New York? The question of locality depends upon the further inquiry as to when the contract became in force. The defendant contends that it was in force as soon as the risk was accepted by the company, and the policy was issued and sent from its office to its local agent for Hope. The plaintiff claims that the policy was not in force until it was handed to Hope by the local agent. This last contention is based, in part at least, upon the fact that Hope had not paid the first premium in cash, and counsel argue that such payment was expressly made a condition to the taking effect of the policy. Appellant relies for authority upon this point upon Griffith v. Insurance Co., supra, and Jurgens v. Insurance Co., 114 Cal. 165, 45 Pac. 1054, and 46 Pac. 386. In the policies considered in those cases it was expressly stipulated that the policy should not be in force until actual payment of the premium to the company during the lifetime and good health of the insured. There is no equivalent stipulation in the policy involved here. There was no provision that it should not be in force until the payments were made. There is no express requirement that the premiums shall be paid in money, nor were the agents restricted, as in those cases, by the express direction that they should receive only cash in payment. Still, in each of those cases it was held that the agent could waive the requirement as to cash payments, and that he did so by an unconditional delivery of the policy. Another difference between the Griffith Case and this is that there the policy was issued and sent with express instructions not to deliver it until the money was paid by the insured, and he was found to be in good health. There was nothing of the kind in this case. The only mention of cash payments in this case is an indorsement upon the policy, which is signed by no one, and presumably not known to the insured prior to his receipt of the policy. In his application he was made to covenant that the policy should not bind the company "until the premium thereon shall have been received by said company in the lifetime of the assured, and that it shall not continue in force in case of default of payment of any note or notes which may be given in part payment of the premium thereon." Instead of prohibiting payment by note, this was a plain intimation that notes might be accepted in payment. The application made by Hope was reported to the general agent at San Francisco, who was also present when the note was given. He testified: "He gave his note, and it was to show the company that a settlement was made at the time the application was made. We call it a conditional binding receipt." He said further that the receipt showed the amount of premium paid for the amount of insurance applied for, and stated that the insurance would be in force "from the date when the application was accepted from the company." In the policy it is recited: "In consideration of the representations and agreements contained in the application therefor, and the sum of two hundred eighty-three dollars and sixty cents, to be paid on or before the delivery of this policy," etc. Among the covenants in regard to forfeiture is one to the effect that if the statements contained in the application shall be found to be untrue, "or in case the said John T. Hope shall not actually pay the first premium, as aforesaid, before the delivery of this policy, and while the said John T. Hope is in good health," or shall not pay subsequent annual premiums, or shall engage in certain specified extrahazardous employments, "or shall die in consequence of a duel, or of the violation of law, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease, and be null, void, and of no effect." Of course, a covenant for a forfeiture implies that the policy is in force, and must do so here, notwithstanding the use of the word "delivery"; and, besides, this contains no provision forbidding payments being made by note. Finally, the attesting clause is as follows: "In witness whereof, the Home Life Insurance Company has, by its president and secretary, signed and delivered this contract at the city of New York, in the state of New York, this eighth day of March, one thousand eight hundred and eighty-eight." We may conclude that there was no rule of the company, condition in the policy, or in the application for it, nor any instruction to the agents, which prohibited payments by notes, or which rendered the policy inoperative until payment in money was made or duly waived. There is, therefore, no force in the argument that the delivery must have been in California, because the contract could not be in force until such condition was waived by an unconditional delivery to Hope.

The question, then, is whether the policy was in force so soon as issued and sent from the home office to the agent in San Francisco for Hope. There was no stipulated condition as to the delivery except that the first premium should be paid while he was in health. That had been paid by his note, for which he received a conditional receipt. The condition was that the risk should be accepted, and would have been the same had the premium been paid in cash. It was a payment if the risk was accepted, otherwise not; and it was provided that the policy should be in force as soon as the application was accepted by the issuance of a policy. Could the company, after the policy had been sent, have then refused to deliver? The test is to suppose Hope had paid in cash, that he had been guilty of no misrepresentation, and had died while it was in transitu. There being no condition requiring an actual tradition of the instrument to him while alive and in good health, such as may be found in some cases, I think the company would have been liable. Our statute makes the rule of delivery as to written instruments the same as in regard to grants (section 1627, Civ. Code), and in section 1059, Id., it is enacted: "Though a grant be not actually delivered into the possession of the grantee, it is yet constructively delivered in the following cases: (1) Where the instrument is by the agreement of the parties at the time of execution understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery." It is therefore a matter solely of intention. If it was intended that document should be in force before it was actually handed over, it will be deemed constructively delivered. Of course, the agent could not complete the contract of insurance, but he could provisionally contract, subject to the approval of the principal, whose ratification would make the contract binding as made. The corporation, by its attesting clause, declared that the instrument was delivered in New York on the 8th of March. By itself this formal clause means but little. But the understanding was that it was then to be in force, and it was sent to the local agent for delivery without condition. No act was to be done, no fact determined, before delivery. Under such instructions, supposing everything had been properly done, and all was fair and honest, had Hope died during the transmission, his beneficiaries could have enforced the policy; and, that being so, its execution was complete when it left the New York office. And such, I think, are all the authorities. In Bliss, Ins. § 150, it is said: "If the company so far accepts the application as to prepare and forward a policy to its agent for delivery, and if payment of the premium has been made, or if such payment is not a condition of the policy's taking effect, or, being a condition, is waived, the contract is then complete, and the company cannot revoke its acceptance, though the policy had not been delivered." To the same effect is 1 May, Ins. 97; 1 Beach, Ins. § 482; Richards, Ins. 54; Elliott, Ins. § 14; 1 Wood, Ins. 49; Ford v. Insurance Co., 99 Am. Dec. 671, note. The matter is elaborately considered in Yonge v. Society, 30 Fed. 902; also in Hallock v. Insurance Co., 26 N. J. Law, 268. In this last case it is said: "Breck, the agent, and the mail were only the vehicles to carry it to him, and it was the same thing as if mailed or sent directly to the plaintiff. The defendants suggest in answer that Breck was their agent, and that by sending it to him they did not part with the possession of the policy, and that they only gave authority to Breck to deliver, which they could and did revoke before actual delivery. But when they mailed the policy to Breck to deliver they did not constitute him their agent to receive it and keep it for them, nor to retain it as their agent. * * * It was a delivery to Breck to deliver it to plaintiff, which was a good delivery to plaintiff." This was affirmed in the court of errors. 27 N. J. Law, 645. See, also, Fied v. Insurance Co., 47 Barb. 127, affirmed in 50 N. Y. 243. In Insurance Co. v. Babcock, 104 Ga. 67, 30 S. E. 273, the matter is again gone over, and the cases cited and discussed. It is concluded that the delivery is complete when sent to the local agent to be unconditionally delivered, and, though it was lost on the way, it was nevertheless the property of the insured. Regarding, therefore, the expressed intention of the parties, and the law as declared in the authorities, the policy was in force when it was transmitted from New York, and is an instrument executed out of this state.

But the appellant argues that, conceding that section 339 of the Code of Civil Procedure is applicable, still it does not appear that the claim is barred, because it is not shown that the cause of action accrued two years before the commencement of the action. Hope died September 22, 1891. The complaint was filed August 21, 1895, in which it is averred that notice of the death was given more than 60 days before the action was begun. No proof having been made, we must assume that no notice of proof was made until immediately before the action was commenced. The only statement in the policy upon the subject is the covenant to pay the legal representatives of John T. Hope, after due notice and satisfactory proof of death and interest, in accordance with the terms of the contract. It is not provided, as in Case v. Insurance Co., 83 Cal. 473, 23 Pac. 534, that an action shall not be commenced until something else has been done in addition to the demand. The main thing is notice and proof of death and the interest of the party giving the notice. These things must necessarily be stated in any notice. Practically, this covenant calls for a demand only. But, in any event, the demand, notice, and proof should be made within the period of limitations, or the demand is stale, and suit cannot be maintained thereon. Meherin v. Produce Exchange, 117 Cal. 215, 48 Pac. 1074; Thomas v. Beach Co., 115 Cal. 136, 46 Pac. 899; Williams v. Bergin, 116 Cal. 56, 47 Pac. 877. In Palmer v. Palmer, 36 Mich. 487, which is a leading case upon this question, it is said: "He is really and in fact able at any time to bring an action when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor, by his own act, and in spite of the debtor, can make the demand payable." This is, in my judgment, the true doctrine; otherwise, the demand is in this condition: The cause of action has accrued if the creditor so wills, but, if it suits his convenience, its life will be prolonged indefinitely. The rule is put upon a different theory in Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43, which, however, may work the same result. It is there practically said that the cause of action does not accrue until demand, but, where demand can be made at any time, it must be made within the period of the statute, or the right of action is lost. This leaves undetermined whether, if the demand is made within the period, the creditor has not the whole period allowed by the statute after demand. But I think that is not the doctrine of the decisions. In Palmer v. Palmer the rule is applied as though the statute is put in motion as soon as demand may be made; otherwise, the creditor could, if he saw fit, add to the life of the contract a period equal to the statutory limitation. He cannot prevent the statute from running by failing to make the demand. Ball v. Railway Co., 62 Iowa, 751, 16 N. W. 592. Whenever he can, if he chooses, by the terms of the contract commence an action, the cause of action has accrued, for the purposes of the statute. Telegraph Co. v. Purdy, 83 Iowa, 430, 50 N. W. 45; Railroad Co. v. Burlingame, 36 Kan. 628, 14 Pac. 271. The order and judgment are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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125 Cal. 603

In re ARMSTRONG'S ESTATE. (L. A. 612.)

(Supreme Court of California. Aug. 23, 1899.)

ADMINISTRATORS—MANAGEMENT OF ESTATE —FINAL ACCOUNTING.

1. The mere fact that an administrator pays off a lien on personal property of the estate, which, on a subsequent sale at public auction, fails to bring the amount of the lien, does not establish gross mismanagement of the estate, and the administrator is not chargeable with the loss, where he acted in good faith, and with reasonable care and prudence.

2. Where an action against an administrator to foreclose a mortgage on property of the estate was tried on its merits, the heirs of the decedent cannot charge the administrator with damages on the settlement of his accounts because of the alleged failure of his counsel to take advantage of a technical defect in the mortgagee's complaint.

3. Heirs of a decedent have no standing, on the settlement of the administrator's accounts, to charge him with damages on the ground of negligence in the management of the estate, where the estate was insolvent, and the negligence charged, if established, did not affect the interests of such heirs.

4. Where delay in the settlement of an estate resulted in no loss to the heirs, the administrator cannot be charged, on his final accounting, with damages therefor beyond interest on the balance in his hands.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

On final accounting of the administrator of Mary J. Armstrong, deceased. From an order allowing the administrator's account, B. F. H. Odell and others appeal. Affirmed.

Henning & Bowen, for appellants. Wells & Lee, for respondent.

COOPER, C. Appeal from order allowing final account of administrator. Deceased died October 20, 1889, leaving personal property, which sold at public sale for $681.79, and 10 acres of land, upon which there was a mortgage for $5,500. Claims were presented and allowed against said estate amounting to over $1,000. The administrator filed his final account in 1897, to which many objections and exceptions were made by the appellants, but two of which are urged upon this appeal.

1. It is first claimed that the court erred in not charging the administrator with $32.75 loss on sale of two horses belonging to the estate. It appears that at the time of the death of deceased the two horses had been for several months out on pasture with one McMaster; that the administrator was informed by one of the creditors that the horses were assets of the estate; that thereupon the said administrator found the horses in the possession of McMaster, who claimed a lien upon them for pasturage to the amount of $93.66. After some negotiations, McMaster agreed to accept $89.50 in full, which the administrator paid, and the horses were delivered to him. The administrator testified that, at the time, he believed the horses would sell for considerably more than the amount of the lien, but that he sold them at public auction, and they only brought $56.75. This testimony was not contradicted, and there was no evidence of want of good faith on the part of the administrator. The sale was approved without objection, after due notice given. It appears that the transaction resulted in a loss to the estate of $32.75, but the loss cannot, from the testimony, be attributable to the negligence of the administrator. He appears to have acted in good faith, and for what he deemed to be the best interest of the estate; and he could not legally be charged with the loss of the sum unless it had been made to appear that he was guilty of negligence in not using ordinary care and diligence in connection with the matter. Estate of Moore, 96 Cal. 525, 31 Pac. 584. It is not claimed that the administrator did not have the authority to redeem the horses; neither is it claimed that there was not a valid lien upon them. The specification is for gross mismangement of the estate in selling the horses for less than the amount paid out for redemption, but no proof is before us of any want of good faith in the transaction. The act might have been for the benefit of the estate, and, as there is no proof of negligence or want of ordinary care, and the proof shows that the administrator acted in good faith, we must hold that if his acts could, under any state of facts, be sustained as valid, they must be presumed to be valid under such state of facts, rather than to be held invalid from the mere fact that the property did not sell for enough to repay the amount paid out by the administrator. Burnett v. Lyford, 93 Cal. 119, 28 Pac. 855. We do not lay down the rule that an administrator can, of his own volition, redeem pledged personal property, or property upon which there is a valid lien, under all circumstances, and justify his acts in case of loss to the estate. If the proof should show that the property, at the time it was redeemed, was of little value, while a large amount was paid out for the purpose of redeeming it, or if the circumstances were such that we could not say a reasonably prudent man would have done the same thing, then the circumstances might justify the charging of the loss to the administrator; but we cannot say, as a matter of law, that a reasonably prudent business man might not make the honest mistake of paying out more to free property from a lien than the property would sell for after the lien was extinguished.

2. The holder of the mortgage which was executed by the deceased in her lifetime brought suit against the administrator for the foreclosure of the same, and in the decree were included the sums of $571.12 for taxes and interest thereon, and $2,643.88 interest on the promissory note. It is claimed that in the complaint on foreclosure there was no allegation of payment of taxes, and that the administrator and his counsel, notwithstanding this fact, consented to the taxes being included in the decree. The mortgage provided that, in case of foreclosure, the mortgagee should be entitled to include in the decree all taxes paid out upon the property. The bill of exceptions shows that proof was made of the amount of taxes so paid, and that the attorneys for the administrator found the same to be correct. It therefore appears that the foreclosure case was tried upon the theory that the complaint contained the necessary allegation as to taxes, and it is too late now to raise the objection for the first time. As the objection, if raised, would have been merely technical, and as the bill of exceptions shows that the taxes were properly included according to the mortgage and the proof, we cannot now say it was negligence in the administrator not to object to the proof of the payment of the taxes because the complaint did not allege such payment. We must presume, in support of the judgment, that the matter was heard and determined in the lower court upon the theory that the complaint was sufficient, and the issue properly before the court. Bank v. Kowalsky, 105 Cal. 43, 38 Pac. 517.

It is claimed that the amount of interest in the decree was computed according to the terms of the promissory note, and not at the legal rate after the first publication of notice of creditors, and that thus the interest was $409.41 too much, and that the administrator here should be charged with it. This claim is made upon the theory that the estate is insolvent, and that after the first publication of notice to creditors the note and mortgage should have drawn interest at the legal rate, and not at the rate specified therein. It is not necessary to decide the question as to whether or not the rate of interest should have been 7 per cent. after the first publication of notice to creditors. If the estate is insolvent, as claimed by appellants, then, as devisees, they have no interest in the matter, and no creditor has appealed from the order allowing the account. We do not think the amount of the judgment in the foreclosure proceedings can be here attacked except by proof of negligence on the part of the administrator.

The decree was offered in evidence by appellants. It showed that plaintiff, in open court, waived all claim for attorney's fees, and all claim to a deficiency judgment; that the court heard evidence, and determined that there was due for principal and interest the sum of $8,715 and $11.45 costs. The evidence introduced in this record shows that the amount named in the decree was correct. It is not claimed that the property was ever redeemed, or that the administrator ever received any money from it in any way. It is not claimed that he acted fraudulently or corruptly. Another answer to the contention as to the interest and taxes amounting to $980.53 is that appellants are not in a position to complain. If the full amount claimed should be charged to the administrator, there would then not be sufficient on hand to pay the creditors, and appellants would not be entitled to anything. The proof shows that after the foreclosure sale the administrator made arrangements with the plaintiff in the suit, who was the purchaser at the sale, that, if he could find a purchaser for the land, she would deduct $1,000 from the amount due her; that the administrator tried to find such purchaser, but could not, and the plaintiff, who purchased the property at foreclosure sale, finally sold it for less than the amount due her. Finally, it is claimed that the administrator did not make any appraisement of the property, and was guilty of negligence in not settling up the estate sooner. These grounds could properly have been urged on petition to remove the administrator, but we do not understand that, in the absence of proof of loss by such negligence, the court could charge the administrator in the final account with damages. The proof shows that the administrator used diligent efforts to procure a purchaser for the land, not only up to, but after, the foreclosure sale; that he procured an agreement from the purchaser at the sale to take $1,000 less than the amount due her, and yet could find no purchaser. B. F. H. Odell, one of the appellants, testified that he knew of the efforts of the administrator to sell the land, and that the administrator requested him to assist in finding a purchaser; that he was aware that the administrator was making diligent efforts to sell the land, but that, owing to the conditions of the real-estate market, he could not find a purchaser; that he did not expect to get anything out of the real estate. There is not in the record any evidence that the real estate could ever, during the administration of the estate, have been sold for even enough to pay off the mortgage upon it. It would, then, have been a useless expense for the administrator to have appraised it. The court below, as a penalty for the delay in the administration, charged the administrator with interest on the balance of $154.42 in his hands at 7 per cent. per annum, with annual rests until the account was allowed, the amount being $80.48. In this the court below was justified. There are no other points requiring special notice. We advise that the order be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

125 Cal. 584

BALDWIN v. SUPERIOR COURT et al. (S. F. 1,770.)

(Supreme Court of California. Aug. 14, 1899.)

APPEAL FROM ORDER DENYING NEW TRIAL—BOND—SUPERSEDEAS.

Execution on a judgment for the payment of money is stayed by an appeal from an order denying a new trial and the filing of a bond in double the amount of the judgment, though the appellant did not appeal from the judgment; hence a writ of supersedeas will issue when the judgment creditor is proceeding to issue execution.

In bank. Application by E. J. Baldwin for a writ of supersedeas against the superior court and others to stay the execution of a judgment. Ordered issued.

Byron Waters, for petitioner.

PER CURIAM. This is a petition for a writ of supersedeas to stay all proceedings upon a certain judgment against petitioner pending an appeal. The judgment was rendered in the superior court against petitioner, and in favor of one Roche, for a certain sum of money; petitioner appealed from an order denying his motion for a new trial, and gave an undertaking in double the amount of the judgment, but has not appealed from the judgment; and the plaintiff in the action is proceeding to enforce the judgment by execution, notwithstanding the undertaking, upon the theory that the execution of a judgment directing the payment of money cannot be stayed upon an appeal from an order denying a new trial, where there is no appeal from the judgment itself. It was held otherwise, however, in the recent case of Holland v. McDade (Cal.) 58 Pac. 9, and upon the authority of that case the petition must be granted. Let the writ of supersedeas issue as prayed for in the petition.

(125 Cal. 596)

STEWART v. NAUD. (L. A. 553.)[1]

(Supreme Court of California. Aug. 19, 1899.)

WAREHOUSEMEN—SALE OF GOODS FOR STORAGE CHARGES—NOTICE TO OWNER—AGENCY.

1. Since the enactment of Civ. Code, § 1856 (St. 1891, p. 470), providing that "a depositary for hire has a lien for storage charges, which is regulated by the title on liens," the sale of goods, not perishable, by a warehouseman, for charges, is governed by Civ. Code, §§ 3000–3011, and a notice to the owner is essential, unless the sale is made in a judicial proceeding for foreclosure of the lien.

2. The want of knowledge of a warehouseman of the address of the owner of goods stored will not excuse the failure to give such owner notice of a sale of the goods for storage charges, where the foreman in charge of the warehouse when the goods were stored was given the address, and requested to note it on the books, which was not done.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by John Stewart against Louise Naud. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

P. W. Dooner, for appellant. McLachlan, Cohrs & Landt, for respondent.

HAYNES, C. Defendant conducted the business of a warehouseman in the city of Los Angeles. Some time prior to August 9, 1895, the plaintiff stored in defendant's warehouse 14 boxes, described as containing household goods, which, as shown by the testimony of the plaintiff, were packed in April, 1892, in Canada, and shipped to Los Angeles. In July, 1895, plaintiff paid the freight charges and storage up to August 9, 1895, and defendant gave him a warehouse receipt for said goods, bearing said date, in which the subsequent storage charges were fixed at $1.50 per month. On September 1, 1896, no part of the storage dues accruing after August 9, 1895, having been paid, the defendant sold said 14 packages to pay said storage charges. This action is for the conversion of said goods by the defendant. It was tried by the court without a jury. The findings and judgment were for the plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

Many questions are discussed by counsel, but the more important are as to the sufficiency of the notice of sale, and whether the conditions existed which justified or authorized a sale. Touching the notice of sale, the answer alleged: "That prior to said sale she caused due and sufficient notice thereof to be published daily in the Los Angeles Herald, a daily newspaper of general circulation, printed and published in Los Angeles city, aforesaid, for ten consecutive days next before said day of sale, and caused a copy of said notice to be posted for the same period in a conspicuous place at the auction room of Thomas B. Clark (a duly-licensed auctioneer, by whom said sale was made and conducted), at a room 232 West First street, in Los Angeles city, and a further copy of said notice to be posted for the same period in a conspicuous place in the said warehouse." There was no allegation of notice to the plaintiff. There was evidence tending to show that about the 5th of August the defendant's bookkeeper wrote a letter to the plaintiff, informing him that his goods would be sold on the 1st of September, unless the storage charges were paid prior to the sale, which letter was addressed to the plaintiff at Los Angeles city; that he had no exact information as to his residence; and that the letter was never returned,—while on the part of the plaintiff the evidence was to the effect that it was never received, and that the city directory showed that there were several persons in the city having the same name as the plaintiff. The plaintiff testified, in substance, that Hopkins, who was in charge of the warehouse at the time the goods were stored therein (and up to the end of July, 1896, at which time the defendant took personal charge of the business), knew the residence of plaintiff, and had been at his house after the goods were stored, and had been requested by plaintiff to enter his address on the warehouse books; but this was not done. Hopkins was not a witness, and this testimony was not rebutted. The court found that "the defendant sold all of said property in the manner and after notice as alleged in the answer, without the knowledge or consent of the plaintiff, and wrongfully converted the same to her own use." At common law a warehouseman had a lien for storage charges, but such lien conferred no right to sell the property to which the lien attached, but only to hold it until his charges were paid. Jones, Liens, § 676. Such common-law liens were enforced by obtaining judgment for the charges and levying an execution upon the goods. In most of the states, however, a remedy by sale is provided by statute, though only in a few states are there any statutes expressly enacted for the purpose of providing a remedy for the enforcement of a warehouseman's lien, while in other states there are statutes applicable to the enforcement of all common-law liens. In this state the statute was silent as to liens for storage until 1891, when a new section was added to the Civil Code, designated as "section 1856." St. 1891, p. 470. It reads as follows: "A depositary for hire has a lien for storage charges, which is regulated by the title on liens." By the same act another new section (1857) was added to the same Code, as follows: "If from any cause, other than want of ordinary care and diligence on his part, a depositary for hire is unable to deliver perishable property, baggage or luggage received by him for storage, or to collect his charges due for storage thereon, he may cause such property to be sold, in open market, to satisfy his lien for storage: provided, that no property except perishable property shall be sold, under the provisions of this section, upon which storage charges shall not be due and unpaid for one year at the time of such sale;" and the act repealed all acts and parts of acts in conflict with its provisions. The section of the Civil Code last above quoted is the only one expressly relating to sales of stored property for the payment of charges found in the article relating to storage, while the first of said new sections declares that the lien of the depositary for hire is "regulated by the title on liens." Said section (Civ. Code, § 1857), however, has no application to this case. It applies only to perishable goods and baggage or luggage; and the court found, upon sufficient evidence, that the goods in question did not belong to either of these classes. It is therefore not necessary to consider or decide what construction should be given to that clause relating to the length of time the charges for storage must be due and unpaid to authorize a sale under its provisions. Turning to the title on liens, we find that "a pledgee, or pledge holder for reward, assumes the duties and liabilities of a depositary for reward" (Civ. Code, § 2997); and "a gratuitous pledge holder assumes the duties and liabilities of a gratuitous depositary" (Id. § 2998). These sections, as well as the general similarity between pledge holders and depositaries, would seem to make the provisions relating to the sale of pledged property appropriate to the sale of property by a depositary for hire, in the absence of special provisions relating to the latter. The provisions of the Civil Code relating to the sale of pledged property are sections 3000-3011, and they require a sale by auction upon notice to the public usual at the place of sale, and "actual notice to the pledgor of the time and place of sale at which the property pledged will be sold, at such reasonable time before the sale as will enable the pledgor to attend"; or the "pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court." The negligence of Hopkins, who was in charge of defendant's warehouse, in not noting plaintiff's address, as requested, was the negligence of defendant; and the defendant's want of knowledge of the residence of plaintiff could not, under these circumstances, if at all, excuse the want of actual notice to him of the time and place of sale. I advise that the judgment and order appealed from be affirmed.

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[1] Rehearing denied September 18, 1899.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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125 Cal. 585

NEWPORT WHARF & LUMBER CO. v. DREW et al. (L. A. 554.)

(Supreme Court of California. Aug. 16, 1899.)

MECHANIC'S LIEN—EFFECT OF NOTICE BY SUBCONTRACTOR—PUBLIC BUILDING—ASSIGNMENT BY CONTRACTOR—APPROVAL OF ESTIMATES—COMPETENCY OF TRUSTEE.

1. A notice given to trustees of a state institution by one who had furnished material to a contractor with such trustees for the erection of a building, that an amount is still due him for such material, and requiring the trustees to pay him any amount then due, or that shall thereafter become due, to the contractor, operates as a garnishment, and intercepts any payments which the contractor may then or thereafter be entitled to receive, but it does not affect a payment which previously became due, and has been transferred for value by the contractor.

2. Where a contract with trustees for the erection of a public building required the work to be done to the satisfaction of the trustees, and provided for partial payments as the work progressed, to be made on estimates certified by the superintendent, the trustees retaining 10 per cent. of such estimates until final completion and acceptance of the building, such a partial payment did not become due so as to be subject to disposition by the contractor until the estimates were approved and the amounts ordered paid by the trustees; and an assignment previously made by the contractor of the amount due on an estimate did not become effective until such approval, nor did an assignment of the 10 per cent. reserved become effective until final completion and acceptance of the work.

3. By St. 1876, p. 430, § 7, it is made the duty of the superintendent of construction of any state building to make an estimate of the amount of each payment to be made the contractor thereon; and, where a contract for the erection of an asylum building required the work to be done to the satisfaction of the trustees, the approval by them of an estimate made by the superintendent operates merely as an acceptance of the work done, and the fact that one of the trustees is president of a bank which has taken an assignment from the contractor of the amount due him on such an estimate does not disqualify him from acting thereon, nor can his right be questioned by any one except the state.

Department 1. Appeal from superior court, San Bernardino county.

Action by the Newport Wharf & Lumber Company against H. L. Drew and others. From a judgment for defendants, and order denying a new trial, plaintiff appeals. Reversed.

J. S. Chapman and Jas. G. Scarborough, for appellant. Otis, Gregg & Hall, for respondents.

HARRISON, J. Dewar & Chisholm, as contractors, entered into a contract with the board of trustees of the Southern California State Asylum for the Insane and Inebriates, January 5, 1894, by which they agreed to perform the labor and furnish the materials required for the carpenters' and plasterers' work of a ward building for the asylum at an agreed price to be paid as follows, viz. 90 per cent. of the value of the materials used and labor performed "as the work progresses," and payment in full "upon the acceptance of said work by the board of trustees." For the purpose of determining the amount of the several payments, the contract provided that the superintendent of construction should for each payment make a certificate "showing a full and accurate estimate of the labor performed and materials furnished under the contract, with the amount due thereon," which estimate should, in all cases, give the amount of the preceding estimates, if any, and the amount of labor performed and materials furnished since the last estimate; and it was further provided that these estimates should not be required oftener than once a month, and that the trustees of the asylum should retain from each and all payments a sum amounting to 10 per cent. of the amount thereof "until the completion and acceptance of said work" by them. Under these provisions, ten estimates, or certificates, were made by the superintendent of construction, of which the first seven were paid to the contractors. The controversy herein relates only to the last three estimates and the 10 per cent. of the contract price to be retained by the trustees. The customary mode of making these estimates was as follows: A certificate showing the labor performed and materials furnished by the contractors subsequent to the preceding one, together with their value, was prepared in the form of a bill of account in behalf of the contractors, with the approval of the superintendent of construction indorsed thereon, and was presented to the board of trustees for its allowance and order for payment. Upon the allowance and order for payment of this bill, a warrant was drawn by the state controller in favor of the trustees for the payment of 90 per cent. of its amount, and delivered to them. In this manner the eighth estimate, amounting to $2,814.75, was presented to the board of trustees, and by that body allowed and ordered paid January 14, 1895, and a warrant for 90 per cent. thereof, viz. $2,533.28, was drawn by the controller in favor of the trustees March 2d, and thereafter paid to the trustees. The ninth estimate, for $649.75, was presented and allowed February 11th, and a warrant for 90 per cent. thereof, viz. $584.78, was drawn March 29th, and paid to the trustees. March 18th the tenth and final estimate, for $725.90, was presented and allowed, and, the work of the contract having at that time been completed, a warrant for $2,579.33, the amount of this estimate, together with the amount of the previous deductions of 10 per cent., was drawn in favor of the trustees and paid May 17th. The plaintiff herein furnished materials to Dewar & Chisholm at various times prior to February 7, 1895, which were used in the performance of their contract, and on March 1, 1895, gave to the board of trustees a notice in writing of that fact, and that there was remaining unpaid thereof the sum of $6,654.10, and demanded payment to it of the balance then remaining unpaid to Dewar & Chisholm. Dewar & Chisholm borrowed money at different times during the performance of their contract from the Farmers' Exchange Bank, one of the defendants herein, and in some instances executed their promissory notes therefor, and assigned to the bank the estimates of the superintendent of construction as security for their payment. The superintendent of construction was accustomed to give to them informal certificates, or estimates, before presenting them to the board of trustees for allowance, and upon their receipt Dewar & Chisholm assigned them to the bank, as such security, with directions that the amount of the estimate be paid to the bank. Such informal certificate for the eighth estimate was made December 28, 1894, and was assigned to the bank on the next day as security for a note of $2,000, with an order for its payment to the bank. The ninth estimate is dated February 11, 1895, and was in like manner indorsed over to the bank February 13th. After the approval of these estimates by the board of trustees, and an order for their payment, the cashier gave notice to the trustees that they had been assigned to the bank, and requested that the amounts thereof should be paid to it. The tenth informal certificate is dated February 15th, and states that it will be presented to the trustees for their approval March 11th. It was indorsed over to the bank on the day of its date, and on the same day the cashier gave notice thereof to the trustees, stating therein that the estimate would be presented to the board at its next meeting. At the meeting of the trustees, March 18th, at which the tenth estimate was approved, the above notice given by the plaintiff to the trustees was considered by them, and they determined that, inasmuch as the above three estimates had been assigned for value to the bank, prior to the receipt of the notice, the amount thereof should be paid to the bank, and not to the plaintiff. Thereupon the plaintiff brought the present action for the purpose of determining the respective rights of it and the bank to the same. The superior court held that the bank was entitled to the unpaid amount of its advances upon the estimates to Dewar & Chisholm, and that the plaintiff was entitled to the surplus thereof, and rendered judgment accordingly. From this judgment, and the order denying a new trial, the plaintiff has appealed.

1. The effect of the notice of March 1st, given by the plaintiff to the trustees, was to intercept in their hands any money which Dewar & Chisholm were then entitled to receive, or which afterwards might be payable to them in accordance with the terms of their contract. The notice was equivalent to a garnishment of the moneys then payable to them, and also operated as a notice to the trustees of the plaintiff's claim against Dewar & Chisholm, and that the payment to the latter of any moneys that might thereafter become payable to them under the terms of the contract would be at the peril of the trustees. The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect upon payments that have matured before it is given, but which have not been made, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, but, if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party. Code Civ. Proc. § 1184; Bates v. Santa Barbara Co., 90 Cal. 543,

27 Pac. 438; First Nat. Bank of Bridgeport v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45. The provision in the contract for the payment of 90 per cent. of the value of materials used and labor performed "as the work progresses," with the condition that, before any payment should be made, the superintendent of construction should, not oftener than once a month, furnish an "estimate" of such labor and materials, "with the amount due thereon," rendered such installment of the contract price due and payable immediately upon the acceptance of the work by the trustees. The contract provided that the work should be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obligation of the state which had been created in favor of the contractors by the trustees became complete, and the right of the contractors to immediate payment became vested in them, and was subject to their disposition. The provision in the contract for payment of the contract price in controller's warrants on the state treasurer did not affect this power of disposition, or right to immediate payment, or suspend its exercise until such warrants should be obtained. The failure or neglect to obtain a warrant immediately upon the approval of the estimates would have no greater effect than a similar failure on the part of the contractor, in the case of an ordinary building contract, to obtain a check from the owner immediately upon receiving the architect's certificate that the installment is payable. As seen above, the eighth and ninth estimates were approved and ordered paid before the plaintiff gave the notice of March 1st, but prior to the giving of the notice the contractors had assigned these estimates for value to the Farmers' Exchange Bank, and were no longer entitled to receive the amount of the warrants drawn therefor. The right of the bank to receive the amounts for which the warrants were drawn was not affected by the fact that the assignment had been made before the estimates were approved by the trustees. The contractors had assigned whatever claim they had by virtue of the "estimates," and the subsequent approval by the trustees, prior to receiving the notice from the plaintiff, inured to the benefit of their assignee. At the time the tenth estimate was presented to the trustees, the plaintiff had given notice of its claim, and had thus intercepted the payment to the contractors before their right to receive the money had accrued. Any assignment thereof by the contractors prior to the time when this estimate was payable was ineffective as against the plaintiff. By the terms of the contract "payment in full" was not to be made until the "acceptance of said work by the board of trustees," and the trustees were to retain, "until the completion and acceptance of said work" by them, 10 per cent. of all payments. The aggregate of the estimates was $19,260.40, and 10 per cent. thereof, viz. $1,926.04, was to be so retained until the acceptance of the work. This amount is included in the warrant covering the amount of the tenth estimate, and was not ordered to be paid until March 18th. There is nothing in the record showing that the work was accepted by the trustees prior to that date, and as, at that time, the plaintiff had given its notice of claim, it must be held that this notice had the effect to cut off the right of the trustees to make the payment to the contractors, or to their order, and gave to the plaintiff the right to receive it.

2. Each of the above estimates made by the superintendent of construction was presented to the board of trustees, and approved by it, and is indorsed, "Examined, allowed, and ordered paid by the board of trustees this —— day of ——, 1895," with the date of such approval, and is authenticated by the signature, "H. L. Drew, Chairman." It is contended by the appellant that, as Drew was at the times of such approval the president of the Farmers' Exchange Bank, he was disqualified from acting as one of the trustees of the asylum in the approval of the estimates. The board of trustees of the asylum consists of five members, and it does not appear from the record that Mr. Drew participated in the action of the board when it approved these estimates and directed their payment. The authentication by him of the action of the board was subsequent thereto, and was only a ministerial act. Drew's position, however, as one of the trustees, was not such as to disqualify him from acting upon the estimates of the superintendent of construction. Under the provisions of section 7 of the "Act to regulate contracts on behalf of the state in relation to erections and buildings" (St. 1876, p. 430), it is made the duty of the "officer to whom is confided the duty of superintending the erection of any state asylum, building or improvement," at the times named in the contract for constructing such building, to make an estimate of the amount of each payment to be made, and the warrant of the controller is to be drawn upon the treasurer for the amount of such estimate. Under the statute authorizing the construction of this asylum (St. 1889, p. 120), the trustees therein created are empowered to appoint a competent person to superintend its construction. The contract between the parties and Dewar & Chisholm was in conformity with the above provisions of the act of 1876, and was approved by the attorney general, as provided in that act; and by its terms these estimates were to be made by the superintendent of construction. The trustees appointed T. H. Goff as such superintendent of construction, and he was, therefore, the officer to whom, in the terms of the act of 1876, was confided the duty of superintending the erection of the asylum, and whose

duty it was under said act, as well as under the contract with Dewar & Chisholm, to make the aforesaid estimates. By the terms of the contract the work was to be done to the satisfaction of the board of trustees, as well as that of the superintendent of construction, and the approval by the trustees of the several estimates when presented operated as an acceptance of the work done on the contract prior to the dates of such approval. Their function, however, was merely to declare their approval or disapproval of the work, and to determine its conformity with the terms of the contract, while the function of fixing the amount of the payment, both under the statute and by the terms of the contract, devolved upon Goff. Upon their acceptance of the work the contractors became immediately entitled to the payment of the amount of the estimate. The state alone was interested in securing a satisfactory compliance with the contract, and under section 10 of the act of 1876 could at any time question the act of Drew in fraudulently accepting the same; but the plaintiff herein is not in a position to object to such acceptance, even if it had been open to objection. It is not suggested that Dewar & Chisholm failed in any respect to complete their contract according to its terms, nor is it claimed that Drew was in any respect negligent or unmindful of his obligations as trustee; the claim of the plaintiff being that by reason of his dual relation he was disqualified from accepting the work, upon the ground that by such acceptance he enabled the bank in which he was interested to receive the amount of the estimate. Such advantage to the bank did not, however, flow directly to it from the acceptance of the work, but was merely an incidental consequence thereof. The acceptance of the work was not invalidated by reason of Drew's relation to the bank, even though its effect was to cause the amount of the estimate to become immediately payable. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

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125 Cal. 572

NILES et al. v. CITY OF LOS ANGELES et al. (L. A. 551.)

(Supreme Court of California. Aug. 12, 1899.)

APPEAL—FINDINGS OF FACT—STIPULATION—PUBLIC STREETS—DEDICATION—JOINT OWNERS—INTENTION TO DEDICATE—EVIDENCE.

1. When a stipulated statement of the facts of a case are inconsistent with the findings of facts made by the trial court, the latter will, on appeal, be set aside, and a new trial ordered.

2. The acts of one of two joint owners of land, tending to show the dedication of a strip thereof to public use as a street, cannot be considered in an action brought by a grantee of such joint owners against a city to restrain it from working such strip as a public street.

3. In an action by the owner of land to restrain a city from working a strip thereof as a public street, findings of fact that for about 12 years prior to the commencement of the action the strip has been open to public travel without protest from plaintiffs, and that it has been continuously used as a public way; that a few years prior to the commencement of the action the owner thereof caused a plat of his land adjacent to the strip to be made, dividing the same into lots facing on the strip, which plat, however, did not include the strip, nor refer to it in any way,—are insufficient to support a conclusion of law that such strip is a public street, as there is no finding of an intention to dedicate.

4. A conclusion of law, following such findings of fact, "that the strip is a public street," is not equivalent to a finding of fact that the owners intended to dedicate it as a street, but such conclusion is clearly one based on the previous facts found.

5. In an action to enjoin a city from working a strip of plaintiff's land as a public street, it appeared that plaintiff and a neighbor, being the owners of adjacent land, agreed with each other to fence off a strip of their respective properties for a passageway, and did fence off a strip so as to constitute a continuation of a regularly opened street; that such strip was thereafter cultivated up to plaintiff's line; that he paid taxes on it; that the city had never worked or improved the strip; and that, on a map made by the city for the purpose of assessing property for improvements made on a street intersecting said strip and the street of which it is claimed to be a continuation, the strip was indicated and assessed as the property of plaintiff. *Held* not to show a dedication or abandonment to the use of the public.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by N. S. Niles and another against the city of Los Angeles and another. From a judgment in favor of defendants, plaintiffs appealed. Reversed.

W. M. Conklin, for appellants. W. E. Dunn, for respondents.

COOPER, C. This action was brought by appellants to restrain the respondents from entering upon, taking possession of, and removing trees, fences, and improvements from the real estate described in the complaint. The respondents, in their answer, claimed that a certain part of the land described in the complaint, about 30 feet wide, off the eastern side thereof, running north and south, bounded on the northern end by Washington street, on the south by Parcel's subdivision of the John Thomas tract, and on the east by a line formerly the west line of the lands of Reed and Snodgrass, constituted a part of a public street, to wit, Trinity street, in the city of Los Angeles. Findings were filed, and judgment rendered in favor of the respondents as to the lands described in the answer. A motion was made for a new trial, and denied, and this appeal is from the judgment and order.

The findings and conclusions of the lower court were as follows:

"(1) That in the year 1887 the plaintiff William Niles was the owner of a certain tract of land in said city of Los Angeles, including the strip of land in question in this action, which tract fronted on Washington street on the north, adjoined Parcel's subdivision of the John Thomas tract on the south, and adjoined a tract of land belonging to one L. Snodgrass on the east. (2) That in 1887, at a time when said William Niles and said Snodgrass were the owners, respectively, of said adjoining tracts of land, said Niles caused a fence to be built across his said tract of land running from Washington street to the south line of his said tract, and on a line parallel with and thirty feet distant from the division line between the lands of Niles and Snodgrass, and at the same time said Snodgrass fenced his said tract of land, leaving outside of his said fence a strip of land about thirty feet in width, adjoining for its full length said thirty-foot strip which said Niles had left outside of his said fence; and that said two strips of land, having a total width of about sixty feet, were at said time thrown open to public travel by said Niles and Snodgrass, and have been ever since, until a few months prior to the bringing of this action, open to public travel without protest from plaintiffs or their predecessors in interest. (3) That the strip of land sixty feet in width, and composed of the two thirty-foot strips aforesaid, was in direct line with Trinity street, in said city, as it then existed, and as it now exists, south of said tract of Niles and Snodgrass, and said sixty-foot strip extends from Washington street south in direct continuation of said Trinity street. (4) That ever since the building of said fences, in 1887, said sixty-foot strip of land, including the land in question in this action, has been and was continuously used and traveled by the public as a public street of said city until obstructing fences were built by the plaintiff across the same a few months before the bringing of this action, and was during said time known as and called 'Trinity Street.' (5) That subsequent to the building of said fences, in 1887, William Niles made a conveyance of his said tract of land, and including the strip in question, to the plaintiff N. S. Niles, and thereafter, to wit, on August 6, 1894, the said N. S. Niles caused a survey of said property to be made, and a map thereof to be recorded in the office of the county recorder of said Los Angeles county, on which map her said property is shown subdivided into lots and blocks only up to the line of said fence theretofore erected by said William Niles in 1887; the easterly line of said subdivision, as shown by said map, being substantially on the same line as the said fence.

"And as conclusions of law from the foregoing facts the court finds and decides: (1) That the land described in the complaint herein is a part of a public street of the city of Los Angeles, to wit, Trinity street. (2) That the restraining order heretofore granted herein should be dissolved. (3) That plaintiffs should take nothing by their said action, and that defendants recover their costs herein."

It is contended that the evidence does not sustain the findings, and that the findings do not justify the conclusions of law, and we think both contentions will have to be sustained. The stipulation contained in the statement on motion for a new trial shows that William Niles and John B. Niles owned the property described in the complaint in fee simple in the year 1880, and continued to so own it until February 4, 1888, when they conveyed it to the appellant N. S. Niles. Findings 1 and 2, to the extent that they find that William Niles was the owner of the land in controversy in the year 1887, are therefore not supported by the evidence, and in direct conflict with the stipulation of the parties as shown by the record. The acts of William Niles tending to show a dedication in the year 1887, and prior to February 4, 1888, at a time when he was not the sole owner of the land, in so far as they would or could in any way affect the rights of this appellant, N. S. Niles, cannot be considered in this case. We then have the findings remaining, to the effect that since 1887 until within a few months prior to the commencement of this action the land described in the answer has been open to public travel without protest from appellants, and has been continuously used and traveled by the public as a public street until a few months before bringing this action, and that on August 6, 1894, the appellant N. S. Niles made a survey and map of the portion of the property described in the complaint other than that claimed in the answer to be a street, and said map showed lots and blocks up to the portion so claimed to be a street in said answer, said portion not being on the said map. There is no finding of dedication, and no finding that the land in controversy is a public street, and we do not think the findings of the probative facts herein stated are sufficient of themselves to show the premises to be a public street. It is not found that the public, during the times it has traveled over the said land, claimed any right to so travel over it, or that appellants even knew of such travel. There is no finding that the public authorities of the city ever claimed the said land as a public street, or that they ever expended any money in improving or grading the same. The finding that the appellants caused a map to be made and filed of other land up to a fence along the west line of the strip in controversy is of little consequence. It is not claimed that the land in dispute was shown or platted on said map as a street, or that the map even included it. The title to the land is in appellant N. S. Niles, unless by clear and unequivocal acts she or her predecessors in interest have dedicated it to the public. The law does not allow the land of a private owner to be taken for public purposes without any conveyance or consideration, except upon proof of such facts and circumstances as clearly show an intention on the part of the owner to abandon or dedicate the land to the public. Section 2618 of our Political Code defines public highways as follows: "In all counties of this state highways are roads, streets, alleys, lanes, courts, places, trails and bridges, laid out or erected as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." There is no pretense that the land claimed to be a street was ever laid out or erected by the public, or that it was made such in any action for partition of real estate. It follows that it cannot be held to be a public street unless it has "been dedicated or abandoned" to the public by the owner of the land.

In the early and leading cases on the question of dedication in this state it is said: "The vital principle of the dedication is the intention to dedicate; and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway." Harding v. Jasper, 14 Cal. 648. To constitute a dedication of land to the public, two things are necessary, to wit: An intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use; and an acceptance by the public of the dedication. Elliott, Roads & S. p. 85; City of San Francisco v. Canavan, 42 Cal. 553; City and County of San Francisco v. Calderwood, 31 Cal. 585; People v. Reed, 81 Cal. 70, 22 Pac. 474; Washb. Easem. 140, 239; Child v. Chappell, 9 N. Y. 257. This use must be of such duration that the public interest and private right would be materially impaired if the dedication were revoked, and the use by the public discontinued. President, etc., v. White's Lessee, 6 Pet. 431, 439; City of San Francisco v. Canavan, supra. The making and filing a map designating certain streets thereon is only an offer to dedicate such streets to the public, and the dedication does not become effectual and irrevocable until the same is accepted by the public. People v. Williams, 64 Cal. 502, 2 Pac. 393; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; People v. Reed, 81 Cal. 77, 22 Pac. 474. Such acceptance must be within a reasonable time after offer of dedication, and, if not accepted, the owner may resume the possession of the property, and thereby revoke his offer. Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; State v. Trask, 6 Vt. 355; Field v. Village of Manchester, 32 Mich. 279; Wayne Co. v. Miller, 31 Mich. 447; People v. Reed, 81 Cal. 80, 22 Pac. 474. The finding that the strip of land was traveled and used by the public since 1887, without protest from appellants or their predecessors in interest, is only the finding of probative facts tending to prove dedication, but the fact of dedication does not necessarily follow from such probative facts, as they are not necessarily inconsistent with a total absence of intention to dedicate, and may indicate a mere license. Cooper v. Monterey Co., 104 Cal. 438, 38 Pac. 106. Dedication is never presumed without evidence of unequivocal intention on the part of the owner. Quinn v. Anderson, 70 Cal. 456, 11 Pac. 746. Where the dedication of a highway is sought to be established by user, it must be shown that the user was adverse (Huffman v. Hall, 102 Cal. 30, 36 Pac. 417), and with the knowledge of the owner (Hope v. Barnett, 78 Cal. 14, 20 Pac. 245); and in this case there is no finding that the use was adverse, or with the knowledge of the owner. It is claimed that under the portion of the findings termed "conclusions of law" the fact is found that the disputed premises are a public street. It has been held in many cases, in which the appellant sought to overthrow a judgment because of the absence of a finding, that a misplaced finding of fact placed in the conclusions of law will be considered to prevent the reversal of a case fairly tried, or to prevent the setting aside of a judgment justly given. But in this case we have the finding of specific facts under five different headings, and, finally: "And as conclusions of law from the foregoing facts the court finds and decides: (1) That the land described in the complaint herein is a part of a public street of the city of Los Angeles, to wit, Trinity street." It is plain that this is a general statement or conclusion drawn by the court from the facts previously found. The rule in such cases is that the general finding cannot stand unless the specific facts previously found support it. People v. Reed, 81 Cal. 76, 22 Pac. 474; Geer v. Sibley, 83 Cal. 4, 23 Pac. 220; Society v. Burnett, 106 Cal. 540, 39 Pac. 922.

As this case must be sent back for a new trial, it may be well for us to indicate our opinion on the evidence without regard to the findings. Conceding that William Niles was the sole owner of the land in 1887, at the time of the acts set forth in findings 1 and 2, and conceding that the court found the facts of dedication, and that the premises are a public street, we do not think the evidence would be sufficient to support the findings. William Niles testified that the fence was moved back, leaving the strip in contest open, during his absence in the East, and that since the fence was removed the ground has been cultivated each year; that there are orange, pear, fig, and eucalyptus trees on the strip; that taxes have been paid to the city upon the land for the years 1891, 1892, 1893, 1894, 1895, and 1896. The witness Snodgrass, who owned the land immediately east of the strip in dispute in 1887, testified that he and William Niles talked it over between themselves, and agreed to leave open a strip 60 feet wide, being 30 feet off the side of the land of each, for a passageway, and that it was so left for a passageway; that it was not left for a street, and there was never any agreement to give the land for a street; that, after the fences were set back, Niles continued to farm his land right up to the line, and that witness always paid taxes on his; that the city never exempted it from taxes, and never curbed or graded it, and claimed that it was not a street. No witness testified to any declaration made by any owner of the land of an intent to dedicate it for a public street. Other witnesses testified that the strip had been in cultivation almost every year since 1887. It appeared that after 1887 (no definite time is fixed) the city levied assessments for the improvement of Washington street, which runs east and west along the northern end of the strip, and made a map for the assessment of the improvements of Washington street. On the map the strip was shown to be the land of Niles, and not a street, and was assessed to Niles. The sidewalk was curbed along the south side of Washington street, and along the 30 feet at the northern end of the strip. It does not appear that the premises claimed to be a street have ever been improved, graded, or accepted by the public authorities. In our opinion, the evidence wholly fails to show that the strip was ever dedicated or abandoned to the public as a street. We advise that the judgment and order be reversed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

125 Cal. 600

McKENZIE v. BUDD et al. (Sac. 647.)

(Supreme Court of California. Aug. 22, 1899.)

DECREE OF DISTRIBUTION OF ESTATE—CONCLUSIVENESS OF TITLE TO REAL ESTATE—ACTION TO QUIET TITLE.

1. A decree of distribution entered in the settlement of an estate, determining the title to real estate under the will of the testator, is conclusive of such title between the parties in interest, or those claiming through them.

2. In an action to quiet title, where plaintiff's claim of title fails, the status of the title as between two defendants is immaterial.

Department 1. Appeal from superior court, San Joaquin county.

Action by Daniel McKenzie against James H. Budd and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Budd & Thompson, for appellant. Minor & Ashley, for respondents.

GAROUTTE, J. This action is brought to quiet title to certain real estate, and arises upon the following state of facts: Andrew Smith died, disposing of the real estate here involved by will, as follows: "I give and bequeath to my wife, Mary Ann Smith, all of the real and personal property of which I die possessed, so long as she remains my widow, and at her death the residue of said property to be equally divided among my lawful heirs." Pending the administration of Smith's estate, the wife died, and letters of administration were taken out upon her estate. By decree of distribution in his estate the court found: "That said Mary A. Smith, by reason of her community right aforesaid, and under and by virtue of the terms of the will of said deceased, was, at the time of her death, the owner of the whole of the residue of the estate of said Andrew Smith, deceased, which said residue is described as follows." By that decree it was ordered that the property of his estate be turned over to the estate of his wife, and this was done. Thereafter, by the decree of distribution in her estate, the property was distributed to her heirs. The defendant V. J.

Smith is a son of the deceased father and mother. Defendant J. H. Budd is a grantee under a deed made by V. J. Smith, pending the administration of his father's estate. Budd appeared at the trial, and disclaimed any interest in the property. Plaintiff, McKenzie, by attachment, levied upon the interest of V. J. Smith in the real estate left by his father. Under this attachment the real estate was sold, McKenzie becoming the purchaser, and he now holds a deed under that sale. All of these circumstances occurred during the administration of the father's estate, and prior to the mother's death. By the decree of distribution in the father's estate it was determined that Mrs. Smith took title to this land in fee; hence the attachment by the sheriff and sale thereunder to plaintiff went for nothing. His deed gave him no title, for defendant Smith had no title. In this collateral proceeding the decree of distribution in the father's estate is conclusive upon all the world. This court cannot say in this proceeding that the will of Andrew Smith was improperly construed by the decree of distribution, or that his wife was declared the owner of a greater interest in the land than that which should have been allotted to her. The later cases upon this question are to the effect that the decree of distribution entered in the estate of Andrew Smith is conclusive upon the question that his wife, Mary Ann Smith, was, at the instant of his death, the owner of his entire estate. It is said in Cunha v. Hughes, 122 Cal. 112, 54 Pac. 535: "The decree of distribution becomes the measure of the rights of all claimants to the estate, and their rights are to be determined by the terms of this decree." The same doctrine is recognized and approved in William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323, In re Trescony, 119 Cal. 568, 51 Pac. 951, and Jewell v. Pierce, 120 Cal. 82, 52 Pac. 132. There is nothing in Chever v. Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081, opposed to this doctrine. It follows, for these reasons, that plaintiff has no title to the land involved in this litigation, and is entitled to no relief.

It is further claimed that defendant Smith, under the decree of distribution in his mother's estate, became possessed of an after-acquired title which passed to Budd under his deed of grant, and therefore he is estopped from making claim of title in himself in this action. This would seem to be a matter wholly between the defendants Smith and Budd. Plaintiff gets no title by that transaction. His claim of title is entirely independent of it, and, having no title of any kind in himself, his claims must fall, regardless of the status of the title as between Budd and Smith. It may be further suggested that the Smith deed did not purport to convey title in fee, hence it carried no after-acquired title. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

125 Cal. 627

HENNESSEY v. BINGHAM. (S. F. 995.)

(Supreme Court of California. Sept. 5, 1899.)

STEVEDORES — PERSONAL INJURY — NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE—INSTRUCTIONS.

1. An instruction, in an action by a stevedore for injury from lumber, which was being lowered through a hatchway into the hold of the vessel where he was taking it away, falling on him, that if it was customary to station a man at the hatch to give a warning cry, and on hearing the signal it was customary for the men to get to a place of safety, and this means of warning the men "had theretofore been found to be" a safe and sufficient mode for the protection of the men so working in the hold, and all these precautions had been taken by defendant, verdict should be for defendant, is properly modified by inserting the word "was" for the words "had theretofore been found to be," as one is not relieved of the consequences of carelessness because no injury had resulted from former carelessness.

2. Whether a stevedore engaged in taking away lumber in the hold of a vessel, where it was lowered through a hatchway, and who was injured by lumber slipping from a box in which it was being lowered, because there was nothing over the end of it,—assumed the unusual risk, there being evidence that the ends were usually closed,—depends on whether the employer understood and had a right to believe that the stevedore knew and assumed it; and this is a question for the jury, though the stevedore testifies that such lumber was sometimes loaded in open boxes.

3. Where an experienced stevedore, who had long been employed as such at S., is there injured by the falling of lumber which was being lowered through a hatchway to the hold of a vessel, where he is taking it away, and the issue is whether there was a sufficient warning, and whether he had assumed the risk of the way in which it was lowered, evidence is admissible which tends to show what was customary among stevedores in S. in handling such lumber, and what the respective duties were of the workmen engaged in the work,—especially of the hatchman and others engaged in lowering the lumber.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Patrick Hennessey against Henry Bingham. Judgment for plaintiff. Defendant appeals. Reversed.

Van Ness & Redman, for appellant. Reddy, Campbell & Metson, for respondent.

TEMPLE, J. This is an action for damages for personal injuries alleged to have been suffered by plaintiff while in the employ of defendant. Defendant was a stevedore, and was engaged in loading dressed lumber upon the steamer Aztec at the Pacific Mail Steamship Company's dock. The lumber was delivered by the shippers in boxes, which consisted of four boards nailed together, and were about 15 feet long and 8 inches in each of the other dimensions. Sometimes the ends of the boxes were closed by wires, and sometimes they were not. Whether they were usually so closed, and whether it was negligence to load them on the vessel in the mode adopted, without being so closed, are matters of interest in this case. As the jury found for the plaintiff, we are bound, if necessary to support the verdict, to assume that the jury believed those witnesses who testified that when loaded on the ship in boxes, as this lumber was, the ends of the boxes were nearly always closed, and, if not so closed, the lumber was very likely to slip out. The lumber was taken from the wharf by the side of the vessel, where a chain was wrapped around two boxes containing lumber, and one end of the chain, having been put through a ring at the other end, was attached to a block and tackle, and raised to the deck of the vessel and above the hatchway, through which it was then lowered to the hold of the vessel, where there were two gangs of workmen, who took alternate loads, stowing the lumber, one gang on one side of the ship and the other on the other side. It took about two minutes for each gang to stow its load, and they were lowered into the hold at the rate of one load each minute. The men took one box at a time, and, per consequence, they would be at the hatchway for the second box at about the time a load was coming down for the other gang. There were four compartments in the ship, and freight was being stowed in each compartment at the time of the accident. The work was being rushed as much as possible, as, according to the testimony, this kind of work always is. The men are paid by the hour, and understand that they must work as fast as possible, or they will be ordered out. There was a great deal of noise about the ship while the work was in progress. Defendant had stationed a man on the upper deck at the hatchway, whose duty it was to call out to the men at work in the hold, warning them of danger when the load was about to be lowered through the hatchway. He was called the "hatchman," and was accustomed to call out, in a loud voice, "Stand clear below." There was plenty of room for the men to get away from danger, and it was shown that on this occasion, as a rule, the warning was given in time and was heard. There was evidence which tended to show that the warning was not given on the particular occasion when plaintiff was injured. Plaintiff testified that he did not hear it, and other witnesses testified that in the hurried work, with the great noise which prevailed, it might not be heard or heeded if given. The men were, however, accustomed to rely upon the warning, more or less, for their security, as from various causes the load or some part of it might fall at any time while being lowered. There was evidence which tended to prove that plaintiff was injured when in the act of picking up a box of lumber, not directly under the hatchway, but two feet inside the coamings. The contents of the box, consisting of 15 or more boards, slipped out "like pouring water out of a glass," struck the shaft tunnel, and "bounced off" upon the plaintiff, injuring him very severely. The theory of the plaintiff's case seems to be that the employer failed to furnish to plaintiff a safe place in which to do his work, and that the injury resulted from unusual and unnecessary hazard, which plaintiff did not assume by accepting the employment. Counsel says: "Neither the failure of plaintiff to hear and heed the warning, if it was in fact given, nor the failure to give the warning, was the proximate cause of the injury, but this proximate cause was the negligence of the defendant in loading into the ship boxes of lumber that were liable to shoot their whole contents into the hold of the vessel so as to injure the workmen, not only if they were standing directly underneath the hatchway, but even if they were several feet underneath the coamings, as was the plaintiff in this case at the time he was injured." Defendant, it is contended, was carrying on a hazardous employment in a reckless manner, and the warning, if given, was not an adequate protection against this unnecessary danger. Defendant contended that such boxes of lumber were quite frequently shipped from this port, and that sometimes they were sent by the shipper with the ends of the boxes closed, and sometimes open; that the stevedore took the lumber as it was delivered to him, and loaded it in the condition in which he found it, and prevented injury to the men below by stopping the lumber at the coamings and giving a warning to the men below; that this was the usual and customary mode of doing the work, and had been found to be, and was in fact, a sufficient protection. Plaintiff was a stevedore, who admitted that he had often assisted in loading such boxes, and knew all the hazards of the employment, and understood the purpose of the warning; and, as defendant did station at the hatchway a competent man to give the warning, defendant is not liable if plaintiff failed to heed the warning, or if his fellow workmen neglected to give it. So far as there is a conflict of evidence the presumption must, of course, be in favor of the respondent, except when we are considering the rulings in regard to the instructions. One of the witnesses for the plaintiff testified that such lumber is usually delivered in boxes, and is wired over the ends to keep the lumber from sliding out. If it is not wired, the lumber is sure to slide out. "It is usual and customary, on the water front in San Francisco, in loading lumber of that character, to have obstructions across the ends of the boxes to keep the timber from falling out." The wires, he said, are put on in the lumber yard, but, if it is delivered at the wharf without wires, it is shipped in that condition. He had known the shipper to be sent for and required to put on wires. He said, however, that it was no part of the stevedore's business to put on the wires, but to load the ship with the freight as delivered. Plaintiff testified that they had been at work about one-half hour before he was hurt. Some lumber had fallen before that time. He came to assist in stowing the second case. He heard no warning, but looked, and, seeing the hatchway clear, stooped to pick up the case, when the lumber being lowered slipped from the case, struck the shaft tunnel which ran across that hatch, bounded off, and hit him. He was not at the time under the open hatchway, but was about two feet inside the coamings. As to the warning, he said: "That is the usual and customary mode of giving to the men working in the hold full notice and warning to get out of the way of the load that is to be sent down the hatch." The hatchman testified that the box from which the lumber fell had no wire upon it. Defendant's witnesses gave nearly the same evidence, except that they emphasized the fact that such boxes were often stowed by stevedores without wires, and that the sling chains compress the lumber, even in the boxes, and usually prevent its slipping. They also testified that the precautions taken in this case are such as are usual in such cases, and contended that such precautions had usually been found sufficient.

1. The first proposition of appellant is that the court erred in refusing to instruct the jury to find for the defendant. This contention, I think, cannot be sustained. The jury were warranted in finding from the evidence that loading timber of this character in the mode adopted was unusually and unnecessarily hazardous. Whether the plaintiff by accepting the employment assumed such risk was for the jury to determine. There was also evidence which could have justified a finding that, in the hurry of the work and the noise, the warning was insufficient to protect the workmen from the dangers which attend the work.

2. The defendant asked the court to give to the jury a long instruction to the effect that if they found that in loading lumber upon a ship, as this was being loaded, it was customary to station a man at the hatch to give such warning as has been described, and upon hearing the signal it was customary for the men to get to a place of safety, "and this means of warning the men had theretofore been found to be a safe and sufficient mode for the protection of the men so working in the hold," etc., and that all these precautions had been taken by defendant, then their verdict must be for the defendant. The court modified the instruction by striking out the words "had theretofore been found to be," and inserting the word "was." I think the modification was proper. Carelessness does not always result in injury. In a case of continued carelessness, when injury results, a common remark is that it is strange it did not happen before. Defendant will not be exonerated because others have been reckless and no one has been injured. As remarked in Monaghan v. Rolling-Mill Co., 81 Cal. 190, 22 Pac. 590, "That circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods." The master's duty was to use due diligence to provide plaintiff a safe place in which to do his work. Former experience may have some bearing upon the question as to whether he has taken the proper precautions, but its value is for the jury. I may remark, these hypothetical instructions are always dangerous, and especially so in a case of alleged negligence. Negligence is the ultimate fact to be inferred from many probative facts. The inference is within the province of the jury, even when the facts are undisputed. When different conclusions as to negligence can reasonably be drawn from the admitted facts, it is not for the court to instruct the jury as to which is to be adopted by them. The defendant also asked for an instruction which may be summarized thus: If it was not Bingham's duty to close the boxes so that the lumber would not slip out, but to load it into the ship as it was received, giving proper warning, as already explained, and a competent hatchman was employed to give the warning, and, if given, the workmen could have avoided the danger, "and the plaintiff accepted employment from the defendant, Bingham, with the understanding that his safety in the hold was to be secured by the giving of the warning referred to, and such further care on his part as should be necessary, then and in that case" the verdict should be for the defendant. The instruction is misleading. When the jury find that it was "only his duty to load the lumber into the ship as he received it, giving such warning," etc., they have found the entire issue as to negligence for the defendant. But this was probably not what was intended. Probably counsel meant, if the jury find that that was what he contracted to do. Respondent contends that he violated his duty when he loaded into the ship lumber in that condition, in that mode, and that the warning was not a sufficient protection, and that the risk, not being an ordinary risk of employment, was not assumed by the plaintiff. The jury were not required to find, by this instruction, that plaintiff knew that this particular lumber was to be loaded upon the ship in boxes, the ends of which had not been closed; and there was evidence to the effect that usually they were closed. Whether plaintiff assumed these unusual risks or not depended upon the question whether, under the circumstances, defendant understood and had a right to believe that plaintiff knew and assumed them. Martin v. Railway Co., 94 Cal. 326, 29 Pac. 645. Plaintiff may have been willing to depend upon the warning for his safety, as against the ordinary risks of the work. Whether he was not in this case subjected to more than the ordinary risks of the employment was an important question, and was for the jury. Plaintiff himself

testified that such lumber was sometimes loaded in open boxes. This was very important evidence on this issue for the defendant, but is still left a question for the jury, which this instruction would have taken from them. I understand the warning was provided as additional security to the workmen from dangers resulting when the freight was being lowered into the hold, not dropped, and because, although the master used ordinary care to see that it was properly handled and safely lowered, still accidents might happen. But if the employer has failed to use ordinary care in the mode of doing the work, and therefore injury has resulted, he has failed to provide a safe place for the workmen to do their work, and has subjected them to unusual risks, which they did not assume by accepting the employment, unless they knew of the unusual risks. Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720; Civ. Code, § 1971. In such case the neglect of the employer in respect to duties which he cannot evade, by putting them upon a coemployé, has contributed to the injury, and he is responsible.

But this argument in favor of the rulings of the court below in regard to the instructions necessitates the reversal of the case upon another ground. The learned judge of the trial court evidently disagreed with the theory of the case which was acted upon by the defendant, and exception was taken to 38 rulings made against the defendant in regard to the admission of evidence. Evidence was rejected which tended to show what was customary among stevedores in San Francisco in handling such lumber, and what the respective duties were of the workmen who were engaged in the work; that is, what was required of each, and especially of the hatchman and others engaged in lowering the freight. I think this evidence was relevant and material. It tended to show what care was taken by the defendant in the work, and also what risks the plaintiff assumed by the employment. Plaintiff's own testimony shows that he was an experienced stevedore, and had long been employed as such at San Francisco. As to some of the evidence, it might perhaps be shown that it was immaterial, or that the particular ruling was not harmful; but that certainly cannot be said as to all, and a more minute discussion could not be useful. The judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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125 Cal. 636

McCRAY v. BURR, Sheriff. (L. A. 481.)

(Supreme Court of California. Sept. 5, 1899.)

TROVER—FINDINGS OF FACT.

1. The findings as to damages in an action for conversion are sufficient to support the judgment, where it is found that, at the time alleged, plaintiff was the owner and in possession of the property, and the same was worth $700, and that defendant then took the same as alleged, and afterwards sold it, and that by virtue of the levy and sale "said property was entirely lost to the plaintiff," and as conclusion of law it is found that plaintiff is entitled to recover of defendant $700, with interest.

2. It is not necessary, in an action for conversion of property levied on by defendant under a writ in a suit between third persons, to find that plaintiff was the owner thereof when he made his demand for its return.

Department 2. Appeal from superior court, Los Angeles county.

Action by R. H. McCray against John Burr, sheriff. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Weller and McKinley & Graff, for appellant. Curtis Wilbur and Murphy & Gottschalk, for respondent.

McFARLAND, J. This is an action to recover damages for the alleged conversion of certain personal property. The case was tried without a jury, and judgment was rendered for plaintiff. Defendant appeals from the judgment upon the judgment roll alone.

It was averred in the complaint that on the 4th of April the plaintiff was the owner of, in possession of and entitled to the possession, and ever since has been the owner and entitled to the possession of, certain described personal property, consisting of horses, wagons, and farming implements; that on the said 4th day of April the defendant, as sheriff, levied upon and took possession of said property under a writ of attachment in a suit against one S. R. McCray, brought by third parties, and converted the same to his own use; that before the commencement of this action, to wit, on or about the 14th day of April, the plaintiff demanded of the defendant the possession of the said property in accordance with the statutory provisions upon the subject, and that the defendant refused to deliver the same to the plaintiff; that the value of the property was about $970, and that the plaintiff had expended large sums of money in pursuit of the same; and that by reason of the wrongful taking, detention, and conversion of the property, plaintiff was damaged in the sum of $1,500, for which he prays judgment.

The main contention of appellant is that the findings do not support the judgment, because there is no finding that plaintiff was damaged in any amount whatever. No doubt, the findings could have been more full and specific, but we think that they are sufficient to support the judgment. A great many embarrassing questions have been raised in this court in consequence of a want of care in preparing findings. It seems to have been assumed in many cases that when the trial court had announced the judgment which it intended to enter the case was over, and there was nothing further for the winning side to look to; but it must be remembered that, under our Code, findings must be prepared, which must contain statements of facts necessary to support the judgment. In the case at bar, while there has been carelessness in the preparation of the findings, still we think that they are sufficient. The court finds that on the said 4th day of April the plaintiff was the owner of and in possession of the property, and that it was of the value of $700, and that on said day the defendant took the property as alleged in the complaint, and afterwards sold the same, and that by virtue of the levy and sale "said property was entirely lost to the plaintiff." And as a conclusion of law the court finds that the plaintiff is entitled to recover of the defendant the said sum of $700, with interest, etc. The objection to the finding is that the court does not expressly say that the plaintiff was thereby damaged in the sum of $700, or any sum, but from the facts found it necessarily follows that the damage accrued to plaintiff. "Where probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient." Water Co. v. Richardson, 72 Cal. 601, 14 Pac. 381. See, also, Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Coveny v. Hale, 49 Cal. 552; People v. Hagar, 52 Cal. 189; Osborne v. Clark, 60 Cal. 622. From the facts found in the case at bar it necessarily followed that plaintiff was damaged in the amount of the value of the property. Moreover, the court finds that by virtue of the other facts found the property "was entirely lost to plaintiff"; and, while this language is not very good legal literature, yet it sufficiently includes the fact of damage. The findings are not deficient because the court did not find that on the 14th day of April, when plaintiff made his demand upon the sheriff, the plaintiff was then the owner of, and entitled to, the property. The cause of action was the taking of the property on the 4th of April. Demanding its return was a mere statutory requirement for the benefit of the sheriff. We see no other points necessary to be noticed. The claim of respondent that damages should be imposed for a frivolous appeal cannot be allowed. The respondent, under the circumstances, should be satisfied with an affirmance of the judgment. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

125 Cal. 615

KUHN et al. v. SMITH. (S. F. 1,890.)

(Supreme Court of California. Sept. 1, 1899.)

TENANT AT WILL.

One in possession of land under a lease for a definite period, and who, on expiration thereof, refuses to give up possession, does not become a tenant at will, so as to be entitled to the 30-days notice provided by Code Civ. Proc. § 1162, before action to eject him can be brought.

Department 1. Appeal from superior court, Santa Clara county.

Action by A. C. Kuhn and others against Charles C. Smith. Judgment for plaintiffs. Defendant appeals. Affirmed.

John W. Moore and Chas. Clark, for appellant. S. F. Lieb, for respondents.

GAROUTTE, J. This is an action of ejectment. Plaintiffs, by writing, leased certain agricultural lands to defendant for a fixed, definite period,—about 10 months. Upon the expiration of the lease, defendant refused to give up possession, and this action was commenced. Plaintiffs commenced the action some six weeks after the lease had expired, and defendant now rests his right of possession upon the claim that after the expiration of the lease he became a tenant at will, and by virtue of such tenancy he was entitled to a notice of 30 days (section 1162, Code Civ. Proc.) before action could be brought to eject him; in other words, his only defense is that the action is prematurely brought. There is nothing whatever in the claim made. The defendant was not a tenant at will. Under his lease he was a tenant for years, and upon the expiration of his term it was his duty to move without notice. He had no rights of any kind which demanded a notice in writing in order that they might be cut off. It is not the law of this state that a tenant who remains in possession, perchance a single day after the expiration of his lease, thereby becomes a tenant at will, and must be served with a 30-days notice before he may be ejected. Upon a similar state of facts it is said in McKissick v. Ashby, 98 Cal. 425, 33 Pac. 730: "Under the facts stated, we think that plaintiff had a right to re-enter when the term expired, and to maintain an action for possession without previous notice or demand." It is also said in Canning v. Fibush, 77 Cal. 196, 19 Pac. 376: "And, inasmuch as the lease expired by its own limitation, there was no necessity of a notice to terminate it. * * * This being the case, we do not see how the defendants had any right to continue in possession, and, if they had no such right, why the plaintiff should not recover the premises, with damages for the detention." In Perine v. Teague, 66 Cal. 446, 6 Pac. 84, the syllabus is as follows: "A tenant who enters and continues in possession of the demised premises under a written lease until the expiration of the term does not thereafter become a tenant at will by refusing to surrender that possession, and by holding over without the consent of the lessor." For the foregoing reasons, the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

125 Cal. 618

GRIFFITHS v. LEWIN. (L. A. 593.)

(Supreme Court of California. Sept. 1, 1899.)

NOTES—PAYMENT—EVIDENCE.

The prima facie case of nonpayment made out by plaintiff introducing a note, proving the signature of deceased thereto, due presentation of the claim to defendant's executor, and its rejection, is not overcome by defendant showing that, after its date, deceased executed to plaintiff a note for about the amount of the note sued on and another note which deceased had given plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by David E. Griffiths against M. Lewin, administrator of John M. Hughes, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

James & O'Donnell and Graves & Graves, for appellant. F. A. Dorn, for respondent.

COOPER, C. Action to recover on a promissory note. Judgment for defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial. The case is here on the judgment roll and a bill of exceptions. The court below found that the note had been fully paid, and the plaintiff contends that this finding is not supported by the evidence, and we think the contention will have to be sustained.

On May 22, 1893, John M. Hughes, now deceased, made his promissory note to plaintiff for $1,174.35, due one year after date, with interest thereon until paid. On September 30, 1895, the said Hughes died, and defendant was in October, 1895, duly appointed administrator of his estate. In October, 1895, publication of notice to creditors was made by defendant as such administrator. The plaintiff in due time made out and presented his claim against said estate upon the said promissory note, which claim was rejected by the defendant. The complaint contains a copy of the said note, alleges the due presentation of the claim and its rejection by defendant, and is verified. The answer, which is also verified, alleges that defendant has no information or belief as to the making and delivering of the note, and upon that ground denies that it was made and delivered as set forth in the complaint. The answer also denies that the note has not been paid, and denies the presentation of the claim to the defendant. Plaintiff introduced in evidence the promissory note, with the indorsements thereon, proved the signature of deceased thereto, and the due presentation of the claim and its rejection, and rested. This made out a prima facie case of nonpayment. Bank v. Christensen, 51 Cal. 572; Turner v. Turner, 79 Cal. 566, 21 Pac. 959; Ritter v. Schenk, 101 Ill. 389. It being thus proved that the note was not paid, the burden was cast upon defendant to prove by competent evidence that it had been paid. The evidence on the part of the plaintiff raised a presumption of nonpayment, which in law entitled him to recover. The evidence on the part of the defendant must have been such, whether direct or by raising legal presumptions, as to rebut the prima facie case made by plaintiff. The only evidence offered by defendant is to the effect that on October 5, 1894, the deceased executed and delivered to plaintiff his promissory note, secured by mortgage, for $4,543.32; that on said last-named date there was due upon an old note and mortgage executed by deceased to this plaintiff in 1891 the sum of about $3,200 or $3,300. There was no proof that the note and mortgage of October 5, 1894, was in payment of the old note and mortgage of 1891, and no evidence as to the consideration for the same, and it was not shown that either of the mortgages had any connection in any way with the note in controversy here. Counsel for defendant, in their brief, in a very ingenious manner, undertake to show by calculation that the note and mortgage of October 5, 1894, were for about the amount due on the old mortgage of 1891 and the note in this case, and insist that the presumption is that the note and mortgage of October 5, 1894, was in full settlement of the note in this suit. We do not think the law indulges in such imaginary presumptions. It is said we must presume "that the ordinary course of business has been followed." If so, we must presume that, if deceased in his lifetime ever paid the note in this case, it was delivered up to him. If it had been delivered up to him, we would have to presume that it had been paid. Code Civ. Proc. § 1963, subd. 9. But as it was not delivered up, but was at his death in the possession of plaintiff, we must presume that it has not been paid. A promissory note in the possession of the payee after the death of the maker is an instrument of too solemn a nature to be adjudged as having been fully paid, in the absence of proof or circumstances which raise a legal presumption of its payment. The uncontradicted evidence shows that at the time of the death of Hughes the note was in the possession of plaintiff's agent, Mr. Brown, with whom it had been since 1893. During the years 1894 and 1895 Mr. Brown made some 20 indorsements of payments, in his own handwriting, amounting to over $600. These payments were all made and indorsed on the note after the making of the note and mortgage of October 5, 1894. It would not be considered the ordinary course of business for the payee of a note to keep it in his possession after it had been paid. It would certainly not be in the ordinary course of business for the maker of a note, after having once paid it, to continue making payments upon it for two years thereafter. The plaintiff was not permitted to testify against the estate of deceased, and the lips of deceased had been closed by death. The note, therefore, in the possession of plaintiff, raises a presumption of nonpayment, which, in the absence of testimony, or legal presumptions from facts established by the testimony, entitles him to judgment. The receipts offered in evidence by defendant are not described in such manner in the bill of exceptions as to enable us to even guess at what they were for. The date is not given, nor the contents of the receipts, nor any single fact from which a presumption can arise that the receipts were for money paid on the note. The statement shows that the defendant introduced in evidence "receipts aggregating $310.50, none of which receipts correspond in date or amount with the indorsements on the note." Even if the amount was for money actually paid by deceased, to be credited on the note, it would not change the result here, because the amount is not sufficient to show that the note has been fully paid. We advise that the judgment and order be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

125 Cal. 622

IRWIN v. EXTON et al. (L. A. 468.)

(Supreme Court of California. Sept. 1, 1899.)

MUNICIPAL CORPORATIONS—TAXES COLLECTED FOR INTEREST ON VOID BONDS—USE OF FUND—EQUITY—ADEQUATE LEGAL REMEDY.

1. Money collected by a city by a tax levy to pay interest on void bonds voted to be issued for constructing waterworks, under St. 1889, p. 399, as amended by St. 1891, pp. 84, 132, and St. 1893, p. 61, authorizing the issue of such bonds, is held by the city freed from the directions of the statute relating to taxes collected to pay principal and interest on bonds, requiring the same "to be inviolably appropriated to the payment of principal and interest on such indebtedness"; and, if it cannot be recovered by the taxpayers who paid it, it may be carried into the general fund of the city, and expended like other money in that fund.

2. A court of equity will not restrain municipal officers from doing an act which, if done, would not injure the plaintiff, where the party really aggrieved has an adequate remedy at law.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Action by I. Isaac Irwin against Thomas C. Exton and others, trustees of the city of Oceanside, Cal., and the city of Oceanside. From a judgment for defendants, plaintiff appeals. Affirmed.

Eugene Daney, for appellant. W. T. McNeally, for respondents.

CHIPMAN, C. Oceanside is a city of the sixth class. On May 8, 1894, it voted $30,000 of bonds, under the act of March 19, 1889 (St. 1889, p. 399) and the acts amendatory thereof (St. 1891, pp. 84, 132, and St. 1893, p. 61), for the purpose of acquiring water rights and the construction of waterworks to supply the city and its inhabitants with water. Bonds were printed, but were never executed or sold, and it is conceded by both parties that they are void, and therefore cannot be legally issued. After the election the city proceeded to levy an annual tax, under the provisions of the act, to raise the funds with which to pay the interest on the bonds, and provide a sinking fund to pay the principal at maturity. As the result of said levy it is stipulated that "there is now in the city treasury, * * * for taxes collected on account of said bonds, * * * in the fund known as 'Water-Bond Fund No. 2,' about the sum of seven thousand nine hundred and ninety-nine dollars"; and that, unless restrained, defendants "will transfer from said water-bond fund No. 2 to the waterworks improvement fund, or to some other fund, moneys of said water-bond fund No. 2, and will pay and order paid out of said moneys now in or hereafter taken from said last-mentioned fund, for the services of the engineer employed under the aforesaid resolutions,"—i. e. certain resolutions of the said defendants,—the sum of eight hundred and forty dollars. Plaintiff is an elector and resident property holder of said city, but whether he paid into the treasury any of said sum collected as taxes does not appear. He is not seeking to recover any of this fund as paid by him. He seeks only to restrain defendants from transferring any of the money now in the said water-bond fund to any other fund, and to restrain defendants from using any of said money for the purposes threatened by them. The court entered judgment for defendants, denying the injunction, and the appeal is from this judgment.

Counsel discuss many propositions which we do not deem it necessary to consider. The validity of the bond issue is not necessarily raised by the pleadings, and we do not pass upon that question. Both parties, however, concede that the bonds are invalid, and for the purposes of this case they will be so regarded. Appellant devotes much attention to the provisions of the statutes relating to the transfer by the municipal authorities of money under their control from one fund to another fund, and also to certain requirements of the municipal corporation act, by which it is claimed that taxes collected to pay the principal and interest on bonds "shall be kept in the treasury as a separate fund, to be inviolably appropriated to the payment of the principal and interest of such indebtedness." We cannot regard these provisions of the statute as involved. Appellant contends and respondents concede that there are no legal bonds in existence for many reasons, and, among others, that the initial proceedings of defendants were not in conformity with law, and no authority exists for creating a bonded debt. This being so, we cannot see how there can be a water-bond fund, where the taxes collected under these illegal proceedings can be impounded and held indefinitely. The statute provides for holding inviolate money paid into the treasury to meet the interest and principal of valid bonds, not bonds that have no legal existence. The trustees of the city may have entered these taxes on the books of the city as to the credit of a water-bond fund, but as the proceedings leading up to the collection of this money were void, and as the purpose for which the money was paid has failed, it seems to us that it is held by the city authorities freed from any of the directions of the statute under which it was collected, and is to be treated as any other money coming into their hands for some lawful purpose, but which cannot be used for the particular object contemplated when it was paid into the treasury. The money either belongs to the persons who paid it, or, if it cannot be recovered back by them, it may be carried to the general fund of the city, and may be used for any of the purposes for which any other money in that fund may be used. Appellant cites the case of Kerr v. Butz, 34 Ill. App. 220, to show that these payments were not voluntary, and that the city holds the money as bailee, to be paid to the taxpayer on demand. We are not called upon in this action to decide whether this money may be recovered back by the taxpayers who paid it. They are not asking it, and may never do so; and the evidence is not directed specially to that question, and to express any opinion upon it would bind nobody. We cannot see, however, in what way plaintiff would be injured, whatever may happen. He paid none of the money, so far as we know, and has no claim upon it. If it is paid back, it does not injure him, and, if it is retained and used, presumably he will be benefited in common with other property holders. We do not think that the equity powers of the court should be interposed to restrain the officers of a municipality from doing an act which, if done, will not injure the complainant, and in a matter where there is an adequate remedy at law given to the persons really aggrieved. Appellant's action amounts simply to a benevolent effort on his part to tie up this money against the day when the taxpayers who paid may claim their own. We cannot believe it to be within the legitimate powers of an equity court to aid in such a purpose. If defendants proposed to use this money for some unlawful object (that is, for some object for which they could not use the funds of the city), plaintiff might maintain the action, upon the principles laid down in Winn v. Shaw, 87 Cal. 631, 25 Pac. 968, but no such case is presented. The city has the right to use its general fund in proper expenditures to secure plans for proposed waterworks. The act relied upon by appellant provides, and he insists, that, before the city can submit to the voters the question of issuing bonds for this purpose, there must be plans and estimates of cost for the information of the voters. For authority to employ an engineer as is proposed, see Act March 13, 1883 (St. 1883, p. 269) § 862, subd. 3. The proposed use of the money is not, therefore, in excess of the powers of the city authorities. In no view of the case can we see that plaintiff is entitled to the relief asked, and for this reason it is advised that the judgment be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

125 Cal. 656

STEPHENSON v. DEUEL et al. (S. F. 994.)

(Supreme Court of California. Sept. 6, 1899.)

QUIETING TITLE—DEED—HARMLESS ERROR.

1. Judgment, after trial on the merits, will not be disturbed on appeal, because of the overruling of demurrer to the answer on the ground of uncertainty and ambiguity, it not clearly appearing that there was prejudice therefrom.

2. Defendant may have his title quieted by cross complaint, in suit to have set aside a sale to him on execution against one from whose grantor plaintiff claims under deed.

3. Nothing passes under a deed without consideration, the grantor having previously executed and delivered a deed thereof to another.

4. It is enough to entitle defendant to have title quieted as against plaintiff, who has no title, that at the time plaintiff commenced his action defendant was in possession under a sheriff's deed.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by Alice M. Stephenson against J. C. Deuel and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Wiley J. Tinnin, for appellant. J. C. Deuel and Frank H. Short, for respondents.

CHIPMAN, C. Berdenia F. Stephenson brought an action for divorce against William

M. Stephenson on February 13, 1892, in the superior court of Fresno county. On that day the court made an order requiring defendant to pay a counsel fee of $150, and on April 18th the court made another order reciting the former order and defendant's refusal to obey it, and ordering the fee to be increased to $300, and that it, together with certain alimony previously ordered, be paid within two days after notice of the making of the order, and that, in case of default, execution issue to enforce payment. A copy of this last order was served on defendant's attorney, April 19th. On May 20th an execution was issued for the unpaid balance, which was levied upon the right, title, and interest of William M. Stephenson (defendant in the divorce suit) in and to certain lots situated in the city of Fresno, the lots in controversy, and the same were sold by the sheriff to defendant Deuel on July 14, 1892, and a certificate of purchase issued to him, and on January 17, 1893, a deed was made to him by the sheriff, and a writ of assistance was issued January 23, 1893, under which said William M. Stephenson, then in possession, was removed from the land, and Deuel put in possession thereof, which he still holds. Plaintiff claims title to the land under deed from one Dyas and wife, dated February 1, 1892. It is in support of this title that plaintiff now seeks to have the proceedings set aside as void under which Deuel claims. Defendant Deuel in his answer avers that Dyas conveyed the lots to William M. Stephenson prior to the alleged conveyance to plaintiff by Dyas, and that Stephenson became, and at the time of the levy was, the owner of the lots, but that the deed was not recorded, though delivered and the consideration paid; and that, pending the divorce proceedings between Berdenia and William, the latter caused Dyas to convey the lots to William's minor child (plaintiff), with the fraudulent purpose of preventing his wife, Berdenia, from getting the same, and to prevent the collection of the money ordered to be paid as alimony and counsel fees, and in fraud of his creditors generally. By cross complaint, defendant Deuel asked to have his title quieted. The court gave judgment for defendant, from which and from the order denying a new trial plaintiff appeals.

1. The ruling upon demurrer to defendants' amended answer, on the ground of uncertainty and ambiguity, cannot now avail plaintiff. The pleadings are verified, and defendants' answer is deemed controverted. Where there is an answer and trial on the merits, the court will not reverse the judgment for ambiguity and uncertainty, unless it clearly appears that demurrant was prejudiced by the alleged infirmity in the pleading. It does not so appear here. Lothrop v. Golden (Cal.) 57 Pac. 394.

2. The demurrer to defendants' cross complaint, on the ground that several causes of action were improperly united, was rightly overruled. Defendants could have the relief asked in this action by way of cross complaint. Code Civ. Proc. § 442.

3. Several of the findings are attacked for insufficiency of the evidence to justify them. Finding 3 is to the effect that plaintiff did not become the owner of the property in question by the deed of J. C. Dyas and wife, dated February 1, 1892, or otherwise. The evidence tends to show that prior to the delivery of this deed Dyas sold and conveyed the lots to W. M. Stephenson by deed, which was delivered for him to his agent, one McKenzie, who testified that it was still in his office. Another witness testified that she heard Stephenson in the latter part of January, 1892, say that he had bought the property in controversy. There is evidence tending to show that he was occupying the premises when Deuel caused the execution to be levied. The deed under which plaintiff claims bears date February 1st, but there is evidence from which the inference may be drawn that it was first executed and acknowledged by Mrs. Dyas at Santa Cruz on March 29, 1892, and that it was afterwards sent to McKenzie at Fresno, and then executed and acknowledged by Mr. Dyas before McKenzie on March 31, 1892. The acknowledgments are dated, respectively, March 29 and March 31, 1892. Plaintiff claims, and there is some evidence tending to show, that Stephenson instructed McKenzie to prepare a deed from Dyas and wife to plaintiff, after the deed was executed conveying the property to him, as he said the former deed was a mistake, and he wanted the lots to go to his child (plaintiff), and that McKenzie did, by Stephenson's direction, prepare the deed which bears date February 1st. This first deed, however, had been delivered to McKenzie for Stephenson and as his agent. The deed to plaintiff was recorded April 2, 1892, by McKenzie at the direction of W. M. Stephenson and his son, John M. Stephenson, and the latter testified that he paid Dyas for the lots from his own money. There is evidence that the money came from a sale of property by W. M. Stephenson, the proceeds of which he gave his children, and that Dyas got $2,600, the consideration for the lots, out of a portion of the money paid on account of this sale. This money was handled by McKenzie, and he testified that when he paid Dyas he charged the money to the account of John M. Stephenson. There is some evidence tending to show that W. M. Stephenson caused the deed to be made to his daughter because of the divorce proceedings, and because he wanted to prevent his wife from getting any of his property. We think, however, aside from the question of fraud raised by the answer, that the execution of the deed by Dyas, and its delivery by Dyas to McKenzie for Stephenson, devested Dyas of the title, and vested the title in Stephenson. When Dyas undertook to convey the property to plaintiff, he had nothing to convey. No

question of purchase by plaintiff for a valuable consideration without notice is presented. It appears that plaintiff paid no consideration, and it does not appear that she knew that the property was conveyed to her at the time Dyas made the deed under which she claims. Finding 5 is that the order of April 18, 1892, as to counsel fees, was served on the counsel of Stephenson, defendant in the divorce action, and that both counsel and Stephenson had knowledge of the making and entry of the order. The order, in fact, was served upon Stephenson's attorney, but not on Stephenson. Counsel for appellant contends that the order should have been served upon Stephenson personally; citing Code Civ. Proc. §§ 1015, 1016, and numerous cases. Whether the service was sufficient or not, appellant is in no position to complain. The court found, as we have seen, upon sufficient evidence, that plaintiff had no title to, or interest in, the lots. This is a collateral attack upon the proceedings under which Deuel claims title. Unless plaintiff had some interest in the property, it is immaterial whether the order above referred to was properly served. This view of the matter disposes of appellant's objection to findings 6 to 13, inclusive. Finding 14 is that Dyas and wife, about February 1, 1892, executed their deed conveying the property to W. M. Stephenson, which deed was delivered to W. H. McKenzie and accepted by him as the agent of and for Stephenson; that this deed was retained by McKenzie, but not recorded, and that thereafter, on or about March 25, 1892, and before the purchase price had been paid by Stephenson to Dyas, said Stephenson, "with the purpose and intention and designing to cheat, hinder, and delay and defraud defendant Berdenia F. Stephenson, who was then his wife, and to prevent said real property from being subject to the order and process of the court, and the payment of the expenses, counsel fees, and alimony, which had been then, or which he anticipated or expected would be, awarded against him" in the divorce action then pending, etc., did procure said deed to be made from Dyas and wife to plaintiff, then a minor and daughter of said W. M. Stephenson, and to be delivered to said McKenzie, and thereupon said W. M. Stephenson caused McKenzie to pay Dyas $2,600, the purchase price of said real property, and that said last-named deed was procured to be made "for the purpose of hindering, delaying, and defrauding the said Berdenia, and not otherwise; that about February 13, 1892, she commenced her said action for divorce, and said action was pending thereafter at all times until January 10, 1893, upon which last date W. M. Stephenson died." Other subdivisions of this finding relate to matters concerning the proceedings in the action for divorce under which defendant Deuel claims title. There was evidence tending to show that about the time the divorce was commenced, both before and after, Stephenson declared that his wife should have none of his property, and that, to prevent her from getting any of it, he would "put the property out of his hands." A witness testified that Stephenson told witness he had bought the lots in controversy for $2,700, and after that, "when Mrs. Stephenson commenced suit against him, he said she would not get a dollar of his property; that he would put the property out of his hands; that he would give it to Alice; that he would deed it to Alice, his daughter." There was much other testimony to like effect. There was also evidence introduced by plaintiff tending to contradict the evidence of defendant, but, at most, it left the evidence as to the transfer to plaintiff in conflict, as also the evidence as to the delivery of the deed to Stephenson. It cannot be said there was not sufficient evidence to sustain this finding. And, if this were not so, we cannot see that plaintiff was injured by the finding, since Dyas had no title to convey when he made the deed to plaintiff, through which alone plaintiff claims.

4. There are numerous assignments of error in admitting evidence, over plaintiff's objection, tending to show that the conveyance to plaintiff was fraudulent. Counsel for plaintiff has not stated why he objected to the evidence as immaterial, but I infer that the objection rests upon the theory that evidence as to Stephenson's alleged fraudulent intent was outside the issues. The issue of fraud was presented by the pleadings, and the evidence was material upon that issue.

5. It is contended that the decision is not justified by the evidence unless it be held that Deuel's title was good, and that, before it can be held good, the court must hold the service of notice of the order under which Deuel claims to have been properly made upon the attorney of Stephenson in the divorce case. When this action was commenced, Deuel was in possession under the deed of the sheriff. This was sufficient to have his title quieted as against the deed of Dyas to plaintiff, which the court found, upon sufficient evidence, conveyed no title and was void. Pierce v. Felter, 53 Cal. 18; McKinnie v. Shaffer, 74 Cal. 614, 16 Pac. 509; Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398.

There are some other assignments of error, but they appear to depend, in one way and another, upon matters already noticed, and do not require special consideration. Discovering no reversible error, I advise that the judgment and order be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

6 Cal. Unrep. 321

BUCKLEY v. MOHR. (L. A. 570.)

(Supreme Court of California. Sept. 8, 1899.)

BOUNDARIES—MAPS OF DIFFERENT ADDITIONS TO CITY—ADVERSE POSSESSION.

1. Where plaintiff in ejectment claims land under the official map of a certain addition to a city, and defendant claims under the official map of an adjoining addition, and it is stipulated that the map under which defendant claims is the official map of that addition, and that under it defendant has shown title to the land in controversy, and the evidence shows that such map is the one under which both parties have acted, it will be considered as the controlling map by which to locate the line between the two additions.

2. Where plaintiff in ejectment claims the west 25 feet of a certain lot on which a building is located, and the land in controversy consists of a certain number of feet off the east side of said strip of 25 feet, and the evidence shows that plaintiff and her grantors supposed they had located the building as far east as they claimed possession, and made no claim of possession to any land east of the building until after defendant inclosed the same, plaintiff cannot claim constructive adverse possession to the land east of said building.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Ejectment by Mary Buckley against William Mohr. From a judgment in favor of defendant, and an order denying motion for new trial, plaintiff appeals. Affirmed.

Withington & Carter, for appellant. A. C. Mouser, for respondent.

CHIPMAN, C. Ejectment. Defendant had judgment, from which, and from the order denying motion for new trial, plaintiff appeals. Block K of Horton's addition to the city of San Diego is fractional, and its west boundary line is the east boundary line of fractional block 2 of Middletown, the two fractional blocks extending from Front street on the east to Union street on the west, forming one entire block, being bounded as shown above on the east and west, on the south by C. street, and on the north by B street. Plaintiff claims by a deed made to her in 1886, describing her land as follows: "Beginning at the southwest corner of block K, Horton's addition, thence easterly 25 feet, thence northerly 100 feet, thence westerly 25 feet, thence southerly 100 feet to beginning; being the same land previously conveyed to plaintiff's grantor by the San Diego and Los Angeles R. R. Co." It is otherwise known as the west 25 feet off lots G and H of Horton's addition. Defendant claims the east 92 feet of said lot G through conveyance which described a piece of land beginning at the southeast corner of said block K; thence northerly along Front street 50 feet; thence at right angles west to the west line of the block, which line divides this block and block 2 of Middletown; thence south along this line to C street; thence along C street 117 feet to the beginning,—"excepting a strip off the west end of above tract of 25 feet wide from east to west on said C street by 50 feet long from north to south, deeded to the Texas Pacific Railway Company August 5, 1873." This excepted piece is the same as described in the complaint. When plaintiff's grantor bought the property, in 1886, he built a laundry upon it, which was then, and ever since has been, rented and used for laundry purposes. The building fronts 22 feet and 3 inches on C street, and extends back about 50 feet, and plaintiff's evidence tends to show that it was the intention of plaintiff's grantor to build the house entirely on the west 25 feet of lot G, with a space for a drainage sewer on the west side of the house to C street. Plaintiff made no use of any of the land lying along the east side of this laundry building, and no door opened on that side, but a door opened on the west side. In 1896 defendant inclosed his part of lot G with a fence, including in his inclosure all the land within six inches of the laundry. Defendant claims that lot G runs back from Front street to the dividing line between block K of Horton's addition and block 2 of Middletown, 117 feet, according to Lockling's map of Horton's addition, and that his part of the lot is the east 92 feet, while he concedes that plaintiff's deed calls for the west 25 feet of the lot, to which defendant makes no claim. Plaintiff claims according to the Jackson map of Middletown, which gives 87 feet as the width of block 2, and would locate the dividing line between the two blocks 3 feet 6 inches further east than by Lockling's map of Horton's addition, and would reduce the length of lot G to 113 feet 4 inches; and, as defendant concedes to plaintiff 25 feet off the west side of this lot, the Jackson map, if the true survey, would reduce defendant's lot from 92 feet to 83 feet 4 inches, and would show defendant to be a trespasser. It was stipulated at the trial by the parties that Lockling's map of Horton's addition is the official map, and was filed June 21, 1871, "and that the south line of said fractional block K, in said addition, is marked thereon 117 feet long, and that said south line of said fractional block K is the south line of said lot G therein; that said map shows that Horton's addition has in it over 400 blocks, each divided into 12 lots, designated by the letters A to L, and that the west half of each block is lettered A to F from north to south, and the east half G to L from south to north; that the Jackson map of Middletown is the official map of Middletown, and was filed October 19, 1874." It was stipulated that defendant showed valid title to the realty east of the property named in the complaint, by a description which, among others, describes lot G as running on C street 117 feet from the line dividing Horton's addition and Middletown.

It seems to me that the pivotal question is as to which of these two maps should prevail. A subordinate question is whether the occupation by the laundry building carried with it title by adverse possession to any land east of that building. That the Lockling map should prevail over the Jackson map seems quite clear from the evidence. The Middletown reservation comprised some 637 acres, more or less, having a frontage "along the line of low-water mark on the bay of San Diego, and 1,980 feet easterly is the dividing line between Middletown and Horton's addition, running parallel with said low-water mark on said bay of San Diego." This Middletown reservation was partitioned by decree of court, and the map thereof is what is known as the "Jackson Map," which was filed October 19, 1874. There is no evidence that any of defendant's predecessors in interest were parties to that partition suit, or that it involved any of the other lands of the city of San Diego. It appears, however, that the remainder of the city's lands were surveyed and platted by Charles H. Poole, and divided in pueblo lots of 160 acres each, and were so designated on the official map thereof by Poole in 1856; and on May 11, 1867, the city conveyed to Horton certain six of these pueblo lots as designated on the map of 1856 (among which was the lot in which block K is situated), and these pueblo lots were subsequently subdivided by Horton, and the official map thereof duly filed June 21, 1871. The deed under which plaintiff claims begins its description at the southwest corner of block K of Horton's addition, and the evidence is that plaintiff's part of lot G has generally been described as the west 25 feet of lot G of Horton's addition. We think the evidence, stipulated and otherwise, sufficiently establishes the fact that the Lockling map of Horton's addition, and not the Jackson map, has been the one upon which all the parties have acted. And, as it is stipulated that lot G has a depth of 117 feet east and west from Front street, it seems quite plain that, so far as the conveyances should control, defendant has a clear right to the land he has inclosed, and he claims no more. We do not wish to be understood as deciding for all purposes, and in all cases which may hereafter arise, that the dividing line between block K of Horton's addition and block 2 of Middletown must be located by the Lockling map. We only decide that in the case here it must be so done, upon the evidence before us.

But plaintiff claims that, if it be that she has failed to prove perfect title by deed, she yet has proved title by adverse possession. The evidence is that her grantor took possession of what he supposed was the west 25 feet of lot G as laid down on the Lockling map of Horton's addition. He built upon that assumption, and the house is where it was placed in 1886. Plaintiff's witness testified: "Before I obtained any interest in this property, in 1886,—possibly in 1885,—I went to it with Santee [his grantor], who showed me this twenty-five feet on C street. He pointed it out, and located it where we built the laundry, which has been occupied, ever since we built it, as a laundry. We built a sewer, at great expense, on the west side of this twenty-five feet. It was not put on the line, but on this twenty-five feet." Again he testified: "We had a map there, and he showed me the west line of the twenty-five feet from the map, * * * and he indicated to me the fact that we had twenty-five feet off the west end of lots G and H of fractional block K. * * * I do not remember how much of our twenty-five feet we left on the east side of the laundry, nor how much on the west side. There was never any fence on either side of the laundry, that I know of. There was nothing there but the laundry. Before we put the wash house there, we measured off our twenty-five feet. Then the sewer was expensive, and we aimed to be right about it, so we had a survey made. We had some one make a survey before we put the sewer in, and we put it on the westerly part of our twenty-five feet. We did not aim to put it on any line. We aimed to get it inside of our own domains." For purposes of taxation this piece was variously described. Plaintiff's agent since 1889 testified that it has been generally described as the "west twenty-five feet of lot G." It seems to me that the evidence warrants the inference that plaintiff and her grantors supposed they had located the laundry as far east on the lot as they claimed possession. The building is stated by one witness to be 23 feet 3 inches, and by another witness 22 feet and 3 inches, wide. The latter of these measurements would leave but 2 feet 9 inches for the sewer, which was built west of the house, and within the 25 feet claimed; there was a door leading out to the west, but no door or entrance from the east. The evidence tends strongly to show that no claim of possession or right of possession was set up by plaintiff or her grantor to any land east of the laundry. We do not see how the doctrine relied upon by plaintiff, as to constructive possession of a larger tract while in actual possession of only a portion, can apply, for the evidence shows that the entry was upon the whole tract called for by plaintiff's deed, as the claimants understood their rights. They never occupied or made claim to any land east of the building until after defendant built his fence. Plaintiff's adverse possession was of the west 25 feet of the 117 feet of lot G of Horton's addition, and we do not see how she can claim constructive adverse possession beyond this, in view of the evidence in the case. How far in the other direction her adverse possession may be maintained, in order to give her the full 25 feet front on C street, it is not our intention to intimate. All that is intended to be decided is that the evidence fails to support her claim to the land she now seeks to recover, and we therefore advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

125 Cal. 639

McKEEBY v. CITY OF LOS ANGELES.

(L. A. 484.)

(Supreme Court of California. Sept. 5, 1899.)

ADMINISTRATORS — SETTLING CLAIM—RIGHTS OF HEIR.

An administrator, without any authority, executed to a city a deed to part of a lot belonging to intestate, which commissioners had reported as land to be taken for opening a street, and the city took possession of the land, and paid to him the sum fixed as the value thereof, which he used in paying claims against the estate. *Held* that, though the deed was void and the city was a trespasser, yet, as the administrator had the right to accept payment for the damage, subject to the approval of the court, which he had when his account, showing the facts, was settled and allowed, the heir, who knew of the facts, and consented to the allowance of the account, or one who, also knowing the facts, took from him a deed of the lot and an assignment of any claim for damages, could not recover damages from the city.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by L. C. McKeeby against the city of Los Angeles. Judgment for defendant. Plaintiff appeals. Affirmed.

McKeeby & Whitney and H. H. Appel, for appellant. W. E. Dunn, for respondent.

CHIPMAN, C. Action for damages. The court found the following facts: Under the provisions of the act of March 6, 1889 (St. 1889, p. 70), for laying out, opening, and extending any street, etc., and to condemn and acquire any land necessary or convenient for that purpose, the city council of the city of Los Angeles took all the steps required by the statute to assess the benefits and damages for the opening of Castelar street into Bellevue avenue. The report of the commissioners was confirmed and adopted May 7, 1894, and among other pieces of property described in the ordinance of intention and in the report as land to be taken for said opening of said street was a portion of lot 24, in block H, of the Fort Hill tract, reported as belonging, and which did belong, to the estate of Mary Martin, deceased, and the sum of $620 was fixed and allowed as the value of said portion of said lot. D. W. Field, public administrator, was the administrator of said estate at the time, and so continued until after March 12, 1896. On February 15, 1895, the street commissioners, by warrant drawn on the funds of the treasury of said city to the account of said improvement, paid to said Field the sum of $620, as administrator of said estate, and on that day he executed, as such administrator, to the city a deed conveying said portion of said lot, and delivered the same to the commissioners. One Samuel Earl was the sole heir of deceased, and as such succeeded to all the property of the estate, subject to all just debts of deceased and costs and expenses of administration. Said sum so paid to said Field was used by him and applied "in payment of claims against said estate of Mary Martin, deceased, and costs of administration, duly allowed; and that in his final account as such administrator said Field fully accounted for the same as money received 'for improving street,' and that on the settlement of said final account it appeared that said estate was indebted in the sum of $710, and that the further sum of $90 in addition to said sum of $620 was required to pay off and discharge the debts and expenses of administration, in order to close up said estate; that said sum of $90 was advanced by said heir, Samuel Earl, and said account settled and allowed; that said Earl was represented on the hearing of settlement of said final account by his attorneys (one of whom is the plaintiff in this action), and that no exceptions or objections to said final account were made." A decree of distribution was thereafter entered, whereby the whole of said lot was distributed to said Earl, who thereafter made his deed of conveyance to plaintiff, who "knew that said commissioners had paid said sum of $620 to said Field, and that said Field had executed and delivered said deed to said city, and that said Field had paid and applied said sum of $620 in satisfaction of legal and duly-allowed claims against the estate of said Mary Martin, deceased." "The value of the strip of land hereinbefore described and the damages to the remaining portion of said lot * * * does not exceed in the aggregate the sum of $620." As conclusions of law, the court found that the plaintiff should recover nothing by his action, and that defendant should recover its costs. Judgment was accordingly entered, from which, and from an order denying motion for new trial, plaintiff appeals.

It is admitted that the administrator took no proceedings in the probate court to sell the property to the city, and obtained no order to convey it. All parties agree that his deed was without authority and is void. The evidence shows that Earl, the sole heir of deceased, plaintiff's grantor, had knowledge of the conveyance by the administrator and the purpose for which it was given. He had knowledge that the consideration paid was used by the administrator in paying debts and expenses of administration, and his attorney, the present plaintiff, was in court at the time the final account was heard, as Earl's representative, and he examined the items of the account. Plaintiff testified: "We looked at the account, and had no objection to it. We wanted to see what part of the $620 was paid." When asked to what extent he represented Earl, he said: "To the extent I have stated. We simply said that we had no objection to that account. The court asked if we had looked at this account, and we said, 'Yes,' and that we had no objection." And, again, he said he "consented that this account be allowed." The account shows receipts, including an item of $620 "cash received Los Angeles city damages to

Reid lot for improving street," $2,022.80, and disbursements, $2004. There was a report accompanying the account explaining this item of $620, and showing a balance of $18.80. The account was settled as rendered, and Earl's attorneys advanced for Earl to the administrator sufficient ($90, as shown by the report) to enable the estate to be closed and the property distributed. Subsequently, with full knowledge of all the facts, plaintiff took his deed from Earl (including an assignment of any claim he had for damages), and presented the claim to the city authorities for damages, which being refused, he thereupon brought this suit.

So far as we can see it is a simple action for damages done by the city under a deed which it is conceded has no validity. The right of the city to retain the possession of the land is not involved. The city was a trespasser, and as such became liable in damages. It paid in full, however, all the court found that the land was injured, and the only question is whether it should pay a second time. Appellant's position is that the payment by the city was under a mistake of law, and was a voluntary payment to the administrator, and cannot be recovered from him nor from one to whose benefit he applied it, by way of counterclaim or set-off; that there is no ground for estoppel in the case against the heir or his grantee, and there is no right of subrogation; that the decree of distribution, until set aside, is a complete estoppel of record against the city. Whatever may be the law in this state as to the title to the land and the right of the city to withhold possession from plaintiff,—questions not now involved,—we think the plainest principles of equity and good conscience should prevent plaintiff from recovering damages after having once had the benefit of full payment. When the land was damaged, it was part of the estate. The city became at once liable to the estate, but we cannot see that because the liability arose through mistake of law, and through the unauthorized act of the administrator, the claim for damage would be different from a claim which would have arisen if the city had proceeded without the knowledge or consent of the administrator. The claim became an asset of the estate, and it was the duty of the administrator to collect it, and he did so as the representative of the heir, and accounted for the money to the estate, and used it to pay debts and charges for which the land in question was liable, and which had to be paid before complete title could pass by distribution to plaintiff's grantor. Conceding that, if this were an action to quiet title or to recover possession of the land, defendant would not be subrogated to the rights of creditors, and would not be entitled to the repayment of the money it paid out before plaintiff could recover, and also conceding that in such an action plaintiff would not be estopped, because he had indirectly received the benefit of the sale, it seems to us that the principles upon which the court might hold with plaintiff do not apply. The statutes relating to sales of land by an administrator, compliance with which is essential to a valid sale, have no reference to claims accruing to the estate by reason of acts of trespass upon the land. There is no pretense of fraud in the permission given by the administrator to the defendant to take possession of the land. The most that can be said is that he unlawfully permitted injury to property in his care and custody as trustee of the estate and of the heir at law. But when that injury was fully compensated, and the estate and the heir received the full benefit of the compensation, and the heir consented to the settlement of the final account, including this item of damage to his property, he took the land on distribution freed from any claim against defendant on account of this damage. The administrator, as the representative of the heir, had a right, as such, to accept payment for the damage, subject to the approval of the court. He had this approval when his account was settled and allowed, and, as the heir consented to the allowance of the account, we cannot see why his grantee, who stands in his shoes, should be heard to complain. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

125 Cal. 664

CASEY v. LEGGETT et al. (S. F. 932.)

(Supreme Court of California. Sept. 6, 1899.)

FRAUDULENT CONVEYANCE—CONSIDERATION—EVIDENCE—APPEAL.

1. Finding that there was a consideration for a deed claimed to be in fraud of creditors, and that the deed was delivered, being supported by substantial evidence, cannot be disturbed on appeal.

2. There being consideration for a deed, one attacking it as in fraud of the grantor's creditors has the burden of proving that the grantee was a party to the fraud, and did not take the deed in good faith.

3. A case having been tried as though the pleadings raised a certain issue, a technical objection that they did not cannot be made for the first time on appeal.

4. Deed from F. to L. being supported by consideration and taken in good faith, a conveyance of the property by L. to a third person, though without consideration, is good as against a creditor of F.

5. An owner of lands, though not in possession, may maintain action to quiet title.

6. Allowance of leading questions is not ground for reversal, except in case of manifest abuse of discretion.

7. Letter to F., advising him to convey his property to the writer till he could settle with a creditor, is not admissible in action to set aside, as in fraud of creditors, a conveyance by F., where he did not act on the advice, but refused to so deed his property.

8. Where F., when free from debt, gives money to L., and afterwards borrows it, a deed in payment thereof has a good consideration, as against creditors of F.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county.

Action by E. J. Casey against Joseph Leggett and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

James G. Maguire, for appellants. Wm. H. Jordan (Anson Hilton, of counsel), for respondent.

COOPER, C. Action to quiet title. Judgment for plaintiff. Motion for new trial denied. This appeal is from the judgment and order. On July 24, 1893, and prior thereto, one L. Frank Clar was the owner and seised in fee of the lands in controversy, and was then in insolvent circumstances, and owed, among others, one Adolph Sommer the sum of $4,800, besides interest. On said date the said L. Frank Clar made a bargain and sale deed of said lands to his brother Leo H. Clar. On September 11, 1893, said Sommer assigned the indebtedness so due him from L. Frank Clar to defendant Leggett, and on September 21, 1893, Leggett commenced an action in the proper court against said L. Frank Clar, and had a writ of attachment issue, which said writ was levied upon the said lands September 22, 1893. On the following day, September 23d, the deed made by said L. Frank Clar to his brother Leo H. was placed on record in the county where the lands are situated. October 15, 1894, said Leo H. Clar made a quitclaim deed of said lands to plaintiff, and on the 25th of the same month said Leggett recovered judgment against said L. Frank Clar. On December 17, 1894, the defendant Leggett purchased the said premises at execution sale under his said judgment, the same having been sold as the property of said L. Frank Clar. The defendants other than Leggett made default. Leggett, by his answer and cross complaint, denied the execution, delivery, and consideration of the deed from L. Frank Clar to Leo H. Clar, and of the deed from Leo H. Clar to plaintiff, and asked the court to set aside the said deeds, upon the ground that they were fraudulent, made without consideration, and that the lands were held in secret trust by plaintiff for said L. Frank Clar. The plaintiff denied the averments of the cross complaint, and upon the issues so made the case went to trial. The court found in favor of plaintiff upon the material issues, and the main contention of the defendant is the insufficiency of the evidence to justify these findings. The court found that the deed made by L. Frank Clar to his brother Leo was made for a valuable consideration, to wit, in consideration of an indebtedness due from said L. Frank Clar to his said brother amounting to about $4,237.87.

As this finding is the most vital one, and the one most earnestly attacked, we will first examine it. L. Frank Clar testified that his father, before his death, left $670 in a sack for his brother Leo H., who was then a mere boy, and that the father, among his last requests, asked him to take care of it and keep it for Leo; that his father deeded him a lot in San Francisco about the year 1880 for himself and his brother Leo; that this property was sold for $5,000, and of this sum one-half of it belonged to Leo; that $2,000 of the amount realized from the sale of the real estate, and the $670 and $680 due for wages, amounted, with interest, on July 24, 1893, to $4,600 or $4,700; that the money after the sale of the lot was placed in Leo's hands, or, rather, $2,000 of it, together with the $670 and $500 that witness had from other sources; that Leo gave witness permission to use this money, and that witness did use it, in his own business, and was thus indebted to his brother Leo, on the 24th day of July, 1893, in a sum exceeding $4,600. Leo H. Clar testified that he went with his older brother, L. Frank, to the safe-deposit vault, and the money was placed in his hands, and he gave his brother L. Frank permission to use it in his own business. Ivan Clar, another brother, testified to seeing and counting the $670 tied up in a sack in the vault of the safe-deposit company, with a tag on it bearing his brother Leo's name. It further was testified by the brothers Leo and Frank that after Leo attained his majority he worked for Frank for 17 months, and that such services were worth $40 per month, amounting to $680, and that Leo had never been paid. There is other testimony, but the above is sufficient to support the finding as to consideration. The brothers, who were witnesses for each other, do not agree as to all the facts, and there is a certain degree of improbability about much of the evidence that leaves it to our minds unsatisfactory. If we had to pass upon it in the first instance, we are not at all certain that we would find as did the judge of the court below. But the evidence is not contradicted or impeached, except by its own weakness, and the judge of the court below has found it true. As he saw and heard the witnesses, he was more capable of judging of the credit to be given to their testimony than we could possibly be by examining the record. As we understand the rule, we have not the power to disturb a finding of fact if there is substantial evidence to support it. Unlike the court below when trying the cause without a jury, we possess none of the functions of the jury, and therefore cannot substitute our opinion in the place of his, and say which testimony is true and which is false. Lick v. Madden, 36 Cal. 212.

It is further claimed that the evidence is insufficient to support the finding that the deed made to Leo H. Clar was delivered. The witness Butts testified that at the request of, and as agent of, Leo he prepared the deed and sent it to L. Frank Clar at Boston, to be executed and returned to him; that the deed was executed and returned to witness, and that he received it and took possession of it for Leo. The witness Leo H. Clar says that he employed Butts as his attorney to get the deed for him. We think the evidence (which is not contradicted) amply sufficient to support the finding. The deed having been made for a valuable consideration and delivered to the grantee, the law presumes that the grantee rightfully acquired the title to the property. The burden was therefore upon the defendant, after such consideration and delivery were established, to prove a fraudulent intent on the part of the grantor, and that the grantee was in some way a party to such fraud, by purchasing with knowledge of such fraudulent intent, or under such circumstances as should put him on inquiry as to the fraud on the part of the grantor. Jones v. Simpson, 116 U. S. 614, 6 Sup. Ct. 538; Ross v. Wellman, 102 Cal. 4, 36 Pac. 402. The court found that, at the time of the making of the conveyance from L. Frank Clar to Leo H., Leo was not privy to, or a participator in, any fraud whatsoever, and that Leo never conspired with his brother or any one else in any fraudulent attempt to convey or dispose of said property. This finding does not appear to be directly attacked in appellants' brief, but the argument against it is only from inference and a narration of circumstances. The burden was upon the defendant to show that Leo was in some way a party to the fraud, and that the deed was not taken by him in good faith. In the absence of proof—that is, in the absence of such facts and circumstances—that the court would be justified in the conclusion that Leo was in some way connected with or a party to a fraudulent intent on the part of Frank H., the finding would be justified. As was said by this court in Levy v. Scott, 115 Cal. 41, 46 Pac. 893: "It is quite true that evidences of fraud are not left lying patent in the sunlight; that fraud itself is always concealed; and that the truth is to be discovered more often from circumstances, from the interests of the parties, from the irregularities of the transaction, coupled with injury worked to an innocent party, than from direct and primary evidence of the fraudulent contrivance itself. Nevertheless, the evidence of these matters, facts, and circumstances, taken together, must amount to proof of fraud, and not to a mere suspicion thereof; for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties."

If we are correct in what has been said, the finding as to the intent of L. Frank Clar in making the deed to his brother Leo is not material, and it is not necessary to discuss it. It is claimed that the finding that the deed from Leo H. Clar to plaintiff was for a valuable consideration was outside the issues, contrary to the admissions in the pleadings, and that the said deed was in fact a mortgage given as security only. The technical argument is urged that the plaintiff, in denying the cross complaint, literally denied "that the deed was wholly voluntary and without any consideration whatever," and that such denial was virtually an admission of the allegation of the cross complaint as to want of consideration. If counsel had urged the objection in the court below, it would probably have resulted in an amendment to the answer to the cross complaint in furtherance of justice, and in order that the case might be tried upon its merits. This course was not pursued, and the case was fully tried, as though the issue was properly made by the pleadings. Counsel will not be allowed to try the case upon the theory that the issue was properly before the court below, and thus entice his adversary into a trap to be sprung in this court at the last moment. This court does not countenance technical objections to pleadings when the case was tried in the court below upon the theory that the issues were properly made. Cushing v. Pires (Cal.; S. F. 1,089, filed June 5, 1899) 57 Pac. 572. We do not think the defendant is in a position to claim that the deed from Leo H. Clar to plaintiff was not made in good faith, or that it was intended as a mortgage. He is not a creditor of Leo H. Clar nor of the plaintiff, and, if the deed was a gift, it would not in the least concern the defendant. The deed to Leo H. Clar having been made in good faith and for a valuable consideration, he could afterwards transfer the title acquired by the deed to any one, whether such person was a purchaser in good faith or not. A purchaser without notice of the fraud may sell the property to a person who has notice; for the law does not know of an unincumbered estate which is forfeited by alienation, or for which the owner cannot pass a good title to the purchaser. Bump, Fraud. Conv. § 499, and cases cited.

Considerable space is taken up in appellants' brief in the attempt to show that the finding that plaintiff was in possession of the lands at the time of the commencement of the action is not supported by the evidence. The evidence is sufficient, but the finding is wholly immaterial. The owner of land does not have to be in possession in order to enable him to maintain an action to quiet title. Code Civ. Proc. § 738; People v. Center, 66 Cal. 555, 5 Pac. 263, and 6 Pac. 481; Brusie v. Gates, 80 Cal. 463, 22 Pac. 284.

Many technical objections are made to the rulings upon the admission or rejection of evidence. The first one argued is the ruling of the court in sustaining plaintiff's objection to the defendants' question asked of the witness Leo H. Clar, to wit: "What statement did you make to Mr. Butts at the time you told him to get the deed? How did you tell him? Did you give him any instructions about getting it?" The court sustained the objection upon the ground that the question "had already been answered and gone over."

We think the ruling is not prejudicial error. The witness had been fully examined and cross-examined, and then re-examined and recross-examined, and again re-examined and recross-examined, and this question was asked at the latter end of the third cross-examination, and had been substantially gone over before. The witness was again called by defendant, and examined and cross-examined some three or four times.

The next objection is to a large number of questions asked by plaintiff's counsel, upon the ground that they are leading and suggestive. It is the settled rule in this state that the allowance of leading questions is in the discretion of the trial court, and that a case will not be reversed on such ground unless there is a manifest abuse of such discretion. White v. White, 82 Cal. 452, 23 Pac. 276; Kyle v. Craig (Cal.; filed June 17, 1899) 57 Pac. 791.

A Miss Burnett testified by deposition, and it appeared that she wrote a letter to L. Frank Clar prior to the time the deed was made by Frank to Leo. The letter was written by Miss Burnett to Frank, and not to Leo, or any party now interested in this case. It appears that Miss Burnett knew that Frank was indebted to Sommer, and she was afraid that Sommer might attach his property or cause him trouble. She advised Frank to deed his property to her until he could settle with Sommer, and then she would reconvey it. The court excluded the portions of Miss Burnett's letter relating to or rather advising such conveyance, and we think the ruling correct. The advice was never acted upon, and in fact Frank refused to so deed his property, and told Miss Burnett that he would not do it, as it would not be honest. It would be contrary to all rules of evidence to allow a written suggestion of a stranger to the litigation, to which no one of the parties or their privies consented, to be admitted in evidence. The case quoted by counsel (People v. Colburn, 105 Cal. 651, 38 Pac. 1105) is directly against him. It is said in the opinion: "The letter was a statement of a third party in no wise connected with defendant, was not made under the sanction of an oath, and not admissible. The possession of unanswered letters is not such evidence of acquiescence in their contents as to make them admissible in a civil case, and a letter found upon a prisoner when arrested has been held to be no evidence of the facts stated in it." If the proof had shown that L. Frank Clar acted upon the advice given in the letter, or that he requested it or in any way agreed to it, then it would be admissible for the purpose of showing his fraudulent intent. His fraudulent intent, however, would not change the result of the finding that the deed was made to Leo H. in good faith and for a valuable consideration. We think the testimony tending to show a gift of $2,000 from L. Frank Clar to his brother Leo was within the issues made by the pleadings. The cross complaint alleged that the deed to Leo was without consideration. The answer to the cross complaint denied this. If L. Frank Clar, at the time when he was not indebted, made a gift of $2,000 to his brother, he had the right to do so. If he afterwards borrowed it, the payment of the debt would be a good consideration for the deed. As has been said before, the truth or falsity of the evidence was left to the trial judge, and is not for this court. We advise that the judgment and order be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(125 Cal. 645)

BROWN v. ROUSE. (S. F. 787.)[1]

(Supreme Court of California. Sept. 6, 1899.)

SUBROGATION—VOLUNTARY PAYMENT.

Where plaintiff made a loan to defendant's husband, who gave a mortgage therefor on his wife's land, acting under a power of attorney, which plaintiff, under a mistake of law, thought authorized the mortgage, and the wife never ratified it, he cannot be subrogated to a prior mortgage on the land, which he and defendant's husband paid out of the loan, and had canceled, such payment being voluntary.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county.

Action by Adam Brown against Charlotte D. Rouse. Judgment for plaintiff. Defendant appeals. Reversed.

John H. Durst, for appellant. W. C. Kennedy, for respondent.

CHIPMAN, C. This is the third appeal of the case. Originally the action was to foreclose a mortgage executed by one German M. Rouse, under power of attorney, in the name of defendant, who was then his wife. At the first trial the court below held the note and mortgage to have been given without authority, but entered a personal judgment against defendant for $1,271 and costs. On appeal this judgment was reversed as outside the issues. 93 Cal. 237, 28 Pac. 1044. At the second trial plaintiff amended his complaint, alleging a loan of $1,200 on November 18, 1887, and its nonpayment. Plaintiff had a personal judgment for $1,510.68 and costs, on the theory that defendant had ratified the loan. On the second appeal the judgment was reversed, on the ground that the evidence failed to establish ratification. 104 Cal. 672, 38 Pac. 507. Defendant had previously given a mortgage on the land to one Davis, which had been overdue for three years and a half at the time of this alleged loan. In the opinion reversing the second judgment, the court said: "As to the $481.65 which went to satisfy the Davis mortgage, it would certainly be proper and just for appellant to pay it, and it is stated in appellant's brief that she is willing to pay it. * * * Perhaps, under appropriate pleadings and findings, plaintiff could recover for the amount of money that went to satisfy the said prior mortgage." The third trial was upon an amendment of the complaint, by which it was alleged that defendant, through her husband, procured plaintiff, as agent, to pay, and he did pay and satisfy, the Davis mortgage, amounting to $580, in full discharge thereof, and that Davis released the same at defendant's request, acting through her said agent; that she had full knowledge of these facts, and thereupon ratified and confirmed said release and discharge of said mortgage, and all the acts of her said agent, Rouse, and said sum of $580 forms a part of the consideration alleged to have been created by the said loan of $1,200 on November 18, 1887. The court found the facts substantially as alleged in the complaint, and that the amount paid to Davis was $481.65. The court also found that defendant had knowledge of all said facts, "and thereupon expressly ratified and confirmed said payment and release of said mortgage, and all of said acts of said agent, G. M. Rouse." As to the loan of $1,200, the court found that defendant's husband, assuming to act as agent and attorney in fact, and in pursuance of said power of attorney, borrowed from plaintiff and said plaintiff loaned to defendant the sum of $1,198, and gave therefor to said plaintiff a promissory note executed by said German M. Rouse, in the name of said Charlotte D. Rouse, for $1,200, which remains unpaid, except the said sum of $481.65, and that defendant "did receive by her said husband, as her agent, the residue of said $1,198. * * * Subsequently to said 18th day of November, 1887, and from time to time, she ratified and confirmed the loan made by Brown, by letters instructing the payment of interest on said loan, after being fully informed and having specific and complete knowledge of said loan and all the circumstances thereof." These interest payments were $54 on May 19, 1888, and $54 on November 23, 1888, being semiannual installments at 9 per cent. It is further found that when the money was borrowed defendant and her husband resided in the territory of Washington; that soon after the loan her husband returned to their then home, "taking with him the balance of said money, to wit, $716.35; that he then reported to his said wife that he had borrowed the money in her name, and had used the sum of $481.65 to pay off said mortgage, and that he had the balance with him, and that she, knowing that he had said money, did not request him to pay it to her, but allowed him to use the same as he saw fit, believing at the time that she was liable therefor; that thereafter she ratified and confirmed the acts of her said husband in procuring said sum of $1,198 from the plaintiff." Judgment was accordingly entered in favor of plaintiff for $1,729.37 and costs. Defendant claims that the evidence does not support these findings or the decision, and that the decision is against law, and appeals from the judgment and from the order denying her motion for a new trial.

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[1] Rehearing denied October 2, 1899.

So far as the alleged ratification of the loan is concerned, the case is in no particular strengthened by any new evidence. It still rests upon the fact that defendant paid two installments of interest on the note. As was said in the opinion given at the second appeal: "She consented to the two payments of interest, not as interest upon a mere verbal loan made by her husband, but as interest on a genuine note and mortgage executed in her name, and which bound her firmly and irrevocably. Now, it is an inherent element of ratification that the party to be charged with it must have fully known what he was doing." Plaintiff added to his testimony given at the second trial the following as to the loan to Mrs. Rouse: "She got the full benefit of it." He had no personal knowledge of the fact, he never saw her, and at the time defendant's husband borrowed the money she was in Washington Territory and he was in California. His statement has no probative value. Added to the former evidence are certain letters,—one from Mrs. Rouse to Rucker & Son, her then agents in San Jose, dated July 21, 1887, relating to the management of the property, and stating her desire to sell at a price not less than $2,000, and referring to the mortgage then on the place; a letter, also, dated October 27, 1887, from Rucker & Son to J. H. Durst, of San Francisco, defendant's nephew, calling attention to an offer they had for the property, to which Durst replies October 28th, stating that he has not heard from Mrs. Rouse lately, and must refer the matter to her. These were all written before the alleged loan, and seem to have no relation to it, and certainly cast no light upon the alleged ratification of the loan subsequently made; and the same may be said of the only remaining additional letter of Rucker & Son to Mrs. Rouse, of date February 9, 1888. It relates only to the price the party to whom they were trying to sell the property would probably be willing to pay. The witness Rucker, who had testified at the former trial, added the following to his testimony given at that time: "Davis had previously requested me to notify Mrs. Rouse that the mortgage and note must be paid or he would be obliged to foreclose. I did write her to that effect, but received no reply from her directly, but shortly after that her husband came down on this business." His letters to Mrs. Rouse were not in evidence, and there was no evidence that she received any such letters, and there is no evidence that her husband came here in response to these letters. But, if he did, the fact throws no light upon the question of his authority to borrow money in her name, nor upon the question of subsequent ratification of any such loan. Plaintiff also introduced as additional evidence the testimony of John

H. Durst, who resided in San Francisco at the time the loan was made. He testified that defendant's husband told him what had been done in the matter of the loan. Durst was not only nephew to defendant, but had attended to some of her business for her. He testified: "I corresponded with Mrs. Rouse about her San Jose property at times, both before and after the note and mortgage in this case were given, and up to the present time." He nowhere testifies that he informed her of what her husband had done. The evidence as to ratification stands precisely where it did when the case was last here, and we discover no reason for changing the opinion then expressed upon the point.

The evidence as to what defendant's husband reported to his wife as to the loan on his return to Washington, and what she did in the matter, is the same as at the second trial. There is no evidence now, and there was none then, to support the finding that defendant's husband paid her the borrowed money, less the amount used to discharge the Davis mortgage. She testified then, and it is the only evidence on the subject, that she never received any of this borrowed money; that her husband told her he had borrowed money from plaintiff, but he never informed her he had executed a note in her name. He told her he had paid off the Davis mortgage out of the money he had borrowed, and he told her he had money with him when he came home, and this is the extent of her knowledge of the transaction, except as subsequently obtained, when called upon to pay the interest on the plaintiff's mortgage. In June, 1888, Rouse deserted his wife, and they never after lived together. Upon substantially the same evidence as now here, the trial court at the second trial found, as conclusion of law, that plaintiff was not entitled to be subrogated to the Davis mortgage, but was entitled to recover the amount of the loan on the ground of ratification. The court at the last trial made no finding as to the right of plaintiff to be subrogated to the Davis mortgage, but found that plaintiff was entitled to recover the amount of the loan, with interest at 7 per cent. from November 18, 1887.

Plaintiff, however, urges his right to be subrogated to the Davis mortgage, and he prays that this may be done; but he does not ask that he be treated as the equitable assignee of the Davis mortgage, and that it be foreclosed for his benefit, the property sold, and its proceeds applied to the payment of his claim to the amount of the Davis mortgage. Subrogation is the substitution of another person in the place of a creditor, the substituted party succeeding to the rights of the creditor in relation to the debt. The substitute is put in all respects in the place of the party to whose right he is subrogated. Sheld. Subr. § 1. The Davis note was dated January 1, 1884, and was due 12 months after its date. The statute of limitations barred foreclosure after January 1, 1889. There is evidence tending to show that this action was not brought until after January 1, 1889, and after the Davis note and mortgage were barred by the statute, and defendant has pleaded the statute. It is not necessary to pass upon the question of limitation.

The right of subrogation in this case rests upon the undisputed facts: That plaintiff's mortgage was made without defendant's authority, and we have held that it was not afterwards ratified. It therefore is a nullity as to defendant. When plaintiff made the loan to Rouse, the two went together with Davis to the recorder's office. Out of the money loaned the Davis mortgage was paid, and it was thereupon satisfied of record, and the plaintiff's mortgage was then recorded. Plaintiff had previously caused the record to be searched. He testified: "Being told by Mr. Bailey that the title was all right, and that the power of attorney was all right and of record, and appeared in the abstract, I made the loan in good faith upon the property, and under the circumstances I have stated." He did not take an assignment of the Davis mortgage, but paid the debt secured by it and had it canceled. There was no mistake of fact, for he had knowledge of the authority under which Rouse was acting. His mistake was one of law. No question of fraud, accident, or mistake of fact arises. The case is closely analogous to Guy v. Du Uprey, 16 Cal. 196, where the mortgage was executed by the guardian of a minor without authority, and the guardian used a portion of the money to discharge a valid mortgage lien resting on the property at the time. It was held that the guardian could not be substituted in the place of the prior mortgagee, for the reason that he made payment voluntarily and as a stranger. We think Guy v. Du Uprey correctly states the law of this case, and is in harmony with adjudication of the question in other states. See cases collected in 24 Am. & Eng. Enc. Law, p. 281, tit. "Subrogation"; Sheld. Subr. § 240. The case of Campbell v. Association, 163 Pa. St. 609, 30 Atl. 222, in most respects was a counterpart of the case here. The mortgage under which subrogation was claimed was executed under a power of attorney to sell, and the money borrowed by this mortgage was in part used to pay off and discharge then existing prior mortgage liens. Both questions as to the power to mortgage under a power to sell and the right of subrogation had very full consideration, and an unusually painstaking examination of the authorities is shown in the opinion. It was held that the mortgagee, on the second mortgage being declared invalid, had no right to be subrogated to the position of the first mortgagee so as to recover the $6,000 paid in extinguishment of the first mortgage. It was said in Webster and Goldsmith's Appeal, 86 Pa. St. 409: "While subrogation is founded upon principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor." At the second trial defendant expressed a willingness to pay the amount of the Davis mortgage, and at the last trial counsel for defendant offered in open court to allow judgment to go against defendant for the sum of $481.65. These overtures, however, were rejected, the plaintiff apparently insisting upon the full amount or nothing. We advise that the judgment and order be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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125 Cal. 652

SHERWOOD et al. v. KYLE. (S. F. 974.)

(Supreme Court of California. Sept. 6, 1899.)

NEW TRIAL—EXCESSIVE DAMAGES—ABUSE OF DISCRETION—REVIEW ON APPEAL.

1. In an action for slander against defendant, a trustee of the school district, for words spoken of plaintiff as a school-teacher, where the trial was two years after the alleged slander, and plaintiff testified that she had found no difficulty in obtaining schools since, and a verdict of $1,000 was given her, an order of the trial court granting a new trial on the ground of excessive damages, unless plaintiff would remit $700 of the judgment, will not be set aside on the ground that the court abused its discretion.

2. An order of the trial court granting a new trial on the ground of excessive damages, given under the influence of passion or prejudice, will not be interfered with unless it clearly appears that there was an abuse of discretion.

3. Except where one of the grounds for a new trial is as to the ruling on the insufficiency of the evidence, it is immaterial, on appeal, on what ground the new trial was granted, as respondent may defend the ruling on any point involved in his motion.

Department 2. Appeal from superior court, Lake county.

Action for slander by Dwight Sherwood and Julia C. Sherwood against Shelton Kyle for injurious words spoken of plaintiff Julia C. Sherwood in respect to her profession as a school-teacher. From an order granting defendant a new trial, plaintiffs appeal. Affirmed.

R. J. Hudson and Dan Jones, for appellants. T. J. Sheridan and J. J. Bruton, for respondent.

TEMPLE, J. This is an action for slander, wherein the plaintiffs seek damages for injurious words spoken of the plaintiff Julia C. in respect to her profession or occupation as a school-teacher. After suitable allegations in regard to the qualification and occupation of said Julia C., plaintiffs charge that while engaged in her profession, and while school was in session, defendant entered her schoolroom, and, in the hearing of the pupils, spoke willfully and maliciously to, of, and concerning said plaintiff the following false and scandalous words: "You have no business to be in charge of young children. You are no more fit to teach school than hell is for a powder house,"—meaning, etc. Defendant does not deny the language attributed to him, but says it was not malicious, and has not damaged plaintiffs. He avers, also, that the language was privileged. He was a trustee of the school district, and, having evidence that the proper discipline was not maintained by such plaintiff, he went to the school to remonstrate, and did not intimate or say anything derogatory to Mrs. Sherwood, except that she did not maintain the proper control over her pupils, and for that reason only was unfit to teach. He denies that he harbors any malice or ill will towards said plaintiff, or that he was at all angry with her; and he avers that his charge that she was unfit to teach school, because of her lack of power to control her pupils, is true. In another defense he alleges that he owns and occupies a farm adjoining the school lot, and the school children, through lack of proper control, have frequently committed depredations upon his property, and therefore he went to the teacher to complain, and to request that she exercise some restraint over her pupils. Plaintiffs recovered a verdict for $1,000, which the trial judge, upon the motion for a new trial, adjudged to be excessive, and made an order granting a new trial unless plaintiffs would remit $700. This plaintiffs declined to remit, and the order was made absolute.

The first question which naturally presents itself for consideration is whether this court can set aside the order on the ground that the court abused its discretion in ordering a new trial unless plaintiffs would remit a portion of their judgment. The power of the court to make a conditional order of this character is thoroughly settled in this state. Gregg v. Railroad Co., 59 Cal. 312; Lee v. Railroad Co., 101 Cal. 118, 35 Pac. 572; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024. It is true that in actions for damages for a personal tort the court should not substitute its judgment for that of the jury. The judge should not grant a new trial merely because he deems the verdict excessive, unless it is so excessive as to indicate that it was the result of passion or prejudice. But the motion for a new trial was based, in part, upon the ground of excessive damages given under the influence of passion or prejudice. The court sustained this contention, holding that the damages were given under the influence of passion or prejudice. The learned judge had advantages over us in regard to the matter, and, besides, that he abused his discretion must clearly appear before we can interfere. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter. From the testimony of Mrs. Sherwood, the conduct of defendant certainly seems very offensive and boorish. His testimony, however, which the court must have believed, puts a different phase upon the matter. Manners are largely a matter of training and circumstance, and absence of decorum does not always imply malice or insult. And the suit is not for an injury to the character and general reputation of Mrs. Sherwood. In her complaint she says that defendant meant to be and was understood to mean "that plaintiff was unreliable and unworthy of confidence as a teacher aforesaid, and in all respects in her profession was wholly disqualified for the exercise thereof." No insinuation was made that she did not enjoy and deserve the highest reputation as a woman. The trial was two years after the alleged slander, and Mrs. Sherwood testified that she had found no difficulty in obtaining schools in Lake county since. She might have continued at the same school. The judge probably concluded that she had not been seriously injured by the slander, and that the jury had simply imposed a fine on the defendant for his bad manners.

It is not necessary to discuss the other points made on the motion for a new trial. They are, however, all involved on this appeal; for the court cannot foreclose the defendant as to any of them by granting a new trial upon some one ground. Except where one ground is as to the insufficiency of the evidence, and this only as to the ruling upon that one point, it is utterly immaterial here upon what ground the new trial was granted. The respondent may defend the ruling upon any point involved in his motion. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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125 Cal. 674

DOW et al. v. SWAIN et al. (S. F. 1,144.)

(Supreme Court of California. Sept. 6, 1899.)

FRAUD—RESCISSION OF SALE—VALUE OF CORPORATE STOCK—FINDINGS.

1. In an action by a purchaser to rescind a sale for false and fraudulent representations made by the vendor, a paragraph following the findings of facts, which recites that, "as conclusions of law from the foregoing facts the court finds that, by reason of their neglect and failure to properly examine the property which they took, and to investigate its value, equity will not grant relief to the plaintiffs," is not a misplaced finding of fact, but the expression of a reason for a decision.

2. Equity will rescind a contract for the conveyance of land, in consideration of the transfer of stock in a corporation, induced by false representations of the agent of the owner of the stock as to its value, who claimed to know the facts concerning which the representations were made, where such representations are believed and relied on by the owner of the land, though no relation of confidence existed between them, and the owner of the land was not prevented from investigating the truth of the representations by any fraud of the agent, where he did not investigate the truth of the representations, as to the condition of the corporation, and the value of the stock, and, even if he had investigated, he would not have been able to have learned the truth.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Burritt N. Dow and others against Revilla A. Swain and others. From a judgment in favor of defendants, plaintiffs appealed. Reversed.

Boyd & Fifield, for appellants. A. E. Bolton, for respondents.

TEMPLE, J. This action was brought to enforce a rescission of a contract for fraud. It is averred that Carrie C. Dow, wife of the other plaintiff, until August 1, 1895, and until conveyance to defendant Swain, owned as her separate property a ranch in Tulare county, worth $20,000. The Atlas Iron Works was a corporation with a capital stock of 100,000 shares, of the par value of $10 per share, of which 83,882 shares had been issued. August 1, 1895, plaintiffs contracted with defendant Hovey, who professed to be the agent of defendant Swain, to exchange said farm for 22,220 shares of stock in said corporation. August 5th she conveyed the property to Swain and received the stock. Plaintiffs were induced to make the exchange by certain fraudulent misrepresentations, which admittedly were quite material and important, and which were all averred and found to be false. It is also averred and found that the defendants were both interested in the exchange, although Hovey represented that he had no interest in the matter, and no stock in the corporation, except just enough to authorize him to act as a director; also that plaintiffs knew nothing of the facts save what they were told by Hovey. The representations were made with the intent to defraud and deceive. They were false, and both defendants knew that to be so. It is found that plaintiffs believed the representations, and were induced by them to make the exchange, which they would not otherwise have made. The representations were as to facts, and not mere matters of opinion. Demand for a rescission and the necessary offer to return stock, etc., before the action was commenced were all admitted. But, while finding all other facts for plaintiffs, the court also found that there was no relation of trust or confidence between the parties, and plaintiffs were not fraudulently induced to forbear inquiry into the truth of the said representations, and "they might have ascertained their falsity by making the necessary investigations and employing the proper means to that end"; and, so finding, rendered judgment for the defendants, and adds: "As conclusions of law from the foregoing facts the court finds: First. That by reason of their neglect and failure to properly examine the property which they took in exchange for their property, and to investigate and ascertain its value, equity will not grant relief to the plaintiffs." It is argued that this is a misplaced finding of a fact. I think not, though it may be doubted whether it can be called a conclusion of law. It is expressly a conclusion from the foregoing facts, and in its nature is not the statement of an ultimate fact, but the reason for a decision. The property of the corporation consisted of a foundry on the Potrero, with machine shop attached, with tools and stock, and certain book accounts and bills receivable. The works were in operation. The finding states: "The plaintiffs had no experience in the business there carried on, nor in any similar business, and no knowledge in regard to the value of the said property and assets of the concern, nor its shares of stock, and neither of them was skilled in books of account." The false representations, as stated in the third finding, were the following: "The said Hovey, for the purpose and with the intent to induce the making by the plaintiffs of the contract mentioned in the complaint, and the execution of the said deed and transfer therein mentioned, stated and represented to the plaintiffs that the said Atlas Iron Works was perfectly solvent; that the net profits of its business for the year 1894 were ten thousand dollars; that there were outstanding accounts due to it, which were good, sufficient to pay all its indebtedness; that it was in better condition than the statement of February 1, 1895 (set forth in the complaint) showed; that its credit was A 1; that it could buy all the material it wanted on credit; that he knew more about its business than anyone else; that he had thoroughly investigated its affairs, and that said stock was worth ninety cents a share; that the open accounts shown in said statement of February 1, 1895, among the assets, were good; that he did not own any of said stock, except enough to qualify him as a director of the company; that said Swain had borrowed thirty-five or forty cents a share on the stock." The statement of February 1, 1895, was shown to plaintiffs in connection with the representations, and is as follows:

Statement of the Atlas Iron Works.

February 1, 1895.

Assets.		
Construction, building, hotel, stock and tools	$68,742 22	
Cash	883 92	
Merchandise	5,016 00	
Open accounts	21,252 27	
Total		$95,894 41
Liabilities.		
Open accounts	$ 4,169 05	
Note, J. F. Chapman	1,173 89	
Anglo-California Bank	2,412 50	
Pacific Axle Co., note due January, 1896	8,791 50	
Total		$16,546 94
Assets over and above liabilities		$79,347 47

As stated, the court specifically finds each representation untrue. As to the statement of February 1, 1895, it was found that the property valued at $68,742.22 was not worth to exceed $25,000, and that more than $8,000 of the open accounts were worthless, and that the collections from bills receivable will not pay the indebtedness by $4,357.35. The eleventh finding is as follows: "The stock of the Atlas Iron Works has no market value. It was not bought or sold on the market. It was not worth intrinsically to exceed thirty cents a share. That amount per share might have been derived from a sale of all its property and plant as a going concern, the payment of its debts, and the division of the surplus among the outstanding shares, provided a purchaser could be found. If it had been compelled, within any reasonable time, to sell its property and assets for what they would bring in cash, there would have been no surplus for the stockholders. The value of the stock could have been approximately ascertained only by a thorough investigation by experts of the values of its assets and property, and of its books and business." Before closing the trade, Hovey took plaintiffs to the foundry, where they met Swain, who was secretary of the corporation. The defendants then showed plaintiffs through the foundry, and they were "informed in a general way that they could have opportunity to examine the books of the company." At the same time Hovey told them that he "knew all about the affairs of the company, and could give them any information that they wanted." Plaintiffs did not examine the books, or employ any one to do so, and did not discover the falsity "of any of the said statements or representations above found to have been made, nor did they gain any knowledge beyond the said representations." All these facts are from the findings, there being no bill of exceptions. And this is the rule of law asserted by the judgment: Although the vendor and his agent had peculiar means of knowing the material facts, and knew that plaintiffs knew nothing of the property, or of the business, or of bookkeeping; and although the value of the property could not have been ascertained without the employment of skilled accountants and expert appraisers; although plaintiffs relied wholly upon the false representation, and had no other knowledge and no means of knowledge except by the employing of experts to examine the books and property, and although even by that means the falsity of some quite material representations could not have been discovered (such as the value of the open accounts),—still plaintiffs cannot recover, because there was no relation of trust and confidence between the parties, and they were not fraudulently induced to forbear inquiry, "and they might have ascertained their falsity by making the necessary investigations, and employing the proper means to that end." The word "necessary" must mean such inquiries as would have proved successful. If the rule were applied to all cases of fraud, relief would always be denied where the relations are not confidential. It is unnecessary to state that no case has been or can be found which comes anywhere near sustaining this proposition. The only rational explanation of the ruling which I can imagine is that the court concluded that plaintiffs did investigate for themselves, and did not rely upon the representations, and, since they were not induced to forbear by the fault of the defendants, it was their own fault if their investigations were not sufficiently thorough. The general rules upon the question as to when a party may or may not rely upon representations are stated in Pomeroy's Equity Jurisprudence (section 892). He cannot rely upon them (1) when he investigates for himself; (2) when he is afforded the means of investigation, and commences to make inquiries which, if efficiently prosecuted, would have resulted in proving the falsity of the representations; (3) when the representation is in regard to generalities, equally within the knowledge of the parties, or the knowledge is equally within the reach of both parties. "But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or second case, then it will be presumed that he relied on the statements. He is justified in doing so." This case is plainly within this last proposition, unless the plaintiffs, instead of relying upon the representations, did investigate for themselves. The parties were not on an equal footing as to knowledge. Defendants, as they represented, knew more about the matter than anybody else; the plaintiffs were entirely ignorant in regard to such property. The corporate stock, which was the subject of the trade, had no market value, but the false representations gave it an intrinsic value. This is not a case of patent defects, or where the property is at hand, and it would argue gross negligence on the part of the buyer to rely upon statements of the seller without opening his eyes to look. Under such circumstances there is no case which holds that the purchaser is bound to investigate for himself, and may not rely upon the representations, and that equity will not grant relief to him if he does, and is defrauded.

The reason given by the court for its conclusion that defendants were entitled to judgment was as stated, but it found facts as follows: "The plaintiffs were deceived and misled by said false statements and representations, and were ignorant of their falsity, but believed them to be true; and they both acted and relied solely upon them as true in making said contract and executing and delivering said deed and transfer, and were induced thereby to make said contract and execute said deed and transfer, and, but for said false statements and representations, would not have entered into said contract, or made said deed and transfer. The plaintiffs did not discover or know the falsity of said representations and statements, nor any of them, until more than two weeks after they had executed and delivered the said deed and transfer." And further: "By reason of said statements and representations, and their reliance thereon, the plaintiffs have suffered damages in the loss of the real and personal property described in the complaint, and to the value and amount thereof." The plaintiffs were not put upon inquiry by having their suspicions so aroused that it was negligence on their part not to inquire further, and it also appears that they did not in fact rely upon any examination made by themselves, if it can be held that they made any. It is quite obvious that the plaintiffs in this case did not make an examination for themselves, or attempt to do so. Defendants knew that they were utterly incapable of so doing, except, as the court finds, by the employment of experts. Showing these inexperienced rustics through the foundry and machine shop was but in furtherance of the fraud, and, when they were told "in a general way" that they could examine the books, Hovey also told them that he knew all about it, and could give them all the information they desired. To lead a blind man through the works would not have afforded an opportunity to examine for himself. These could learn no more except that there was in fact a foundry.

I do not subscribe to the idea that under all circumstances an actual examination by the buyer will shield the wrongdoer from an action for damages. Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts, and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations, I see no reason why relief should not be granted, although an imperfect examination was made. It may have been imperfect because of the representations. Means were used to prevent the examination, and it would not be going far to say that the relation is made confidential by the mere making of the representation with the knowlege that it will be acted upon. Section 2219, Civ. Code. "It is now settled law that one who chooses to make positive assertions without warrant will not excuse himself by saying that the other party need not have relied upon them. He must show that his representations were not in fact relied upon. In the same spirit it is now understood that the defense of contributory negligence does not mean that the plaintiff is to be punished for his want of caution, but that an act or default of his own, and not the negligence of the defendant, was the approximate cause of his damage." Webb, Pol. Torts, 378; and see note, where numerous authorities are cited. In Bish. Noncont. Law, § 330, it is said: That plaintiff is too credulous is not generally a defense. "The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying." See, also, Bigelow, Frauds, 524. "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." Mead v. Bunn, 32 N. Y. 275. To the same effect are Eaton v. Winnie, 20 Mich. 156, McBeth v. Craddock, 28 Mo. App. 380, and numerous cases there cited. The effrontery of the defendants, and their unbounded confidence in the guileless simplicity of the plaintiffs, is shown by the fact that they told Mrs. Dow that she could verify the statement of February 1, 1895, which is set out above, by inquiring at the mercantile agencies. She did so inquire, and found only that the same statement had been submitted there by the Atlas Iron Works, of which Swain was secretary. This sufficiently shows the incapacity of plaintiffs, but hardly proves that they examined for themselves, and did not rely upon the representations.

I have examined the numerous authorities cited by counsel for respondent, and do not think there is one which would help his case. He assumes, however, that his case is one in which the purchasers did not rely upon the representations, but made an examination for themselves. I cannot agree with that proposition. The findings seem to cover the whole case, and every issue of fact is resolved in favor of plaintiffs. I see no reason for a new trial. The findings, as they are, entitle the plaintiffs to the relief demanded.

The case is therefore remanded, with directions to set aside the judgment, and in lieu thereof to enter judgment for the plaintiffs as demanded in the complaint.

We concur: McFARLAND, J.; HENSHAW, J.

125 Cal. 684

HUBBARD v. UNIVERSITY BANK OF LOS ANGELES et al. (L. A. 485.)

(Supreme Court of California. Sept. 7, 1899.)

MORTGAGES—FORECLOSURE BY ACTION—INDORSERS AS DEFENDANTS—PERSONAL JUDGMENT—ATTORNEY'S FEES.

1. On general principles, as well as under Code Civ. Proc. § 383, providing that parties to promissory notes "may all or any of them be included in the same action at the option of the plaintiff," the indorsers of a promissory note, secured by a mortgage on real estate, may be joined as codefendants with the maker, in an action to foreclose the mortgage, where a personal judgment against them is asked.

2. A corporation cannot object to the allowance of attorney's fees, provided for in its mortgage, on the ground that the resolution authorizing its execution did not authorize payment of such fees, where its directors had passed a resolution authorizing the execution of a mortgage, "to contain covenants, terms, and provisions set forth in a draft of such mortgage submitted" to them by the proposed mortgagee, which provided for such fees.

Department 2. Appeal from superior court, Los Angeles county.

Action of foreclosure by Anthony G. Hubbard against the University Bank of Los Angeles and others. From a judgment for plaintiff, defendants appeal. Affirmed.

R. & H. L. Dunnigan, for appellants. E. R. Anable, for respondent.

HENSHAW, J. The action was brought upon a promissory note secured by mortgage. The University Bank, as maker, executed both the note and mortgage to the plaintiff as payee and mortgagee. Others of the defendants indorsed the note at the time it was made, and before its delivery, as follows: "Demand of payment, notice of dishonor, protest, and notice of protest hereby waived." The mortgage provided for a reasonable attorney's fee, to be fixed by the court, and declared that the fee fixed should be deemed a lien upon the mortgaged premises, secured by the mortgage. The complaint was verified. It pleaded that $1,000 was a reasonable sum to be allowed as attorney's fees. The only issue upon this point was a denial that such an amount was a reasonable amount. The foreclosure was decreed, the property ordered sold, and a judgment for any deficiency docketed against the appellants, the makers and indorsers of the note.

The indorsers contend that they were improperly joined as co-defendants in the action. They were properly joined. Civ. Code, § 3117; Code Civ. Proc. § 383; 3 Rand. Com. Paper, § 1660; Wilts. Mortg. Forec. § 208.

It is next contended that no attorney's fee should have been allowed. Herein it is argued that the resolution of the corporation authorizing the execution of the mortgage and mortgage note to plaintiff did not authorize the payment of an attorney's fee; but the complaint, which was verified, averred that plaintiff agreed with the bank that, "if it would cause to be executed and delivered to him a certain indorsed note and collateral mortgage in manner and form as it subsequently did execute and deliver said instruments, as hereinafter stated, he would make such loan to it," etc. It is then averred that "the defendant corporation, in response to plaintiff's proposal, did then and there duly adopt and pass a certain resolution authorizing the execution of a mortgage to plaintiff, said mortgage to contain the covenants, terms, and provisions set forth in the draft of mortgage proposed and submitted to this board by the said Anthony G. Hubbard"; and, further, "that the bank did, pursuant to the proposals and demands of the plaintiff, made as aforesaid, execute and deliver unto him the mortgage set forth." There is no question but that the mortgage executed by the bank did provide for the payment of attorney's fees, and that the fee allowed by the court should be secured by the mortgage. The averments above quoted are sufficient to charge the corporation with the execution of this particular mortgage, and, as they are not denied, the defendants are bound by them.

We think the court correctly construed the collateral agreement, and that the judgment rendered was not in excess of the sum actually due. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(134 Cal. 641)

CHAPMAN v. HUGHES et al. (S. F. 968.)[1]

(Supreme Court of California. Sept. 7, 1899.)

JUDGMENTS—RES JUDICATA—PRINCIPAL AND AGENT — ACCOUNTING — AUTHORITY OF AGENT—RESULTING TRUST—NOTICE TO PURCHASER—EVIDENCE—PARTIES.

1. While a general verdict or judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues.

2. According to the terms of a trust agreement in writing between the parties, a principal advanced money to his agent for the purchase of lands in the name of the latter, who was to sell them, and reimburse himself for the purchase money and other expenses, after which the profits and the remainder of the unsold lands were to be divided equally between them. *Held*, in an action of accounting, that the principal was entitled to enforce the agreement to the letter, and to avoid all conveyances made in violation thereof.

3. An agent authorized to sell real estate, in which he has an interest under a trust agreement with his principal, has no authority to mortgage it, or exchange it for other lands.

4. An agent authorized to sell land, in which he had an interest under a trust agreement with his principal, conveyed a portion thereof in exchange for the grantee's equity in other lands, and charged himself in his account with the consideration as though received in cash. The grantee was the agent's son and partner, familiar with his business, and had knowledge of the terms of the trust agreement. *Held*, that the principal was entitled to have the grantee charged as an involuntary trustee for his interest in the land so conveyed, under Civ. Code, § 2243, providing that every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee, unless he purchased it in good faith and for a valuable consideration.

5. Where a principal attacks his agent's conveyance of land as made in fraud of his rights under a trust agreement between them, slight evidence of the purchaser's lack of notice of the fraudulent intent on the part of the agent is sufficient to support a finding that he was a purchaser in good faith, in absence of direct evidence of such notice.

6. When the agent of the vendee has full knowledge of the terms of a trust agreement between the vendor and a third party, such knowledge will be imputed to his principal.

7. In an action of accounting, where real estate had been conveyed by an agent to grantees, who are made defendants, in violation of a trust agreement with the plaintiff, the latter is not obliged to take a money judgment, but may recover the land improperly or fraudulently disposed of.

8. In an action of accounting to enforce the terms of a trust agreement in writing between the plaintiff and defendant, under which lands were sold by the latter as agent and trustee, grantees of the land may be brought in as defendants by supplemental pleadings for the purpose of avoiding conveyances made in fraud of plaintiff's rights.

Department 2. Appeal from superior court, Fresno county.

Action by W. S. Chapman against Thomas E. Hughes and others. From a judgment for defendant Hughes, the plaintiff, W. S. Chapman, and the defendant E. W. Chapman appeal. Reversed in part and affirmed in part.

Garret W. McEnerney, for appellants. L. L. Cory, George E. Church, Horace Hawes, and Stearns & Elliott, for respondents.

HENSHAW, J. W. S. Chapman commenced this action against Thomas E. Hughes for an accounting under an agreement according to the terms of which the latter advanced $95,000 for the purchase of certain lands, taking the title thereto, and was to sell these lands, reimburse himself for the purchase money and all other necessary and proper outlays, after which the profits and the remainder of the unsold lands were to be equally divided between himself and Hughes. Hughes, by his answer, did not dispute the terms of the agreement, nor question Chapman's right to an accounting, but, with other allegations, he set out an agreement made between himself and plaintiff, whereunder he was entitled to offset against any sum due from him to W. S. Chapman any indebtedness existing in his favor against E. W.

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[1] For opinion on application for rehearing, see 58 Pac. 916.

Chapman under another agreement touching the management and sale of lands between Hughes and E. W. Chapman. E. W. Chapman thus came into the case as a party defendant. Afterwards the plaintiff, W. S. Chapman, filed two supplemental complaints, and brought two separate actions, alleging that Hughes had made conveyances of parts of the lands and of notes and mortgages in contravention of the agreement and in fraud of his rights. The grantees under these conveyances were impleaded and brought in, and a decree was sought annulling these deeds and assignments. After trial and submission of the cause, the court ordered its commissioner to take an accounting between Hughes and E. W. Chapman, and report the result. The commissioner found that E. W. Chapman was indebted to Hughes in the sum of $114,825.30. The court reduced this amount, and found an indebtedness from E. W. Chapman to Thomas E. Hughes of $67,741.46. It further found that Thomas E. Hughes was indebted to the plaintiff, W. S. Chapman, in the sum of $55,551.46. Under the agreement above referred to, the indebtedness of E. W. Chapman to Hughes was set off against the indebtedness of Hughes to W. S. Chapman, and Hughes was given a judgment for the difference, amounting to something over $12,000. The court further upheld the questioned conveyances made by Hughes as having been executed to purchasers in good faith and for value, and decreed that the unsold property was owned equally by W. S. Chapman and Hughes. Upon this appeal the principal attack is made upon the findings of the court upholding the various conveyances made by Hughes, which plaintiff insists were in violation of the terms of the trust agreement, and in fraud of his rights, and also upon the ruling of the court admitting a certain judgment roll, and giving it the force of an estoppel against the plaintiff. This last question is of vital consequence in the case, and may receive first attention.

Prior to the commencement of this litigation, W. S. and E. W. Chapman had commenced an action against the defendant Hughes for an accounting with reference to certain real-estate transactions under an agreement which then existed between the parties. The facts and the decision of this court upon the appeal in that case will be found in 104 Cal., at page 302, 37 Pac. 1048, and 38 Pac. 109. The relief sought by the plaintiffs in that action was for an accounting under the so-called "syndicate agreement," which they insisted constituted themselves and Hughes co-partners. Their whole cause of action rested upon the existence of and the transactions under the syndicate agreement. Hughes, defending, pleaded that the relation of partnership did not exist; that the syndicate agreement did not create a partnership, but that it expired by limitation on August 31, 1889, and that the syndicate agreement was canceled, annulled, and set aside by later agreements of the respective parties, "as is more fully set forth in the contracts hereinafter particularly set forth." As to these contracts which Hughes pleaded had been entered into with the effect to cancel and annul the syndicate agreement, one was with and between Hughes, E. W. Chapman, and Richard L. Dixon. It was in the form of a trust deed made by E. W. Chapman to Dixon as trustee. The trustee was to hold the legal title to the lands for two years, or until an earlier termination of the trust by the fulfillment of its purposes, or by the joint revocation of the parties. Hughes, the party of the third part, was diligently to use his personal efforts and experience to effect sales of the land, and after the payment of certain specified sums Chapman and Hughes were to become joint owners in the funds, notes, and mortgages arising from the sales of the lands, and tenants in common of all lands and water rights not sold. Having thus pleaded that the syndicate agreement had been canceled and superseded by the trust deed (and by a certain other agreement with W. S. Chapman, which it is not necessary here to particularize), and that no sales of or transactions in the land had been made or had under the syndicate agreement, Hughes added: "That subsequent to the execution of said agreement and trust deed of June 20, 1888, the said Richard L. Dixon, the trustee therein named, resigned and relinquished the trust so reposed and vested in him, and the trust thereby created was revoked and terminated, and the legal title to the property therein described was reconveyed and reassigned to and vested absolutely in said E. W. Chapman, subject to the mortgages thereon; but none of the other agreements or conditions contained in said agreement and trust deed were revoked, canceled, annulled, or terminated, but the same remained and continued in full force and effect, and the property therein described was sold and disposed of under said agreement by this defendant, and the moneys and notes and mortgages received, taken, and realized from such sales were paid, given, and delivered to and retained by said E. W. Chapman, and under the terms and conditions of said agreement this defendant is entitled to receive from said E. W. Chapman, upon a settlement and adjustment of their accounts, more than eighty thousand dollars as his share of the profits of the sales of said lands, * * * and his expenses and commissions in making such sales provided in and by said agreement." After trial of that cause the court found, in accordance with the terms of Hughes' defense, that the syndicate agreement had in fact been canceled, annulled, and set aside by the later agreements between the parties, of which the trust deed was one. This determination of the trial court was upheld upon appeal to this court. Chapman v. Hughes, 104 Cal. 302-305, 37 Pac. 1048, and 38 Pac. 109. It is to be borne in mind that the decision of the trial court was that the making of the agreement with W. S. Chapman, and of the trust deed with E. W. Chapman and Dixon, was understood to operate, and did operate, as an absolute revocation and cancellation of the syndicate agreement. But the court found additionally, as defendant had pleaded, that, subsequent to the execution of the trust deed, Dixon, the trustee, resigned and relinquished his trust, and the trust thereby created was revoked and terminated, and the legal title to the property was reconveyed and reassigned to, and vested absolutely in, E. W. Chapman, but that none of the other agreements or conditions in the agreement and trust deed were revoked, canceled, or terminated, but they all remained and continued in full force and effect.

The foregoing statement of facts is necessary to the understanding of the question here presented. Upon the trial of the present action it will be remembered that it was conceded to be Hughes' right to offset against any sum due from him to W. S. Chapman any sum found due to him from E. W. Chapman on account of their land transactions. The basis of Hughes' right to an accounting against E. W. Chapman, and of his claim of indebtedness against E. W. Chapman, is this trust deed. By cross complaint Hughes pleaded these matters. For answer the Chapmans denied that any of the terms or agreements of the trust deed were continued in force after the reconveyance by Dixon to E. W. Chapman of the land, and alleged that the reconveyance was made by a written instrument, signed by all the parties to the trust deed, which instrument was set forth at length. Upon the trial of the cause it was contended by the Chapmans that the question whether the trust deed and all its terms and conditions had been revoked by the parties was one open for the reception of evidence, and one calling for a construction of the revocatory instrument above referred to. Upon the other hand, Hughes offered in evidence the judgment roll in Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, and 38 Pac. 109, insisting that the judgment in that case foreclosed the parties, and estopped the Chapmans from raising this question. The court admitted the judgment roll in evidence, and it is not disputed that it was received in evidence in accordance with Hughes' contention that it operated as an estoppel. The finding of the court following its reception in evidence was that, though Dixon had reconveyed to E. W. Chapman, all of the other terms and conditions of the trust deed remained and were continued in full force and effect, and that consequently Hughes was entitled to an accounting, in accordance with them, of Chapman's transactions with the land. An attack is made upon this finding as being unsupported by the evidence, and upon the ruling of the court in admitting the judgment roll. The admissibility of the evidence and the soundness of the court's finding depend, then, upon the determination whether or not the judgment in the earlier case of Chapman v. Hughes adjudicated this question so as to estop the parties in this action from further litigating it. We think it did not. By section 1911 of the Code of Civil Procedure, that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually or necessarily included therein, or necessary thereto. The adjudication in Chapman v. Hughes was simply and directly to the effect that there had been no transactions in the land under the syndicate agreement, and that the syndicate agreement had been wholly canceled and superseded by later contracts between the parties. The judgment which necessarily followed from this was one denying to plaintiff an accounting under the syndicate agreement. It is true that Hughes, by his answer, pleaded that the trust deed, which he said, and which the court found, operated to annul the syndicate agreement, had, in its turn, been modified, and it is true also that the court made a finding to this effect; but this was an entirely immaterial allegation in Hughes' answer and defense. It tendered no material issue in the case. A determination upon it one way or the other would not and could not have affected the court's decision. When the court had found, as it did, that the syndicate agreement was superseded by the trust deed, it mattered not at all to that action what thereafter might have become of the superseding contract. The immateriality of the issue, and of the finding of the court upon it, is clearly seen when one considers that if, upon appeal, the Chapmans had convinced this court that this finding was wholly unsupported by the evidence, it would not have operated to effect a reversal. If that finding had been pressed upon the attention of this court as being erroneous, it would not have merited consideration, because the conclusive answer would have been that, whether erroneous or not, the judgment was in no way dependent upon it. While a general verdict or a judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues. McDonald v. Mining Co., 15 Cal. 149; Fulton v. Hanlow, 20 Cal. 456; Lillis v. Ditch Co., 95 Cal. 553, 30 Pac. 1108; Packet Co. v. Sickles, 5 Wall. 592; Herm. Estop. § 275; Wells, Res Adj. § 295. It follows, therefore, that the judgment was not conclusive upon the parties in this particular, and the question whether or not the terms and conditions of the trust deed continued in force was not res judicata between the parties, but was an open question, which the court in this case was called upon to decide upon its merits. It was, therefore, error for the court to have admitted the judgment roll in evidence. Under this conclusion must fall to the ground the whole account stated between Hughes and E. W. Chapman, since Hughes' right to an accounting was a question first to be determined by the court upon competent evidence before the taking of an account could be ordered; and, as the judgment in this case offsets against the amount which the court finds due from Hughes to W. S. Chapman the larger amount which it finds due to Hughes from E. W. Chapman, with the result that a judgment in favor of Hughes for over $12,000 is given, it also follows from the foregoing that this judgment must be reversed, and the cause remanded.

But, in contemplation of a new trial, other points and propositions advanced by appellants merit consideration. These questions arise out of certain sales, transfers, and assignments made by Hughes of parts of the land, and of mortgages and notes, proceeds of the sales of parts of the land. It cannot be assumed, however, that the evidence which may be adduced at the second trial concerning these matters will be identical with that shown in the present record, and therefore the observations of the court relative thereto can only be considered with reference to the facts as they now appear; and first, generally, as to the sales of land made by Hughes which are attacked as being in fraud of plaintiff's rights. Some of these sales were made to relatives of Hughes; some, it is contended, were mere gifts made without valuable consideration. As to all it is charged that the vendees took with notice or with actual knowledge of plaintiff's rights. But in each of these cases the defendant Hughes charged himself in his account with Chapman with what appears to have been the fair and full value of the land so disposed of. At any rate, we fail to find any attack upon this particular point, and the court seems to have regarded these charges as being adequate. If, then, the defendant Hughes were solvent, and able to respond promptly to any sum which might be found against him upon the accounting, it would really matter little to the plaintiff whether he were to be allowed the fair value of his share of these lands in money, or whether the sales should be set aside as fraudulent, and the vendees charged as involuntary trustees, holding an undivided one-half interest in the lands for the plaintiff. But there are other considerations which make the matter of some consequence. First, that plaintiff charges that the defendant Hughes was and is insolvent; and, though the finding of the court is against him upon this point, he is, of course, not obliged to accept it. If, in fact, Hughes is insolvent, or should prove unable to respond promptly to such money judgment as might be awarded against him, it would, indeed, be a matter of much consequence to the plaintiff to reduce an uncollectible money judgment by the value of the lands in question, and have those lands made available to his ends. And, again, without regard to the benefits or injuries which may follow, the plaintiff, occupying the position of a beneficiary under the trust agreement between himself and Hughes, Hughes being his agent and trustee, is entitled to enforce the agreement to the letter, and to insist that every transaction in the land which is in violation of the terms of the agreement, and of which fact the vendee had knowledge or notice, may be avoided.

By one of the transactions to which general reference has just been made, defendant Thomas Hughes conveyed to his son, William Hughes, a portion of the land embraced within the agreement between himself and Chapman. The conveyance was made after the commencement of this action. The consideration for it was the son's equity or interest in the Hughes block and in the Hughes hotel. Thomas Hughes testified that he received no cash; that he made the contract with him to clean up all his interest in the partnership business; that the consideration was $8,000, and that he entered that as so much received under a cash sale. The finding of the court is that William Hughes had no notice or knowledge of plaintiff's right in the property; that the conveyances were made without intent to defraud plaintiff, and were made in good faith and for a valuable consideration. But so much of the finding as declares that the defendant William M. Hughes had no notice or knowledge of plaintiff's rights in the property is unsupported by, and contrary to, the evidence. There is evidence tending to show that he did not know that the particular property in question was affected by the suit for an accounting which Chapman had brought against his father, but he testified that he was his father's partner, was familiar with his business, and had knowledge of the terms of the contract between his father and Chapman. He knew, therefore, that by the terms of the trust his father's power was limited to the right to sell. "Sale," in law, has a well-defined meaning, and trustees empowered to sell real estate are not authorized to exchange it for other lands. Ringgold v. Ringgold, 1 Har. & G. 11. As to one who has notice of the terms of an express trust, which terms are expressed in the instrument creating the estate, every transfer or act of the trustee in contravention of the trust is absolutely void (Civ. Code, § 870), and every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration (Id. § 2243). Under the evidence, this transaction between father and son was but an exchange of properties; and while it is true that the father charged himself in his account with Chapman with the sum of $8,000 as though it were cash received, the fact remains that the transaction was not for cash, and was not a sale at all. Under the present showing, the plaintiff, Chapman, would be entitled to have William E. Hughes charged as involuntary trustee for his (Chapman's) one-half interest in the property so conveyed; but, upon the other hand, if this be done, the account of Thomas E. Hughes should be credited with the value of the land thus returned to the trust estate, with which value he now stands charged.

The findings upholding the conveyance to James B. King are sufficiently supported by the evidence. For the purchase price of the land Hughes testified that he received some money,—how much he did not recall,—and the rest in notes; the full purchase price being $2,000. It is within the terms of the agreement that notes should be thus received. It is said, however, by appellant that there is nothing in the record to show that King was an innocent purchaser, but it had been established that King gave value for the land, that he was a purchaser in the ordinary manner, and that he afterwards found out that there was a lawsuit which did or might affect the title to the land. Where a plaintiff attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden is then on the purchaser to show a valuable consideration, which shown, the burden again shifts, and the creditor must show knowledge of the fraudulent intent of the vendor on the part of the vendee. Ross v. Wellman, 102 Cal. 4, 36 Pac. 402; Wait, Fraud. Conv. (3d Ed.) § 271. Though the evidence of King's lack of notice is slight, yet it is sufficient, in the absence of direct evidence of notice, to support the finding that he was a purchaser in good faith. Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242.

Thomas E. Hughes conveyed to Miss Bernhard, now Mrs. Patterson, certain pieces of property. The conveyances were in fact mortgages given as additional security to Miss Bernhard for moneys which she had loaned to Thomas E. Hughes. However different the rule may be in other states, it is well settled in this that one who takes a mortgage to secure a pre-existing debt is a purchaser for a valuable consideration. Frey v. Clifford, 44 Cal. 335; Insurance Co. v. McCormick, 45 Cal. 580. So much having been established, it was incumbent upon the plaintiff to show that she took this conveyance with notice or knowledge of his rights. There is no evidence to establish that she had any actual knowledge, but her agent in the transaction was William Hughes; and while, under the evidence, he is not chargeable with notice that the particular land conveyed was embraced within the accounting suit, yet, as has been before said, he did have full knowledge of the terms of the trust agreement between his father and Chapman, and with that information knew that his father was empowered merely to sell. The knowledge of the agent in this particular must be imputed to his principal. The transaction was not one contemplated by the agreement, and plaintiff, on the showing here made, would be entitled to have it avoided, while Thomas E. Hughes, upon the other hand, would be entitled to a credit for the amount with which he had charged himself upon account of this transaction. A somewhat similar transaction is involved in the conveyance by Thomas E. Hughes to Matilda B. Hughes, wife of his son, William M. Hughes. This was a conveyance of 80 acres of land. It was negotiated by William M. Hughes, who testified that he acted as his wife's agent in the matter. Thomas E. Hughes first testified that the conveyance was by way of gift to his daughter-in-law, for which he received no consideration, and that he charged himself in his account with Chapman for a price of $80 per acre. Subsequently he corrected his testimony in this regard, and said that the conveyance was made in extinguishment of an indebtedness due from him to his daughter-in-law, and that the plaintiff, with knowledge, consented that he might make it, and charge his account as he did. This conveyance was made before the institution of the suit, and the evidence, we think, is sufficient to support it.

Without setting it forth at length, we think the evidence sufficient to support the transfers made by way of security to H. D. Colson, as well as the transfer of certain water rights to H. U. Maxfield. But, upon the other hand, we think the evidence insufficient to support the finding that the Brown mortgages were sold outright to O. J. Woodward for the First National Bank of Fresno. The evidence, both of Woodward, who received the transfer, and of Hughes, who made it, is to the effect that it was made and taken as security for the debt which Hughes owed the bank, and perhaps for future advances to be made to him. Woodward testified that when the indebtedness amounted to $15,000 Hughes told him that for $5,000 more he would sell the mortgages outright, but we have been unable to perceive where this tentative proposition was accepted and acted upon. Under the showing here made, plaintiff would be entitled to an accounting from Woodward and from the bank of the proceeds of these mortgages after the bank had reimbursed itself in the amount due it from Hughes. Upon the other hand, as Hughes is charged in this account with the face value of these mortgages, he should be allowed a credit for such moneys as might come into the trust fund after the bank's debt had been extinguished.

As to all of these transactions respondent makes the objection that, as plaintiff had sued Hughes for a full accounting, and as such an accounting had been made, followed by a judgment and the satisfaction of plaintiff's right, the plaintiff must be held to his election, and cannot be allowed to recover the moneys due upon account of these sales and transfers from Hughes, and at the same time pursue the vendees and transferees for a recovery of the property. But this is not what plaintiff is doing. He sued his trustee, Hughes, for a general accounting, but at the same time specifically objected to and attacked certain of the trustee's dealings with the land. These were upheld by the court, and the value of the land, sales, and assignments charged against Hughes. But plaintiff has the unquestionable right, as has before been considered, to insist that he shall not be forced to take this judgment in money, but that he shall be permitted to recover the property which has been improperly or fraudulently disposed of. Nor can the fact that the court awarded plaintiff a monetary judgment be held to estop plaintiff, or bind him to its acceptance.

Respondent further urges and argues that Hughes' vendees and transferees may not thus be brought into court because Hughes became vested with the entire and absolute legal and beneficial ownership in the land, with full power of disposition and control, and free from any trust; and that Chapman's sole relief is in a suit for an accounting, or for a breach of contract. The cases which respondent cites in support of this proposition are those declaring the well-recognized and sound principle that no resulting trust arises to the grantor where the grantee takes upon a valuable consideration. 2 Perry, Trusts, § 151; Gibson v. Armstrong, 7 B. Mon. 489. But in this case plaintiff is not suing to have a resulting trust declared in his favor, but he is suing to enforce his rights under an express trust formally declared by an instrument in writing. By the terms of the agreement between the parties, Hughes was to discharge the mortgage which he gave to Montgomery. Ten thousand dollars of this it seems has not been paid. Appellants insist that Hughes should be charged with this balance. That may, in strictness, be so, but, if so charged upon the one hand, upon the other he must be credited with that amount as a payment, for, since upon the payment of the mortgage he was entitled to repayment from the proceeds of the sales of the property, if he is to be charged with this $10,000 provision must be made for reimbursing him. It is to be remembered that, while this was originally a simple action by Chapman against Hughes for an accounting, it subsequently became complicated by supplemental pleadings and the addition of new parties defendant. Of these one was the defendant E. W. Chapman, against whom Hughes was seeking an accounting, and others were grantees and transferees of parts of the land and of mortgages and of mortgage notes. Although these actions were consolidated, and tried as one, and a single judgment entered, yet between these defendants there was no privity nor common interest. It would therefore be unjust to force a defendant who has established the validity of his purchase to litigate the matter anew because the findings of the court in some other respect, not material to his rights, have been successfully attacked. Therefore, in subservience of the ends of justice and the rights of the parties, it is ordered that the judgment appealed from be vacated. It is further ordered that a new trial be had upon the issues touching the right of Hughes to an accounting with E. W. Chapman; that if, after such hearing, the court shall determine that Hughes is entitled to an accounting, it shall take or order taken such an account, to the end that the sum found due, if any, from E. W. Chapman to Hughes, may be set off against the sum found due, if any, from Hughes to W. S. Chapman. It is further ordered and adjudged that the accounting between W. S. Chapman and Thomas E. Hughes be affirmed in all respects as settled by the court, and that his sales, transfers, and assignments of parts of the land, and of the proceeds of sales of parts of the land, be affirmed in all respects as found by the court, saving as to those matters and as to those findings hereinabove considered as to which it has been declared that the findings are not sufficiently supported by the evidence. As to such transactions, a further accounting shall be had in accordance with the rulings of this court, upon which accounting proper evidence adduced by any of the parties shall be received and considered.

We concur: TEMPLE, J.; McFARLAND, J.

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126 Cal. 17

HORNUNG v. McCARTHY et al. (S. F. 1,001.)

(Supreme Court of California. Sept. 8, 1899.)

MUNICIPAL CORPORATIONS—ACTION TO ENFORCE ASSESSMENT — DEFENSE — EMINENT DOMAIN—REASSESSMENT.

1. It is no defense to an action by an assignee of a contractor to enforce an assessment for an improvement made by his assignor, to show that the assessment is based on a contract between the city and contractor for a public improvement which damaged defendant's property for public use without just compensation therefor being first made to, or paid into court for, defendant; as such contract is not void under Const. art. 1, § 14, which provides that private property shall not be damaged for public use without just compensation first made to, or paid into court for, the owner.

2. The damage to his property imposed by a public improvement, and for which no payment has been made, cannot be used as a set-off or counterclaim by defendant in an action to enforce an assessment based on the contract under which the work which damaged his property was performed.

3. Under St. 1891, p. 205, § 9, which provides that, where it appears by the final judgment of any court of this state that a suit brought to foreclose an assessment lien has been defeated by reason of any defect, any person interested may, at any time within three months after the filing of the judgment, apply for another assessment, a judgment of the superior court, final in its nature, declaring an assessment void for informality, is a final judgment, though the time for appealing therefrom has not expired, where plaintiff has applied for a new assessment.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by C. F. Hornung against Joseph M. McCarthy and others. From a judgment in favor of defendants, plaintiff appealed. Reversed.

J. C. Bates, for appellant. Otto Tum Suden, for respondents.

McFARLAND, J. Action by plaintiff, as assignee of Madigan, contractor, to enforce a street assessment against a lot owned by defendant on M street south, between Eighth and Ninth avenues south. Judgment went for defendant, and plaintiff appeals from the judgment upon the judgment roll, which includes findings.

The main ground upon which the court below gave judgment for respondent, and the one principally discussed in the briefs, is this: That the whole assessment proceeding was void because founded upon a contract which was void for the reason that it contemplated the damaging of appellant's land for public use "without just compensation having been first made to, or paid into court for, the owner," within the meaning of section 14 of article 1 of the state constitution. We do not think that this position is tenable. The findings of the court on this point are substantially these: That the board of supervisors, by resolution of intention, ordered M street, between the two avenues, to be "graded to the official line and grade," and let the contract to do the grading to the contractor, Madigan; that at the time of the contract M street was "in a state of nature, in that it had never been graded to any grade"; that respondent's lot was flush with the street, as it was originally, so that there was easy ingress and egress between the lot and street; that the necessary result of carrying out the intention of the board, and the doing of the work provided by the contract, would be to excavate the street to a depth of 30 feet below the natural level of respondent's lot, and thus greatly damage it by cutting off the ingress, etc.; that the board made no provision for compensating respondent for the damage which would result; that, "notwithstanding the board of supervisors knew" that the proposed work would damage the lot, still they "caused and ordered said contract to be entered into with the said Madigan, and caused said Madigan to perform the work"; and that Madigan did perform the work and enter into the contract, and did excavate the street to a depth of 30 feet, as aforesaid, whereby the lot was damaged in the sum of $1,500. It appears this was not a case where an official grade had been changed after a lot owner's title to his property had attached; but, as the case will be determined on other principles, we will not discuss the question whether or not one who acquires a lot after the official grade has been established can recover incidental damages resulting from work necessary to put the street on the official grade.

It is to be noticed that this is not an action to recover damages, as was Eachus v. Railway Co., 103 Cal. 614, 37 Pac. 750, and other cases cited by respondent; nor is it an action to enjoin the prosecution of work, as was Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570; nor is it like Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307, in which it was merely decided that where the municipal authorities made an order closing a street, which order was invalid because made without compensation for the taking of appellant's property, the latter could maintain his easement in the street until compensation had been made. Respondent has not cited and relied on any case where the action was to enforce an assessment, and a defense similar to the one here interposed was set up. Whether or not the respondent could maintain an action for damages against the city, or whether he might have enjoined the prosecution of the work, are not questions here presented. The rights involved here are those of the contractor, and, in order to support the judgment, it must be maintained that, as to him, the contract, at the time it was made, was void. How can this proposition be maintained? The ground on which it rests is simply this: It is found that at the date of the contract the board of supervisors knew that its fulfillment would damage the lot, and knew that no compensation had been made; and, although it was not expressly found, we presume that it was inferred, that the contractor must have known, from the nature of the contract, that the damage would ensue. It is not found, however, that the contractor knew that no compensation had been made, and there is nothing to show that his attention was called to the matter in any way. The respondent never demanded compensation of anybody; he never made any objection to the doing of the work by the contractor, nor took any step to stop it; and, if the contractor had thought of the subject, he might well have presumed that respondent had waived damages, or had made some arrangement with the board on the subject. But respondent, after having allowed the contractor to incur the expense of doing the work without objection of any kind, now attempts, not to recover damages, but to have the entire assessment declared void, and the contractor not entitled to anything for his work, because a third party—the board of supervisors—had not paid him some money which he had never demanded, and about which the contractor knew nothing. The appellant's rights here grow out of the governmental power of taxation (Emery v. Gas Co., 28 Cal. 346), and the consideration that the respondent may have some cause of action founded upon rights reserved by that part of the constitution which deals with the exercise of the power of eminent domain does not make the assessment proceeding void. His claim for damages can certainly not be used as a set-off or counterclaim to the cause of action sued on. The only cases like the one at bar to which we have been referred are cases decided by the supreme court of Missouri, in which the law is declared to be as above stated. Keith v. Bingham, 100 Mo. 300, 13 S. W. 683, cannot be distinguished from the case at bar. That was an action upon tax bills for grading and other work done on a street; and the answer contains, among other things, the following: "Defendant, for a third defense to the tax bill sued on, states that the lot described by plaintiff's petition is now, and was at all the times stated in the plaintiff's petition, private property; that the grading mentioned in plaintiff's petition was done for public use, and damaged, and did not benefit, said lot; that no compensation was made or tendered to or paid into court for any person as the owner of said lot on account of said damages,—wherefore the defendant asks judgment." In response to this defense, the court say: "It is claimed by defendant that the tax bills in suit were issued in violation of that section of the constitution which declares 'that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed.' Const. 1875, art. 2, § 21. Looking at this defense from the most favorable standpoint, it is evident that it is untenable. The section of the constitution just quoted refers to, and is intended to regulate, the exercise of the right of eminent domain; whereas special assessments for local improvements, such as the tax bills before us, are referable to, and sustainable under, the taxing power. This distinction is well recognized both here and elsewhere in the United States. Garrett v. City of St. Louis, 25 Mo. 505; Lewis, Em. Dom. § 5. If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, such as paving or grading a street, it is no defense to a bill issued therefor to say, as is said here, that the street or the improvement damaged and did not benefit, the property, though, if such were the fact, the party might have his action, on a proper showing, under the constitution, for such injury. Householder v. City of Kansas, 83 Mo. 488. If the city had invoked the power of eminent domain unlawfully in the premises, it could be held actionable therefor; but that would not interfere with the collection of the special tax bill for an improvement regularly made under the taxing power. The right of action which a person would thus have against the municipality would constitute no just defense to the claims of the contractor who had made the improvement, and to whom, under the law in question, the tax assessment is payable." Our conclusion is that the assessment was not void upon the grounds above noted.

Respondent also makes some contention that the assessment was void upon two other grounds, which are in their nature technical: First. The present action is upon a second assessment, made under section 9 of the street law (St. 1891, p. 205), which provides that, where it appears by final judgment that a suit brought to foreclose an assessment lien has been defeated by reason of any defect, error, or informality, etc., any person interested may, at any time within three months after the filing of the judgment, apply to the superintendent of streets for another assessment; and it is contended by respondent that there was no final judgment in the former suit brought by the appellant, because the time within which an appeal might be taken from that judgment to this court had not expired when the demand for the new assessment was made. It is no doubt true that for certain purposes an action brought in the superior court is to be deemed as "still pending," although a final judgment has been rendered in said court, until the time for appealing to this court has expired; and that rule has been declared in the decided cases principally where a judgment of a superior court has been invoked as a bar to another action. But a judgment of the superior court, final in its nature, declaring an assessment void for informality, etc., is clearly within the meaning of the street law, where the words used are, "Any final judgment of any court of this state" (Cook v. Rice, 91 Cal. 664, 27 Pac. 1081); and this is certainly so where the plaintiff in such a suit, instead of appealing, has substantially abandoned his appeal by the act of applying for a new assessment. And the judgment was not less final because certain fictitious defendants—John Doe, Robert Roe, etc.—were not served, and did not appear, and there was no judgment against them. The court found that the respondent McCarthy appeared and contested the action, and that he is, and was at all the times mentioned in the complaint, "the sole owner of said lot of land."

Second. It is contended that there was no valid certificate of the city engineer, because one Fitzhugh was city engineer up to the time the work was completed, and went out of office without making any certificate. But a proper certificate was made by Tilton, who succeeded Fitzhugh as city engineer; and the person in office is the proper officer to make such a certificate, and for that purpose may, of course, use the official data found in the office. The judgment appealed from is reversed.

We concur: HENSHAW, J.; TEMPLE, J.

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126 Cal. 51

McLENNAN et ux. v. WILCOX. (L. A. 566.)

(Supreme Court of California. Sept. 11, 1899.)

QUIETING TITLE—APPEAL—SUFFICIENCY OF FINDINGS—LIMITATIONS.

1. A general finding that each of the averments of an answer are not true is equivalent to a finding that a plea of limitation contained therein is not true, and is sufficient.

2. Under Code Civ. Proc. § 659, subd. 4, providing that, when a motion for new trial is based on the insufficiency of the evidence to justify the verdict, the notice of the motion must specify the particulars in which the evidence is insufficient, a notice of intention to move for a new trial, specifying that the evidence is insufficient to justify the decision, without giving the particulars in which it is insufficient, cannot be reviewed.

3. On appeal, all intendments of the law are in favor of the regularity of the judgment, and the appellant must show error affirmatively.

4. In an action to quiet title, the mere fact that the land was conveyed to defendant, and he had not conveyed it, is not sufficient to overcome a positive finding that plaintiff is the owner and entitled to the possession.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county.

Action by J. D. McLennan and wife against W. W. Wilcox. From a judgment for plaintiffs and an order denying a motion for a new trial, defendant appeals. Affirmed.

Chas. R. Gray and F. D. Hamilton, for appellant. Leonard & Morris, for respondents.

COOPER, C. Action to quiet title to real estate described in complaint. Judgment for plaintiffs. This appeal is by defendant from the judgment and order denying motion for a new trial. The answer, after a denial of the allegations of the complaint, alleges affirmatively that defendant is the owner of the premises by reason of a sale thereof for delinquent taxes to one Pettijohn, and a deed by the tax collector in pursuance of said sale, the defendant having purchased from said Pettijohn. The answer also sets up the statute of limitations as a defense. It is claimed that the court failed to find upon defendant's plea of the statute of limitations. The court found that the averments of the answer are not true, except certain matters stated in the findings. The findings do not in any other manner refer to the plea of the statute, and such plea is not among the excepted matters referred to in the findings. The finding is therefore to the effect that the plea of the statute of limitations is not true, and is sufficient. Gale v. Bradbury, 116 Cal. 40, 47 Pac. 778.

The motion for a new trial was made upon the minutes of the court, and the statement of the case was settled after the order denying the motion. It appears from the statement that the only ground argued and presented for decision on the motion was "that the court found that the certificates of tax sales described in the answer were valid, and therefore defendant has an interest in the property." The court found that the plaintiff Mrs. J. D. McLennan is the owner of, and entitled to the possession of, the real estate described in the complaint. The finding is not attacked in such manner as to enable this court to review it. The notice of intention shows the only specification to be "that the evidence is insufficient to justify said decision that plaintiff is the owner of each of said lots or either of them, and that plaintiff is entitled to the possession of said property or any part thereof." The notice of motion must specify the particulars in which the evidence is alleged to be insufficient. Code Civ. Proc. § 659, subd. 4. Here we are simply told that the evidence is insufficient to justify the decision, but the particulars in which it is insufficient are not pointed out. Therefore we cannot examine the evidence. De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Kyle v. Craig (Cal.) 57 Pac. 791. Conceding the sufficiency of the specifications, the statement shows that on January 7, 1893, Pettijohn executed to defendant a quitclaim deed, in which the premises were described, and that no evidence was offered to show that defendant has ever transferred the interest acquired by said conveyance. This is all the statement contains, and no attempt is made to show all the testimony upon any point involved. All intendments of the law are in favor of the regularity of the judgment and findings of the court below, and it is incumbent upon appellant to show error affirmatively. People v. Gibson, 106 Cal. 472, 39 Pac. 864. Applying this principle to the case at bar, and we cannot say the mere fact that Pettijohn made a deed to defendant in January, 1893, and that defendant has not since conveyed the premises, is sufficient to overthrow the direct and positive finding that plaintiff is the owner and entitled to the possession of the property. This disposes of all the points discussed in appellant's brief. We advise that the judgment and order be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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126 Cal. 38

KELLOGG v. BURR. (L. A. 523.)

(Supreme Court of California. Sept. 11, 1899.)

ATTACHMENT—CLAIM AND DELIVERY—PARTIES—NOTICE OF CLAIM—FINDING OF VALUE—DEFECTIVE AFFIDAVIT.

1. Under Code Civ. Proc. § 627, providing that, in actions for specific property, the jury must find its value, and, if so instructed, the value of specific portions thereof, where complainant alleges its value at a gross sum, which defendant denies, and enumerates the items, stating the value of each, the failure to find the value of each item, whether it is requested or not, is not erroneous, there being no reason for such finding.

2. The holder of the legal title to property attached, who is entitled to its immediate possession, may maintain an action of claim and delivery against the sheriff, though at the time of the levy it was in possession of a third person.

3. Under Code Civ. Proc. § 689, providing that, if property levied on be claimed by a third person by a written claim verified by oath, the sheriff is not bound to keep the property, unless plaintiff indemnify him against such claim, where a claim is presented for property attached, and the sheriff acts on it, and procures an indemnity bond from plaintiff, it is imma-

terial, in an action for the property, that claimant's oath was defective, as, having accomplished that for which it was intended, the sheriff was not prejudiced by its defects.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by D. D. Kellogg against John Burr. From a judgment for plaintiff and an order denying his motion for a new trial, defendant appeals. Affirmed.

Victor Montgomery, for appellant. B. W. Hahn and Schutz & Luckel, for respondent.

HAYNES, C. Action in claim and delivery. Findings and judgment were for the plaintiff, and defendant appeals from the judgment and from an order denying his motion for a new trial. On the 28th of June, 1895, the plaintiff was the proprietor of a butcher shop in Pasadena, and the owner of the personal property in question, being such as is usually used by retail butchers. On that day he entered into a contract with Kent & Veale, by which he sold to them said personal property for the sum of $1,350, $500 to be paid on July 1st; $50 per month, payable on the 1st days of August, September, October, and November, respectively; $75 per month, payable on the 1st days of December, 1895, and of January, February, and March, 1896; and $315 on April 1, 1896, —for which several sums Kent & Veale gave their promissory notes. Plaintiff also agreed to execute a bill of sale of said property on April 1, 1896, provided the purchasers performed their contract, and by the same written contract the plaintiff leased said property to the said purchasers, Kent & Veale, from that date to April 1, 1896, and stipulated that, upon the failure of the purchasers to meet any of said payments at the time they became due or within three days thereafter, they forfeited all payments theretofore made, and he should have the option of taking possession without suit. At the time of this transaction Kellogg was indebted to Mead, Wright & Co. (wholesale butchers) in the sum of $343.28, and said firm were informed by Kent & Veale, before said contract was made, of their intended purchase, and at the time it was executed their bookkeeper was present, and at his solicitation Kent & Veale made their promissory note to Mead, Wright & Co. for said sum, payable June 29, 1895, and Mead, Wright & Co. gave Kellogg a receipt in full of his indebtedness to them. After Kent & Veale went into possession of the property they became indebted to Mead, Wright & Co. for meat furnished, and on November 5, 1895, executed to them a promissory note for the sum of $380, payable one day after date. These notes were transferred to J. H. Pritt for collection merely, he having no interest therein, and he brought suit thereon, and on November 27, 1895, caused the said property embraced in said contract between Kellogg and Kent & Veale to be attached by the sheriff as the property of the latter, and this action is brought by Kellogg against Burr, the sheriff, to recover possession of the attached property.

1. The complaint alleged the value of the several articles of personal property at a gross sum. The answer denied that they were of that value, or of a value exceeding $114.65, and proceeded to enumerate the various items, in all 30 or more, stating the value of each, the whole aggregating said sum of $114.65; and appellant contends that the court should have found the value of each item, an issue having been made as to each, citing Code Civ. Proc. § 627, and Brenot v. Robinson, 108 Cal. 143, 41 Pac. 37. Said section provides that the jury "must find the value of the property, and, if so instructed, the value of specific portions thereof." In Brenot v. Robinson, supra, in speaking of this provision, the court, quoting from Whetmore v. Rupe, 65 Cal. 237, 3 Pac. 851, said: "Error can therefore only arise in a case where such instruction was pertinent and proper, and the instruction was asked and refused." No reason is suggested why there should have been a finding as to the value of each item, and we see none. If the court would not have erred in refusing to instruct the jury to find the value of each article, it did not err in failing to find the value of each, whether requested to do so or not.

2. Appellant, conceding that the legal title to the attached property remained in Kellogg, the respondent, contends that the right of action for the recovery of the property was in the attachment defendants, Kent & Veale. The argument is that the attachment was levied on November 27, 1895; that the property sued for was taken from their possession; that their possession at that time was lawful under their contract, all payments prior to that of December 1st having been made; and hence the plaintiff did not at the time of the levy have the right of possession. On December 5th, the note due December 1st–3d not having been paid, plaintiff demanded payment, and was informed by Kent & Veale that they could not make any further payments; that plaintiff then surrendered all the unpaid notes to Kent & Veale, and demanded the property of the sheriff. Triscony v. Orr, 49 Cal. 612, and Lambert v. McCloud, 63 Cal. 162, are cited by appellant in support of his contention. In the first of these cases it was said: "The alleged trespass was committed during the term when the lessee was in the actual, and was entitled to the exclusive, possession against the plaintiff, his lessor. It is well settled that a person having neither the possession, nor the right to the possession, of personal chattels, cannot maintain trespass or trover for an injury done to the property." The second case cited was in claim and delivery, but it was held that the

plaintiff did not have the right of possession, though he had the right of property. Neither of these cases is in point. Here, not only the title to the property was vested in Kellogg, who had never parted with it, but at the time the demand was made by him upon the sheriff for the return of the property he was entitled to its immediate possession, and those facts entitled him to maintain the action of claim and delivery. It was so expressly held in Rodgers v. Bachman, 109 Cal. 552, 42 Pac. 448, a case directly in point. See, also, Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, there cited.

3. Appellant also contends that the verified claim of ownership and right to the possession of the attached property served by respondent upon the sheriff was not a compliance with sections 549, 689, Code Civ. Proc. The part claimed to be insufficient is as follows: "I hereby inform you that I am the owner and entitled to the possession of the following described property which you have in your possession, and demand the immediate return of the same to me." The alleged defect is in not "stating the grounds of such title." Said section 689 provides as follows: "If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received, or be notice of any rights, unless made, as above provided;" and said section 549 makes said claim applicable to attachments. It has been held that said section 689 is intended for the protection of the sheriff. Paden v. Goldbaum (Cal.) 37 Pac. 759; Brenot v. Robinson, 108 Cal. 143, 41 Pac. 37; Dubois v. Spinks, 114 Cal. 289, 295, 46 Pac. 95. If such claim is made, the sheriff is not bound to retain the property unless he is indemnified, and may release it without incurring a liability therefor to the plaintiff in attachment or execution. The sufficiency of the notice is therefore a question between that officer and the plaintiff in attachment. If the plaintiff found the notice which was the basis of the sheriff's demand for indemnity insufficient, he might refuse to give it, and thus place the responsibility of an improper release upon that officer. The sheriff testified that said claim was served upon him, and he "therefore made a demand" upon Pritt for a bond of indemnity, which he gave; and the said bond recites: "And whereas, upon the taking of said goods and chattels by virtue of the said writ, D. D. Kellogg claimed the said goods and chattels as his property; and whereas, the said plaintiff, hereby expressly waiving a trial by a sheriff's jury of the right of property, * * * require of said sheriff that he shall retain said property under such attachment and in his custody." It would appear, therefore, that the plaintiff in attachment, as well as the sheriff, treated and regarded the notice as sufficient; and the sheriff having acted upon the claim served upon him, and because of its service procured the protection of an indemnity bond,—the only protection he could have, if he retained the attached property,—it would seem that the notice, though defective, accomplished the purpose intended by the statute as fully as though it had given a detailed statement "of the grounds" of his title, whatever that expression may mean. I do not see any ground upon which it could be said that appellant was misled or prejudiced by the alleged defect in the claim served upon him, and advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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125 Cal. 687

FERREA v. TUBBS et al. (S. F. 1,763.)

(Supreme Court of California. Sept. 8, 1899.)

JUDGMENT—INTEREST—TENDER PENDING APPEAL—LEAVE OF APPELLATE COURT—DEPOSIT IN COURT—DUTY OF COURT.

1. A tender by defendant to plaintiff personally of the amount of a judgment secured by the latter against the former, pending an appeal by the latter, is as effectual as though made to his attorney.

2. Civ. Code, § 1494, provides that an offer of performance must be free from any conditions which the creditor is not bound on his part to perform. Civ. Code, § 1499, provides that a debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation. A judgment debtor made a tender of the amount of a judgment to his judgment creditor, pending an appeal by the latter, on condition that he satisfied the judgment. *Held*, that such tender was unconditional, and valid, and not violative of section 1494.

3. Where a judgment debtor has made a tender to the judgment creditor of the amount of the judgment, which has been refused by the latter, it is not necessary for the debtor to deposit the money in court in order to stop the running of interest, as such proceeding is only necessary where it is desired to extinguish the original obligation.

4. A tender by a judgment debtor to the judgment creditor of the amount of the judgment, made after the filing of a cost bond and appeal by the latter, operates to stop the running of interest on the judgment from the time of the tender, where the judgment is affirmed on appeal.

5. It is not necessary for a judgment debtor who wishes to make a tender to the judgment creditor of the amount of a judgment, after appeal by the latter, in order to secure the benefit of such tender, to apply to the appellate court for leave to do so, as such tender is extrajudicial.

6. After a tender by a judgment debtor pending an appeal by a judgment creditor of the

amount of the judgment, and an affirmance by the appellate court, and sending of a remittitur to the trial court, it is proper for the judgment debtor to pay the amount of the judgment and interest thereon to the time of tender into court, and demand a satisfaction of the judgment, and it thereupon becomes the duty of the trial court to determine the amount necessary to satisfy the judgment.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Nicola Ferrea against Hiram Tubbs and others. From an order satisfying a judgment on the payment into court by the judgment debtor of an amount required by the court, plaintiff appealed. Affirmed.

Sullivan & Sullivan, for appellant. Hilborn & Hall, for respondents.

GAROUTTE, J. Plaintiff in an action for damages recovered a judgment of $4,800. He appealed from this judgment, and also from an order refusing his motion for a new trial. Pending the appeal to this court, defendants tendered him the full amount of the judgment, with all costs, and interest to that date. This tender was refused. Subsequently, upon appeal, the judgment and order denying a new trial were affirmed. Upon the return of the remittitur to the superior court, defendants asked for an order that the judgment be satisfied conditionally upon the payment into court of the amount of the tender, and at the same time again tendered to plaintiff the aforesaid amount, and paid the same into court; whereupon an order was made satisfying the judgment. The present appeal is prosecuted from that order, the real question being, did the tender made to plaintiff by defendants pending his appeal to this court stop the running of interest upon the judgment from which his appeal was taken?

We see no force in the contention that the tender should have been made to plaintiff's attorneys, rather than to plaintiff himself. While it may be assumed that the attorney has sole control of his client's case, as far as any question of practice and procedure is concerned, yet there can be no question but that a tender of money pending the litigation may be made to the client. The statute expressly authorizes the judgment creditor to satisfy the judgment, and section 1488, Civ. Code, declares that an offer of performance must be made to the creditor, or one authorized by him to receive the amount due. It primarily rests with the plaintiff, and not his attorneys, to decide whether or not an amount tendered should be accepted in full satisfaction of a claim for money due, and this tender was made to the proper party.

It is next claimed that the tender was conditional, and therefore of no force. The condition was that plaintiff deliver a receipt for said money "as payment in full for said judgment, with interest and costs." The offer is claimed to be violative of section 1494 of the Civil Code, which provides, "An offer of performance must be free from any conditions which the creditor is not bound on his part to perform." Whatever may be the law in other jurisdictions—especially in England—as to the effect upon the validity of a tender by the demand of a receipt from the creditor at the time, we are convinced that the true rule in this state is that a receipt may be demanded without jeopardizing the legality of the tender. Sections 1498 and 1499, respectively, provide: "When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition." Section 1498. "A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation." Section 1499. By virtue of sections 1498, 1499, a debtor has a right to demand of the creditor a receipt. And by virtue of section 1494 the offer of performance need only be free from conditions which the creditor is not bound to perform. If the debtor tender a sufficient amount of money, he is entitled to a receipt in full, and may couple his tender with a demand for such receipt. Again, it was not necessary to deposit the money in court after tender made, in order to stop the running of interest. A deposit in court is only demanded when it is desired to extinguish the original obligation. No claim of that kind is made by the debtor here.

Appellant's main contention seems to be based upon the following closely-connected legal propositions advanced separately in his brief: "(1) The filing of the three hundred dollar cost bond perfected the appeal, and operated as a supersedeas as to the judgment. (2) Pending the appeal, the superior court was devested of jurisdiction for the enforcement or satisfaction of the judgment. (3) Pending the appeal, neither party could enforce nor satisfy the judgment." These contentions seem to miss the mark to which they are directed. We are not concerned in the fact, even if it be true, that pending the appeal neither party could enforce or satisfy the judgment; nor the further fact that, pending the appeal, the superior court had no jurisdiction to order the judgment satisfied. These matters are not material here. By the tender made to plaintiff, no attempt was made to secure relief by judicial process. It was a matter entirely outside of the courts. No court was asked to do anything. If the right of tender be denied here, it might with equal propriety be claimed that these two parties, pending the appeal, could not contract regarding the subject-matter of this litigation, either with themselves or with others. By the tender made, it was not sought to invoke the jurisdiction of the superior court in any way, nor to trespass upon the right of this court to hear the appeal. If the tender had been accepted, and the receipt in full given, the transaction would have been perfectly valid, and inevitably would have resulted in an end to the litigation. Appellant concedes all this when he says an acceptance of the tender would have resulted in a dismissal of his appeal. It seems to follow irresistibly that defendants had the legal right to make the tender. If they had the legal right to make it, certainly the creditor had the legal right to accept it; and, if it was a legal tender, it carried with it all the incidents of a valid and legal tender. Of course the appeal stayed any execution of the judgment. Especially is this plain, for plaintiff is appealing from a money judgment rendered in his favor. But appellant's position in this regard is not entirely clear to us. He says the judgment of the trial court was devitalized by the appeal, and revitalized by its affirmance in this court. He also seems—inferentially at least—to claim that, the judgment being devitalized at the date of the tender, no tender could be made; in other words, the claim at that time had assumed its original condition,—that of an unliquidated claim for damages. This is his position, or it is that, when the tender was made, the judgment, being devitalized by reason of the appeal, was drawing no interest, and therefore the tender could not have the effect to stop the running of interest. This court has had occasion many times, especially in recent days, to define the status of a judgment pending appeal; but the position now taken by appellant presents unplowed ground. It is somewhat original. We do not understand that an appeal stops the running of interest upon the judgment. Certainly this court has never so decided. However inanimate a judgment may be pending appeal, we believe it still has life enough to draw to itself interest. This court may have said that such a judgment was sleeping, but it never has gone so far as to declare it dead. If defendants had appealed from this judgment, instead of plaintiff, and upon appeal the judgment had been affirmed, certainly it would have drawn interest pending the appeal. Then why not in the present case? In justice and equity defendants should have the right to stop the running of interest upon this judgment. By the affirmance of the judgment in this court it was declared that plaintiff should not have appealed the case. It was further declared that defendants' tender in effect was sufficient in amount to cover all plaintiff's just claims, and therefore should have been accepted when made. Plaintiff could refuse to accept the tender, and prosecute his appeal, but he thereby assumed the risk of losing the use of this money pending the appeal in case of an affirmance of the judgment. We are perfectly satisfied that this judgment was not so devitalized by the appeal but that it still remained such a liquidated demand that a tender could be made by the debtor which would stop the running of interest.

It is claimed that, if defendants desired to secure any benefit from the tender made, they should have applied for leave to this court while the appeal was here pending. But this court upon appeal only reviewed the action of the trial court. It took the case as made by the trial court. It could not examine into the merits of this tender. Upon the going down of the remittitur it was clearly the right of defendants to bring their money into court, and ask that the judgment be satisfied. Upon such action and request by them, it was the duty of the trial court to determine the amount of money necessary to satisfy the judgment. If there were any credits to be made, then and there was the time for their allowance, and in effect the refusal of the tender here involved operated as a release by the judgment creditor of all interest which would otherwise have accrued upon the judgment after the date of the tender.

The remaining questions raised by appellant in his brief have been considered. We find nothing there which demands extended consideration. They appear to be without substantial merits. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

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126 Cal. 26

KOZMINSKY v. WILLIAMS, Justices' Court Clerk. (S. F. 1,437.)

(Supreme Court of California. Sept. 8, 1899.)

JUSTICES OF THE PEACE—FEES IN CIVIL ACTION—STATUTORY PROVISIONS—MANDAMUS—ACTS OF CLERK OF COURT.

1. Under Act March 28, 1895 (St. 1895, p. 272), allowing each justice of the peace a fee of $2 "for all services to be performed by him before trial," etc., 25 cents for issuing writs "not otherwise herein provided for," and 50 cents "for taking and approving bond or undertaking," a justice of the peace is not entitled to any fee for approving an undertaking on attachment, and issuing the proper writ, in addition to the fee of $2 allowed by said act for "services to be performed by him before the trial."

2. Under Code Civ. Proc. § 91, providing that the justices' clerk shall not issue writs or process, for the service of which a fee is allowed by law, without the order of the presiding justice, and that he must collect the fees for such service in advance, a justices' clerk cannot be compelled by mandamus to issue a writ of attachment when no order for such writ was obtained, and the sheriff's fee for serving it was neither paid nor tendered.

In bank. Appeal from superior court, city and county of San Francisco.

Application for a peremptory writ of mandamus by H. S. Kozminsky against E. W. Williams, justices' court clerk of the city and county of San Francisco. From a judgment granting the application, defendant appeals. Judgment modified and affirmed.

H. T. Creswell, for appellant. A. S. Newburg and Samuel Rosenheim, for respondent.

BEATTY, C. J. The defendant is justices' court clerk of the city and county of San Francisco, and he prosecutes this appeal from a judgment of the superior court awarding a writ of mandate commanding him to file an affidavit and undertaking on attachment, and to issue the proper writ. The controversy arises out of the fact that the defendant demanded the payment of certain fees as a condition of filing the papers and issuing the writ, which the plaintiff contends (and the superior court has found) he was not required to pay. The case is governed by the act of March 28, 1895, establishing the fees of certain officers, including justices of the peace. St. 1895, p. 272. It is therein provided that justices of the peace may collect the following fees, and no others: "Each justice of the peace shall be allowed, in a civil action before him, for all services to be performed by him before trial, two dollars; and for the trial and all proceedings subsequent thereto, including all affidavits, swearing witnesses and jury, and the entry of judgment and issue of execution thereon, three dollars; and in all cases where judgment is rendered by default or confession, for all services, including execution and satisfaction of judgment, two dollars." In compliance with this clause of the statute, the plaintiff, on commencing his action, paid to the defendant the sum of $2, and thereupon presented a proper affidavit and undertaking, with a demand that the defendant should file them and issue the writ of attachment. But the defendant, relying upon two subsequent clauses of the statute, claimed additional fees, amounting to seventy-five cents, as a condition of filing the papers. These clauses are as follows: (1) "For issuing each process, writ, order or paper required by law to be issued, not otherwise herein provided for, twenty-five cents." (2) "For taking and approving bond or undertaking, including the justification of sureties, fifty cents." The superior court held that the defendant could not demand the fees here specified, because the issuance of the writ of attachment is a service to be performed before trial; that it is covered by the payment of $2 at the commencement of the action, and therefore otherwise provided for; and because the filing and approval of the undertaking is also a part of the services covered by the same payment. We have concluded, not without hesitation, that this is a correct construction of the statute. The only objection to it, so far as the issuance of the writ is concerned, is that it renders the clause relating to writs and process wholly superfluous and inoperative, since all sorts of writs and process of justices' courts, both in civil and criminal cases, are in the same manner otherwise provided for. This is, of course, in violation of one canon of construction, but any other view would involve a violation of other rules equally potent; and it is a reasonable conclusion that the special clause relating to writs and process was inserted merely out of abundant caution, to cover possible cases not provided for. So far as the taking and approval of the undertaking are concerned, the clause relating to that matter has full operation upon appeal bonds, which do not come under other provisions of the act.

These views would determine the case, were it not for an objection under section 91 of the Code of Civil Procedure, relating to practice in the justices' court of San Francisco. That section provides, in substance, that the justices' clerk shall not issue writs or process, for the service of which a fee is allowed by law, without the order of the presiding justice, and that he must collect the fees for such service in advance. Now, in this case, it is not alleged in the petition that any order for the issuance of the writ was ever obtained from the presiding justice, or that the fee of $1 allowed the sheriff for serving the writ was ever paid or tendered. The answer, moreover, which is verified, distinctly alleges that no order for the writ was obtained, and that the sheriff's fee was neither paid nor tendered. In the superior court this objection was held to be immaterial, and judgment was rendered on the pleadings. Respondent makes light of the objection here, and asks us to disregard it. But we do not see how we can do so. As to the technical objection that no order for the writ was obtained from the presiding justice, that is fairly enough answered by saying that such order could not be obtained until the affidavit and undertaking had been filed, and, as the clerk wrongfully refused to file those papers notwithstanding full payment of all he could rightfully demand, the plaintiff is at least entitled to a peremptory writ commanding defendant to file those papers. But the judgment appealed from goes further. It not only requires the filing of the affidavit and undertaking, but also the issuance of the writ. We do not think the clerk can issue the writ without the previous order of the presiding justice, or the justice acting for him in his absence, or that he is required to issue it until the sheriff's fee for service is paid. The judgment of the superior court is modified by limiting the peremptory writ to the filing of the affidavit and undertaking, and as so modified is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; McFARLAND, J.; HARRISON, J.; VAN DYKE, J.

(126 Cal. 24)

JONES v. FALVELLA et al. (L. A. 670.)

(Supreme Court of California. Sept. 8, 1899.)

HOMESTEAD—TRANSFER BY ORDER OF PROBATE COURT—INSANITY OF WIFE—PETITION—STATUTE—TITLE.

1. Where a husband whose wife has been adjudged insane proceeds to sell the homestead under the provisions of St. 1873–74, p. 582, enabling the husband or wife to alienate or incumber the homestead when one of them has become insane, such sale is void, unless the petition for the sale alleges the value of the homestead to be sold, as required by section 3 of said act, or contains language which can be fairly construed into a declaration of value.

2. The title of Act 1873-74 (St. 1873-74, p. 582), enabling a husband or wife to alienate the homestead when one of them has become insane, entitled "An act to enable certain parties therein named to alienate or incumber homesteads," sufficiently indicates its purpose, as required by the constitution.

Department 2. Appeal from superior court, Los Angeles county.

Action by Anna W. Jones, administratrix, etc., against Maria A. Falvella and others. From a judgment for defendants, plaintiff appeals. Reversed.

M. W. Conklin, for appellant. F. R. Willis and Geo. W. Baker, for respondents.

HENSHAW, J. The action is to quiet title. The facts were stipulated. Jesse H. Butler was the husband of Ida Merrill Butler in March, 1882, at which time the wife filed a declaration of homestead upon the separate property of the husband. In February, 1892, Ida M. Butler was adjudged insane, and committed to the asylum at Agnews. In April, 1892, the husband filed a petition to be allowed to sell the homestead under the provisions of an act entitled "An act to enable certain parties therein named to alienate or incumber homesteads." St. 1873-74, p. 582. The order was granted, and the sale was effected. The defendants claim title under this sale. Their title was upheld by the trial court, and judgment was rendered for them accordingly.

The first contention of appellant is against the constitutionality of the act. We think the title of the act sufficiently indicates its purpose; and, as for the other matters, they must be considered as adversely adjudicated by the case of Rider v. Regan, 114 Cal. 667, 46 Pac. 820, where the question of the constitutionality of this act received careful consideration.

It is next contended that the court never acquired jurisdiction to order the sale because of the omission of certain statutory requirements from the petition, and that, therefore, the sale is void. Section 3 of the act under consideration requires that in the petition shall be stated the value of the homestead to be sold or incumbered. In the petition which was the foundation of these proceedings there is a total absence of such allegation, nor are there any averments from which an expression of the value may be derived. The court acquires jurisdiction to order a judicial sale only upon the filing of a petition sufficient in form. Townsend v. Gordon, 19 Cal. 189. The statutory prerequisites to the execution of such a power may be, and frequently are, in their nature arbitrary, but when the legislature has prescribed them they may not be omitted or ignored. Thatcher v. Powell, 6 Wheat. 119. Courts have shown great liberality in construing such petitions because of the manifest hardships which result from overthrowing sales for such irregularities, when in other respects they have been fairly conducted; but no court has gone to the length of holding that a petition for such sale is sufficient when there is a total omission of any statutory prerequisite to the conferring of jurisdiction. If in this case it could be said with any reason that the value of the property was even inferentially stated, we should be inclined to uphold the sale; but, even with an inclination so to do, we are unable to see in any or in all the terms of the petition any language which can be fairly construed into a declaration of value. The judgment is therefore reversed, and the cause remanded.

We concur: VAN DYKE, J.; McFARLAND, J.

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126 Cal. 9

MACOMBER et al. v. BIGELOW et al.

(S. F. 1,186.)

(Supreme Court of California. Sept. 8, 1899.)

HARMLESS ERROR—MECHANIC'S LIEN—PROPERTY COVERED—FINDINGS—LIABILITY OF SUBCONTRACTORS—NEGLIGENCE OF PRINCIPAL CONTRACTOR—REMEDY OF SUBCONTRACTOR WHERE CONTRACT IS VOID—LIEN BY SUBCONTRACTOR FOR WORK OF EMPLOYÉS—INTEREST—EMPLOYÉS OF SUBCONTRACTOR—ASSIGNMENT BY SUBCONTRACTOR OF CLAIM—EVIDENCE—ADMISSION OF PARTY TO SUIT.

1. Error in overruling a demurrer directed to one cause of action set out in the complaint is harmless, where judgment is based entirely on another count, which states a good cause of action.

2. Under Code Civ. Proc. § 1185, relating to mechanics' liens, providing that the land on which the building is constructed, together with a convenient space about the same, shall be subject to the lien, the lien of a subcontractor for labor on a particular building is properly confined to the lands necessary and convenient to the use of such building, though the original contract, void for want of filing in the office of the county recorder, embraced other buildings.

3. It is not necessary for the court to make findings as to allegations which are not supported by evidence.

4. Subcontractors are not responsible to the owner for injuries resulting from the negligence of the principal contractor.

5. The remedy of subcontractors, who hold claims for work and materials furnished for a building constructed under a void builder's contract, is under Code Civ. Proc. § 1183, providing that, when the contract for the construction of a building is void, labor and materials furnished by subcontractors shall be deemed to have been furnished at the personal instance of the owner, and they shall have a lien for the value thereof.

6. Under Code Civ. Proc. §§ 1183, 1184, providing that, when a contract for a building is void for any of certain reasons, labor and materials furnished by subcontractors and others mentioned therein shall be deemed to have been furnished at the special request of the owner, and the building shall be subject to a lien for the same, a subcontractor has a lien for the work done on a building by his employés, though the original contract is void.

7. Where the value of the work done by a subcontractor under his contract with the principal contractor was unliquidated and incapable of ascertainment until fixed by judgment of the court, the court, in an action by such subcontractor to foreclose a mechanic's lien, is unauthorized to allow interest on his claim prior to judgment.

8. Under Civ. Code, § 3287, providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, with the right vested in him to recover on a particular day, is entitled also to recover interest thereon from that day, employés of a subcontractor, at fixed rates of compensation, which they are entitled to receive on completion of their work, are entitled, in an action to foreclose mechanics' liens, to interest on their claim from the time it was due, and also to have the amount of their judgments made liens on the property.

9. The assignment by a subcontractor of his claim to another as security merely, and its reassignment to him, prior to the filing by him of a claim of lien, leave him the owner of the claim at the time of the filing.

10. In an action to foreclose a mechanic's lien, a witness testified that he was a stenographer, and that the writing handed him was a transcript from his shorthand notes, which he took at a certain date, of defendant's testimony, and that it was correct, to the best of his recollection. The declarations of defendant contained in said transcript were then offered in evidence "as an admission in the case." *Held*, that the evidence was admissible, as an admission of a party to the suit.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by C. A. Macomber, John Tuttle, and J. S. Reid against L. M. Bigelow, San Francisco Savings Union, Edward Metzger, and Louis Metzger to foreclose mechanics' liens. From a judgment in favor of plaintiffs and an order denying a new trial, defendants appeal. Modified.

Knight & Heggerty, for appellants. Bull & Cleary, Henley & Costello, Crandall & Bull, H. E. Monroe, and Hart H. North, for respondents.

PER CURIAM. William Belyea and J. C. Rogers entered into a written contract with defendant Bigelow to construct for her a building of eight flats on Bush street, in San Francisco. This contract was void for want of filing in the office of the county recorder. The assignor of plaintiff Macomber, Thomas Madigan, the assignor of plaintiff Reid, S. H. Depuy, and plaintiff Tuttle, as subcontractors, each performed and supplied labor and furnished materials in the construction of said building, and filed liens on the property, and each of the plaintiffs began a suit to foreclose his lien. These suits were consolidated, and plaintiffs had judgment, from which defendants appeal. The San Francisco Savings Union and the Metzgers were joined as defendants because they claimed some interest in the premises. After careful consideration of appellants' brief, we have concluded that the judgment should stand except as to the allowance of interest hereinafter directed.

There is no error prejudicial to appellants in the action of the court in overruling the demurrer to the complaint of plaintiff Macomber, for this reason: The demurrer was specially directed to the second cause of action, and the first count of said complaint set out a good cause of action for a foreclosure of plaintiffs' lien, and the judgment in Macomber's favor was based altogether upon this first count or cause of action; and it is therefore immaterial on this appeal whether the second count of said complaint states a cause of action or not, as the judgment appealed from has no need of that portion of the complaint to support it. Canal Co. v. Kidd, 37 Cal. 282.

In the complaint of the plaintiff Tuttle it sufficiently appears that both the work of excavation necessary to be done in the erection of the building and the building itself were completed before the lien was filed and before the action was begun. The excavating was included in the original contract, and this contract, though void, may be looked to to determine what should be treated as a part of the building, and the allegations of the complaint as to the completion of the building apply to all its parts, including the excavations necessary to its construction, as contemplated by the said contract. It was not necessary to state in the complaint that the original contract was void, as that was a proper matter of evidence to establish other material facts alleged in the complaint. Yancy v. Morton, 94 Cal. 558, 20 Pac. 1111. The demurrer to the Tuttle complaint was therefore properly overruled.

In this case the work for which liens were filed was all done and furnished on and for the new building of "eight flats." The liens filed by Madigan and Tuttle were therefore properly confined to the lands necessary and convenient to the use and occupation of that particular building, and the court, having the power so to do under section 1185, Code Civ. Proc., properly restricted the lien of Depuy to the same premises. There was nothing to show that the rear portion of the lot, covered by the old buildings, was in any way convenient or necessary to the use of the new building. Though the original contract embraced other buildings, the liens were properly confined to the building upon which the work was done. Brunner v. Marks, 98 Cal. 374, 33 Pac. 265.

The twentieth finding reads as follows: "That on the 5th day of January, 1894, and not before that time, the said Madigan sold, assigned, and transferred all his right, title, and interest and claim in and to said claim for labor performed by him, together with the claim of lien by which said claim is secured, unto C. H. Macomber, who ever since has been and now is the owner and holder thereof." This finding is supported by the evidence, and it completely disposes of all the issues raised by the pleadings as to the date of the transfer of the claim to Macomber, and as to Macomber's ownership thereof, and the precise time when he acquired such ownership. Taken in connection with the other findings, it shows that such ownership was first acquired after the claim of lien was filed by Madigan.

There was no evidence tending to support the allegations of fraud and trickery in the answer, and therefore it was not necessary for the court to make any finding as to those allegations. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098. There was no fraud or wrong in Madigan's including in his claim of lien work done for him on the building by Tuttle and Depuy.

The allegation as to when the grading and excavations were completed tendered an immaterial issue. The thing material was, when was the building completed? and the findings show the date of such completion. Finding 12 shows that the work on the building was carried on without cessation to the time of its completion from the time it began, and fully covers all allegations in the answer as to cessation of work for more than 30 days.

The allegations of the answer as to injuries to the rear houses by caving, the result of Belyea & Rogers' negligence, were immaterial, and no findings as to such allegations were necessary. These plaintiffs were not responsible for the negligence of Belyea & Rogers.

The claims of plaintiffs are for work and materials necessarily furnished for the construction of a building which was being built under a void builder's contract, and their remedy is properly under section 1183, Code Civ. Proc. Section 1191, Code Civ. Proc., applies to grading or other improvement of a lot, done independent of, and not as a necessary part of, the construction of a building.

That the protection of the mechanic's lien law is not confined to those who actually perform labor, but is extended to subcontractors and others, is settled by the language of the Code. Code Civ. Proc. §§ 1183, 1184. A fair construction of these sections gives to the subcontractor a lien for the work done on the building by his employés, and this, too, where the original contract is void. If it had been intended by the legislature that a subcontractor should have a lien for nothing except his own personal labor, they should have made the statute read, "shall have a lien upon the property upon which they have performed labor." Instead of the word "performed," the legislature used the word "bestowed," which means "used" or "placed," and never means "performed." This language shows that it was intended to give a subcontractor a lien for the labor that he caused his employés to perform on the building. The fact that the original contract was void can in no way affect the question under consideration.

The finding hereinbefore referred to, that the work proceeded without cessation, we think warranted by the evidence. There was some conflict in the evidence on this subject, but we think the trial court found in accordance with the preponderance of such evidence.

The judgment was rendered November 12, 1896, and to the extent that it awarded interest prior thereto upon the amount for which judgment was rendered in favor of the assignee of Madigan it was erroneous. His complaint was against Belyea & Rogers as original debtors to Madigan. He had no right to a personal judgment against the defendant Bigelow, but only to enforce a lien against her property. In the case of unrecorded contracts it is provided by section 1183, Code Civ. Proc., that all persons by whom the labor is done and the materials furnished "shall have a lien for the value thereof." No personal liability is incurred by the owner, but the land upon which the improvement is made is subjected to a lien therefor in favor of these persons. Madigan had ceased work upon the lot before the excavation was completed, and the value of the work done by him under his contract with Belyea & Rogers was unliquidated and incapable of ascertainment until fixed by the judgment of the court at the trial herein. Under these facts, the court was not authorized to allow interest upon his claim prior to the rendition of its judgment. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811; Swinnerton v. Development Co., 112 Cal. 375, 44 Pac. 719.

Tuttle and Depuy were, however, employed by Madigan at fixed rates of compensation, which they were entitled to receive from him upon the completion of their work, and the court properly allowed them interest thereon (Civ. Code, § 3287; Insurance Co. v. Fisher, 106 Cal. 233, 39 Pac. 758), and made the amount of their judgments liens upon the property of Bigelow. As Madigan was personally liable to them under this employment, it was proper for him to include in his claim of lien the value of the work done by them. The statute, however, gives a right of lien to them also, and they were not precluded by his filing a lien from filing a claim of lien in their own behalf, since they could not know whether he would prosecute his claim to judgment. In enforcing these liens, however, a court of equity would render judgment in favor of each according to the amount which it should determine each was entitled to receive. As between Tuttle, Depuy, and Madigan, equity will apportion the liens according to their respective rights inter sese, and will deduct whatever amount Tuttle and Depuy are entitled to enforce as a lien upon the property from the amount which Madigan would have been entitled to enforce except for their claims against him. The property is subject to a lien for only the "value" of the work done; but if Madigan, by his dealings with Tuttle and Depuy, has given them a right against him for a greater sum than he could enforce against the property, the loss must be borne by him.

The assignment of Madigan's claim to another as security merely, and its reassignment to Madigan, prior to the filing by Madigan of a claim of lien, left Madigan clearly the owner of the claim at the time he filed his claim of lien, and fully warranted the conclusion reached by the trial court as to the ownership of such claim.

A careful examination of the several complaints and claims of lien discloses no material variance between the evidence on the one hand and the complaints and claims of lien on the other. "The statute is a remedial statute, and, for the purpose of carrying into effect the object for which it was enacted, is to receive a liberal construction, and the notices which under its provisions are required to be given have regard to substance, rather than to form." McGinty v. Morgan, 122 Cal. 103, 54 Pac. 392. The variances complained of by appellants are trivial, do not go to any matter of substance, and could not have misled the appellants to their injury in any way.

Plaintiffs called one Williamson as a witness, who testified that he was a stenographer and typewriter, and that the writing handed him "was a transcript from his shorthand notes which he took July 18, 1893, of Mrs. Bigelow's testimony, and that it was correct to the best of his recollection and ability." Respondents then offered in evidence, "as an admission in the case," the declarations of the defendant Bigelow, contained in the said transcript. There was no error in overruling the objection made to this evidence. It was not offered as a deposition, but as an admission of a party to the suit.

There are some nine other alleged errors of the court, in ruling upon the admission of evidence, that need not be discussed further than to say that in none of them was there any error prejudicial to appellants. The motion for a nonsuit was properly denied, and there was evidence to support each finding of the court. The order denying a new trial is affirmed. The superior court is directed to modify its judgment in accordance with the views herein presented, and as so modified the judgment will stand affirmed.

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126 Cal. 1

THOMAS et ux. v. GATES. (L. A. 652.)

(Supreme Court of California. Sept. 8, 1899.)

APPEAL—VERDICT BASED ON CONFLICTING EVIDENCE—INSTRUCTIONS RELATING TO TESTIMONY OF PARTICULAR WITNESS OR CLASS OF WITNESSES—INSTRUCTIONS NOT APPLICABLE TO EVIDENCE—INSTRUCTION COVERED BY OTHERS—REVERSAL WHERE CHARGE IS CORRECT AS AN ENTIRETY—RULE OF DAMAGES—PERSONAL INJURIES.

1. Where there is a substantial conflict in the evidence, the verdict will not be interfered with on appeal.

2. Code Civ. Proc. § 2061, subd. 3, providing that a witness false in one part of his testimony is to be distrusted in others, is applicable to all witnesses, whether for plaintiff or defendant; and an instruction that, if the jury believe that plaintiff in her deposition willfully swore falsely in regard to any material fact, then the whole of her testimony should be distrusted, is properly refused.

3. Code Civ. Proc. § 2061, subd. 3, providing that a witness false in one part of his testimony is to be distrusted in others, is applicable to all witnesses, whether for plaintiff or defendant; and an instruction that, if any witness for the plaintiff willfully swore falsely in regard to any material fact, the whole of the testimony of such witness should be looked on with distrust and suspicion, is properly refused.

4. A proposition of law laying down a rule of evidence should be given to the jury in general terms, and not stated as being applicable to a certain witness or class of witnesses.

5. Where the record does not show that plaintiffs produced inferior evidence when it was in their power to produce higher evidence, an instruction requested by defendant that if either party has produced inferior evidence, where it is in the power of such party to produce higher evidence, the jury must presume that such higher evidence, if produced, would be adverse to that party, is properly refused.

6. Where there is no evidence in the record that plaintiffs willfully suppressed any testimony, and the instruction requested by defendant could only apply to testimony which he concedes was properly excluded, an instruction that, if the jury should find that any evidence has been willfully suppressed by plaintiffs, they should presume that such evidence would be adverse to them if produced, is properly refused.

7. An instruction fully covered by other instructions is properly refused.

8. In an action for damages for personal injuries causing plaintiff to have a miscarriage, an instruction by the court, after giving the rule as to the detriment proximately caused by the act of defendant, to the effect that this will include compensation for the pain resulting from the corporal hurt, if it produced pain; for mental suffering, if any, naturally resulting to plaintiff from the injury or wrong, if any; for wounded sensibility or affection, and for sense of wrong and insult, by reason of the malice or oppression of defendant, if he was guilty of malice or oppression,—states the correct rule of damages.

9. Judgment will not be reversed for verbal inaccuracies in the charge or for isolated sentences or phrases open to criticism, where such charge, as a whole, correctly states the law of the case.

10. In an action for damages for personal injuries, causing plaintiff to have a miscarriage, an instruction that if the jury shall find that defendant wrongfully inflicted injuries on the person of plaintiff, and that she suffered pain in consequence thereof, and that she was at the time pregnant, and the injury caused her to have a miscarriage, and that her health has been impaired by reason thereof, or if they find that any of said alleged facts have been proved, the amount of damages to which plaintiff is entitled is such sum as shall appear reasonable and just, provided, however, that a greater amount of damages than is alleged in the complaint cannot be given, is proper.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by Isaac and Rebecca Thomas against David Gates for damages for personal injuries to Rebecca Thomas, causing her to have a miscarriage. From a judgment in favor of plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Davis & Rush, for appellant. John D. Pope and C. N. Mottingly, for respondents.

COOPER, C. This action was brought by plaintiffs, who are husband and wife, to recover damages of defendant for personal injuries to plaintiff Rebecca Thomas, alleged to have been caused by the defendant violently assaulting, beating, and striking the said plaintiff, causing her to have a miscarriage and to suffer great pain. A jury was impaneled, and a verdict rendered in favor of plaintiffs for the sum of $4,500. A motion for a new trial was made, and the court below granted the motion unless plaintiffs would remit and waive $2,000 of the amount of the verdict, which they accordingly did, and the motion was then denied. Judgment was thereupon entered in favor of plaintiffs. This appeal is from the judgment and order denying a new trial.

1. It is argued in appellant's brief that the verdict is not sustained by a preponderance of testimony, and in the brief it is said: "The record in this case discloses that the testimony is conflicting on every important issue of fact." It has been a rule of this court, so long settled that it should now be regarded as elementary, that it will not interfere with or set aside the verdict of a jury when there is a substantial conflict in the evidence. The trial court has the power to do so, and should in all proper cases exercise its discretion in reviewing the evidence, to the end that substantial justice may be done. In this case the court below, in the exercise of such discretion, modified the verdict, and, as it now stands supported by evidence on every important issue, we cannot, under the rule, disturb it.

2. Counsel for appellant contends that the court erred in refusing to give, at his request, two instructions,—the first being to the effect that, if the jury believed from the evidence that the plaintiff in her deposition willfully swore falsely in regard to any material fact, then the whole of her testimony should be distrusted; and the second that, if any witness for the plaintiff willfully swore falsely in regard to any material fact, the whole of the testimony of such witness should be looked upon with distrust and suspicion. We think both the instructions were properly refused. Our Code lays down a well-known rule of evidence (Code Civ. Proc. § 2061, subd. 3), "that a witness false in one part of his testimony is to be distrusted in others," and this rule applies to all witnesses, whether for plaintiff or defendant. If the rule had been asked for as given in the Code, and as applying to all witnesses, whether for plaintiff or defendant, no doubt it would have been given, and, if the court had refused the instruction when so requested, we would certainly hold such refusal to be error. But we do not think that the attention of the jury should be called to the rule as applying to one of the parties and not to the other, or as applying to the witnesses for the plaintiff and not to the witnesses for the defendant. If the instructions had been given, the jury might well infer that the rule applied only to the plaintiffs and their witnesses, and not to the defendant or to his witnesses. Counsel for defendant evidently desired to create this impression upon the jury, or else they would have asked for the general rule. If one of the parties to litigation, either plaintiff or defendant, can be singled out, and an abstract rule of evidence applied to him, or if the witnesses for plaintiff or defendant can be singled out as a class, and the rule applied to them, it could, upon the same principle, be applied to any one witness to the exclusion of others. Suppose that in this case the defendant claimed and strongly urged to the jury that Mrs. Price, one of plaintiffs' witnesses, committed perjury, and was unworthy of belief; can any one doubt for a moment that an instruction to the effect that, if the jury believed that Mrs. Price willfully swore falsely as to any material fact, the whole of her testimony should be distrusted, would not tend to create a suspicion in the minds of the jury that the court believed Mrs. Price swore falsely? A proposition of law laying down a rule of evidence should be given in general terms, and not stated as being applicable to one certain witness, or one certain class of witnesses. In Jones, Ev. § 905, in speaking of the rule in question, it is said: "It is error for the judge in his instruction to the jury to single out a particular witness, and to direct such cautionary instructions against his testimony, as such a course would tend to convey to the jury the impression that the particular witness is disbelieved by the judge." In Waters v. People (Ill. Sup.) 50 N. E. 148, the court charged the jury as follows: "If you believe that any witness for the defense has willfully and knowingly sworn falsely as to any material fact in issue, then you have a right to disregard his entire testimony, except where it is corroborated by other credible evidence in the case." The instruction was held to be error, and the court said: "This instruction calls attention of the jury alone to the testimony of the witnesses for the defense. It is the duty of the jury to consider the testimony of all the witnesses, and if any witness has willfully and knowingly testified falsely, whether for the prosecution or for the defense, the jury had the right to reject the testimony of such witness, unless sustained by other credible evidence." In Wastl v. Railway Co. (Mont.) 42 Pac. 772, the court below had designated three witnesses for plaintiff by name, and told the jury "that, if they believed these three witnesses had willfully sworn falsely to any material matter or thing, they were at liberty to disregard their entire testimony," etc. The instruction was held to be error, and in the opinion it is said: "It is a rule applicable alike to civil and criminal cases that it is error for the judge directly or inferentially to express an opinion to the jury or in their hearing as to the credibility of a particular witness or as to the weight that should be attached to his testimony." To the same effect are 2 Thomp. Trials, § 2421; Ott v. Oyer's Ex'x, 106 Pa. St. 6; State v. Stout, 31 Mo. 406; Davidson v. Wallingford (Tex. Sup.) 32 S. W. 1030;

Pennsylvania Co. v. Versten, 140 Ill. 637, 30 N. E. 540. The case of O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930, is not in conflict with what has been said. The apparent approval of the instruction offered in that case may be regarded as obiter dictum. The court held that the court below properly refused the instruction because the court, in refusing it, charged the jury in the language of the statute.

3. The court refused to give an instruction requested by defendant, to the effect that, if the jury should find that any evidence has been willfully suppressed by plaintiffs, they should presume that such evidence would be adverse to them if produced; and another to the effect that, if either party has produced inferior evidence where it is in the power of such party to produce higher evidence, then the jury must presume that such higher evidence, if produced, would be adverse to that party. There is nothing in the record to show that plaintiffs produced inferior evidence when it was in their power to produce evidence of a higher degree, and hence the second part of the instruction was not applicable, as there was no testimony to which it might be applied, and there is no evidence in the record that the plaintiffs willfully suppressed any testimony, unless the objection to the evidence of Dr. Cates by plaintiffs was the suppression of testimony. Dr. Cates had been called in professionally, and made an examination of the plaintiff, Rebecca Thomas. He was called by defendant as a witness, and asked concerning matters that came to him professionally as a physician, and, upon plaintiffs' objection, the evidence was excluded, under subdivision 4, § 1881, Code Civ. Proc., which reads as follows: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." It is conceded that the evidence was properly excluded under the above provision of our statute, but it is claimed that the instruction should have been given so that the jury might have applied it to the testimony so excluded. To this doctrine we cannot accede. It certainly is not the policy of the law to exclude certain testimony, and at the same time to raise a presumption prejudicial to the party at whose instance it was excluded. A defendant in a criminal case cannot be called as a witness against his will, and, if he does not see fit to become a witness in his own behalf, the law does not allow this to create any presumption against him. In re Carpenter's Estate, 94 Cal. 418, 29 Pac. 1105, the court below instructed the jury "that it is a presumption of law that evidence willfully suppressed would be adverse if produced," and it was held error. It was said the instruction from the record could have applied only to the testimony of one Dr. Stockton, to whose evidence proper objection was made, and the objection sustained. In discussing the matter, this court said: "This was not a suppression of evidence, and it would be strange that the court, having decided that the evidence was not admissible, should nevertheless instruct the jury that the party offering it should have the benefit of a presumption that it was favorable, and that the other party, because he made a legal and proper objection, should thereby lay his case under the suspicion that he had been guilty of suppressing testimony. The instruction would naturally have an injurious effect."

4. It is said that it was error to refuse defendant's instruction: "Plaintiffs, in order to recover in this action, must convince you to a moral certainty that the defendant has been guilty of some unlawful act or negligence by which plaintiffs have been damaged." If we concede that the instruction is correct, it is fully covered by other instructions. The jury, at the defendant's request, were told "that no verdict could be found against the defendant unless by wrongful act he injured the plaintiff Rebecca Thomas, and that every fact or circumstance that the plaintiffs have failed to prove to the satisfaction of the jury by a preponderance of testimony must be resolved in favor of the defendant."

5. It is said the rule of damages is incorrectly stated in the sixth instruction, given at plaintiffs' request. The court, after giving the rule as to the detriment proximately caused by the act of defendant, said: "This will include compensation for the pain resulting from the corporal hurt, if it produced pain; for mental suffering, if any, naturally resulting to plaintiff Rebecca Thomas, from the injury or wrong, if any you find; for wounded sensibility or affection, and for sense of wrong and insult, by reason of the malice or oppression of the wrongdoer, if you find he was guilty of malice or oppression." We think the instruction did not mislead the jury, and that it substantially stated the rule correctly. 3 Suth. Dam. p. 711; Civ. Code, § 3283; Sloane v. Railway Co., 111 Cal. 678, 44 Pac. 320.

It is argued by appellant that the words, "wounded sensibility or affection," mean that plaintiffs should have redress for the loss of their anticipated offspring. We do not think the words, when interpreted in connection with their context, have any such meaning. The jury were told in another part of the charge, and at defendant's request: "Even if you should find that the defendant caused a miscarriage of plaintiff Rebecca Thomas, the death of the fœtus, or unborn child, cannot be included as an element of injury to the plaintiffs for which they can recover any damages of defendant." The whole charge should be taken together as the law of the case, and, if it fairly and clearly states the law, it is not ground for reversal if there are verbal inaccuracies in the charge, or that isolated sentences and phrases are open to just criticism, but it is sufficient that the charge, regarded in its entirety, shows no substantial error. People v. Gibson, 106 Cal. 458, 39 Pac. 864.

6. It is finally claimed that it was error to give plaintiffs' eighth instruction, which reads as follows: "If, under the law as given in charge of the court and the facts as they appear in evidence, the jury shall find that defendant wrongfully inflicted injuries upon the person of plaintiff Rebecca Thomas, and that she suffered pain in consequence thereof, and that she was at the time pregnant with child, and the injury caused her to have a miscarriage, and that her health has been impaired by reason thereof, or if you find that any of said alleged facts have been proven, the amount of damages to which the plaintiffs are entitled is such sum as, in view of all the facts and circumstances of the case, shall appear to the jury reasonable and just: provided, however, that the jury cannot find any greater amount of damages than is alleged in the complaint." It is said that this instruction is vicious, because it enumerates several things, either of which, if proven, under the instruction, would entitle plaintiffs to recover. We do not think the instruction complained of is susceptible of such interpretation. The jury are told that if they shall find that defendant wrongfully inflicted injuries, etc., and that she suffered pain in consequence thereof (of such injuries), and that she was at the time (of such injuries) pregnant with child, and the injury (wrongful) caused her to have a miscarriage, and that her health has been impaired by reason thereof (of such wrongful injuries), or if any of said alleged facts, etc., have been proven, then the amount of damages, etc. It was only in the event the jury should find that the injuries were wrongfully inflicted that it could make any estimate of damages whatever. The instructions, taken in connection with the other instructions, could not have misled the jury. We find no error in the record, and advise that the judgment and order be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(126 Cal. 57)

HOUGHTON et al. v. TIBBETS et al.

(L. A. 482.)[1]

(Supreme Court of California. Sept. 13, 1899.)

NAMES—IDENTITY OF DEFENDANT—APPEAL—DEFAULT JUDGMENT—JURISDICTION—MORTGAGE FORECLOSURE.

1. In an action against William T. C. and others, where the affidavit of service filed shows service on "W. F. C.," and the judgment by defendant recites that William T. C. was "regularly served," it will not be presumed that "W. F. C." is the same person as William T. C., in the absence of any other evidence in the record showing that fact, although there is only one defendant named C.

2. A judgment by default will be reversed on appeal, where there is no evidence in the record showing that the lower court had jurisdiction of the person against whom it was rendered, except the recitals contained in the judgment.

3. Under Code Civ. Proc. § 442, providing that "the cross complaint must be served upon the parties affected thereby," a judgment by default, granting the relief asked in a cross complaint in an action to foreclose a mortgage, will be reversed on appeal, so far as it affects a party not served with such complaint, although it is not alleged therein that he claims any interest in the premises.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county.

Action by James F. Houghton and others against Luther C. Tibbets and William T. Curtis and others. From a judgment for plaintiffs, the defendant William T. Curtis appeals. Reversed as to defendant Curtis.

Wm. Peck and Wm. J. Hunsaker, for appellant. Rolfe & Rolfe, P. S. Castleman, H. C. Hubbard, and Perris & Allison, for respondents.

CHIPMAN, C. Action to foreclose a mortgage. Defendants Lewis Jacobs and Lewis Meyerstein, partners as Bank of San Bernardino, appeared, and filed a cross complaint against all the other defendants in the action, whereby they sought to foreclose a mortgage against defendants Tibbets and wife. Appellant William T. Curtis was named as a party defendant in the cross complaint. The only service of the complaint upon Curtis, as shown by the record, was proved by affidavit, in which it is stated that affiant "personally served the same on W. F. Curtis, one of the defendants named in said action." There is but one defendant of the name of Curtis. Default was entered against W. F. Curtis. The judgment recites as follows: "William T. Curtis having been regularly served with process, and time for answering having expired, and they [referring to all defaulting defendants] not having answered, but made default, and the findings and decision of the court having been made and filed: Now, therefore, the judgment of the court is," etc. The cross complaint is against the plaintiffs and against William T. Curtis, among other defendants; but there is no evidence of its service upon Curtis, and no recital in the findings or judgment that it was served upon him. The judgment forecloses the mortgage of plaintiffs and the mortgage set out by the cross complainants, and directs the sale of all the mortgaged property. Defendant Curtis appeals from the judgment.

There is no evidence in the record that W. F. Curtis and William T. Curtis are the same person, except as it may be inferred from the foregoing. Appellant claims that the person sued and the person served are not the same person, for prima facie two different names designate two different persons.

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[1] Rehearing denied October 13, 1899.

In support of the claim, McNally v. Mott, 3 Cal. 235, and Sutter v. Cox, 6 Cal. 415, are cited. In the latter of these cases one of these defendants was sued by the name of John Cox. Service was returned upon James Cox, and the judgment was against J. Cox, and Cox appealed. The court said: "This is error, unless there was something in the record to show that the person served was the person sued." The judgment was reversed as to Cox, and affirmed as to the defendants. Assuming—and, we think, correctly—that, if the return had shown service upon W. T. Curtis, it would have been sufficient, respondent invokes the rule that the variance in the middle initial is immaterial. The authorities so hold generally as to the middle initial, but we understand the rule to be otherwise where the Christian name of the person is not given, but is designated merely by initials; and it was so held in the recent case of State v. Higgins, 60 Minn. 1, 61 N. W. 816. The Christian names of Higgins and his wife commenced with the same initial,—his name being Marion F. and her name Martha J. He had entered into a contract by the name of M. F., and was charged with having fraudulently changed the middle initial from F. to J., so as to make it the contract of his wife. The question was whether the middle initial was a material part of the name. The court said: "The middle name or initial is material where it appears to be material. Thus it is material when it appears that, with the exception of the middle name or initial, two persons have each the same name, and can be distinguished by the middle names or initial of each. It seems to us that it appears on its face that the middle letter or initial is material when only the initial of the first name is given. In the present case the first name is not given; only its initial. The name was written 'M. F. Higgins' in the body of the contract and in the signature. No one would understand 'M. J. Higgins' to mean the same person. In speaking of a man it is often customary, among his friends and acquaintances, to call him by his first and last name, omitting his middle name or initial. Thus 'Marion F. Higgins' might well be known as 'Marion Higgins.' But there is no such well-understood custom when the first name is not given, but merely his initial. Thus 'M. F. Higgins' would not be known as 'M. Higgins.' When the initials alone are given, it is not customary to drop the second initial, but it is almost invariably the custom to give both initials." With this view of the rule we concur. We do not think that W. F. Curtis can be presumed to be the same person as William T. Curtis. But respondent contends that, if there is no evidence of service upon Curtis, except as found in the judgment, we must, in support thereof, presume that he was duly served. The point is that, if there is no evidence of service upon William T. Curtis, the recital in the judgment that he was served is sufficient to confer jurisdiction. This we understand to be the rule upon collateral attack (Freem. Judgm. § 130, and cases cited); but when, from the whole record, it appears, even upon such attack, to be untrue, or when the record discloses the evidence upon which the recital was based, and such evidence overthrows, rather than supports, the recital, the recital in the judgment will be disregarded (Id.). When, however, there is a direct attack by appeal, as is the case here, it is requisite that the record should show jurisdiction of the person against whom the judgment was rendered. And, as was said in McKinlay v. Tuttle, 42 Cal. 570: "In determining that question, recitals which may be found in the judgment cannot be regarded, for the question is whether the record sustains the judgment. Such recitals, therefore, will not be accepted as a substitute for the summons and the proof of service; and, indeed, it would be as illogical so to do as to receive such recitals in the stead of the allegations of the pleadings." See, also, Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Yolo Co. v. Knight, 70 Cal. 431, 11 Pac. 662.

2. Appellant complains that the judgment granting the relief asked in the cross complaint was unauthorized and erroneous as to him, because it was not served upon him. There is no recital in the judgment, and no evidence in the record that it was served.

The cross complainants ask that all the defendants and all persons claiming under them "be barred and foreclosed of all rights, claim, or equity of redemption in said premises," etc. Appellant was entitled to service of the cross complaint, and to answer or demur thereto. Section 442, Code Civ. Proc., provides that "the cross complaint must be served upon the parties affected thereby." Society v. Fella, 54 Cal. 598; White v. Patton, 87 Cal. 151, 25 Pac. 270; Society v. Clarke, 110 Cal. 27, 42 Pac. 425. It is claimed by respondent that the cross complaint does not allege that defendant Curtis claimed any interest in the premises. Still it appears from the judgment that he was served with process, and the cross complaint does ask some affirmative relief against him. The judgment appears to rest upon both complaint and cross complaint, and the complaint alleges that Curtis claims some interest in the mortgaged property, and that such interest is subject to plaintiffs' mortgage. The judgment would certainly be effectual to foreclose any equity of redemption which Curtis may have if allowed to stand. It is advised that the judgment, so far as it affects the defendant Curtis, be reversed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment, so far as it affects the defendant Curtis, is reversed.

126 Cal. 43

FENTON v. EDWARDS et al. (VON WINDHEIM, Intervener. L. A. 526).

(Supreme Court of California. Sept. 11, 1899.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—FOREIGN ASSIGNMENT—TITLE TO PROPERTY—NOTICE OF ASSIGNMENT TO DEBTOR—VALIDITY OF FOREIGN ASSIGNMENT.

1. A voluntary assignment for the benefit of creditors, made in Illinois by a Minnesota corporation doing business in the former state, vests the personal property of the corporation in the assignee, wherever situate, so that a debt owing to the corporation by a resident of California cannot be garnished after the assignment at the suit of a Nebraska creditor.

2. Where a debtor was garnished after his creditor had made a voluntary assignment for the benefit of creditors, the mere fact that the debtor did not receive notice of the assignment until after he was garnished is immaterial, where he received notice in time to avail himself of it, in discharge of the garnishment proceedings.

3. It will be presumed that an assignment of a Minnesota corporation doing business in Illinois was made in Illinois, where it is shown that the assignment is in conformity with the laws of the latter state, and that the trust is being administered by the courts of that state.

4. An assignment for the benefit of creditors, valid by the laws of the state where made, will be enforced by the courts of another state, though it does not conform to the laws of such state, where it does not purport to transfer property situate in such state.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by W. T. Fenton, as assignee, against Edwards & Johnson, to recover a debt due to plaintiff's insolvent. Emma Von Windheim intervened in the action, and garnished defendants on a claim owned by her against the insolvent. From a judgment in favor of plaintiff, intervener appealed. Affirmed.

O. P. Wideman, M. W. Conklin, and J. P. Jones, for appellant. Anderson & Anderson, for respondents.

COOPER, C. This case was submitted in the court below upon an agreed statement of facts. Judgment was thereupon entered in favor of plaintiff, and this appeal is by the intervener from the judgment, and comes here upon the judgment roll. The agreed statement of facts, which may here be treated as the findings, shows, in substance, as follows: At all times mentioned in the said stipulation the Northrup-Braslan-Goodwin Company was a corporation, organized under the laws of Minnesota, doing business in Minneapolis and in Chicago, Ill. On May 28, 1896, the said corporation made a general assignment for the benefit of its creditors to plaintiff, who is a resident of the state of Illinois, which assignment purported to convey to the plaintiff, as assignee, all the property, both real and personal, of the said corporation, wheresoever situate. The said assignment was made in conformity with the voluntary assignment laws of the state of Illinois. The plaintiff duly qualified as such assignee, filed the proper bond in the office of the clerk of the county court of Cook county, Ill., and ever since has been the assignee of said corporation, acting under the direction of said county court. It does not appear from the stipulation whether the assignment was executed in the state of Minnesota or the state of Illinois. On said last-named date the defendants were indebted to said corporation in the sum of $330.62, which said sum is the subject of controversy in this action. At the time of making the said assignment, and prior thereto, the said corporation was, and still is, indebted to the intervener, who was and is a citizen of the state of Nebraska, in the sum of $1,000. On the 17th day of July, 1896, after proceedings duly commenced by the intervener in the superior court of Los Angeles county, state of California, against said corporation, a writ of attachment was duly issued and served upon the defendants, by which it was attempted to levy upon and garnish the amount so due the corporation by the defendants. After the said writ was served upon defendants, the plaintiff made demand upon them for the payment to him as assignee of the amount owing by them to said corporation. Defendants admit the indebtedness, but desire the court to determine to whom it shall be paid. The only issue to be determined here is whether the indebtedness due by defendants to the corporation passed to plaintiff by said assignment. If it did so pass, then at the time of the levy of the said writ the defendants were not indebted to said corporation, but to plaintiff as such assignee for the benefit of creditors. There is no question here as to the rights of any citizen of this state or of property situate within this state. The chose in action due from defendants to the corporation has no situs in the state of California, but must follow the person of the owner, and was therefore, in contemplation of law, situate in the state of Minnesota at the time of the said assignment. Guillander v. Howell, 35 N. Y. 662; Burrill, Assignm. (6th Ed.) § 282. The above proposition is conceded by appellant's counsel. The stipulation of facts shows that the assignment "was made in conformity with the voluntary assignment laws of the state of Illinois," and that the laws of Minnesota and Illinois shall be considered before the court in determining the question in controversy. The Revised Statutes of Illinois provide that any debtor may make a voluntary assignment of his property for the benefit of his creditors. Chapter 10a, § 1. The assignment, therefore, having been made to a resident of Chicago, in which place the corporation was doing business, under the laws of Illinois, and the assignee having qualified and filed his bond with the county clerk of Cook county, where he is now acting under the direction of the county court of said county, and the voluntary assignment law of Illinois by its terms applying to assignments made in the state of Illinois, we think the assignment was valid, and conveyed all the property of the corporation to the plaintiff, including the chose in action due from defendants to the corporation. It is the rule of all the states of the Union that a contract valid in the place where it is made is valid everywhere. 2 Pars. Cont. p. 570; Burrill, Assignm. § 275; Story, Confl. Laws, §§ 376–383; Guillander v. Howell, 35 N. Y. 657. Certain exceptions are stated in the books in cases where a contract or sale affects property situate in a different state from the one in which the sale is made, or the revenue laws of another state, or if it conflicts with the interests of another state or its citizens. In Burrill on Assignments (section 275), the rule is thus stated: "With regard to all contracts of which the subject-matter is personal property, it may be laid down as a broad general proposition, subject, however, to numerous qualifications, that their validity is to be tested by the law of the place where the contract is made. If valid there, they will be everywhere sustained, and foreign tribunals, on principles of international and interstate comity, will, in determining their force and sufficiency, regard them in the light of the law where they were made. On this principle, a voluntary assignment in one state valid by the laws of that state would operate to convey personal property (not already subject to liens) in every state where it might be found." In Story on Conflict of Laws (section 423a), the author, in discussing the rule that sales and contracts in relation to personal property are to be construed according to the law of the domicile of the owner or the place of the contract, says: "Similar rules will govern in cases of voluntary assignments by debtors and of involuntary assignments under the bankrupt laws of a state. In each case the lex loci of the assignment or the bankruptcy will ordinarily form the basis of the priorities and privileges attaching to his movable property, and will regulate the distribution thereof among his creditors, at least if that is the place of his domicile and of the situs of the property." In the case of Means v. Hapgood, 19 Pick. 105, it was held that an assignment made in the state of Maine by a citizen thereof to certain of his creditors was valid against a subsequent attachment of the debt of the commonwealth by a citizen thereof. The learned chief justice, Shaw, in the opinion said: "This is founded upon the general principle that an owner has the disposing power over property which is recognized by all civilized, and especially by all commercial, nations, to transfer his property for a good and valuable consideration, and the general disposition of all friendly governments to give effect to such contracts, when not opposed by some great consideration of public policy or manifestly injurious to their own citizens. A fortiori is this true of the several states of the American Union, who, though foreign for some purposes, are united for many others." In Campbell v. Iron Co. (Colo. Sup.; filed June 17, 1885) 7 Pac. 293, it is said: "It may be considered a settled doctrine that a voluntary assignment, which is valid in the state where the owner resides, will be held to pass personal property included, the situs of which is in another state. It is said that while 'an involuntary transfer of movable property abroad, by process at home, does not devest the title in prejudice of creditors domiciled at the place of the actual situs, a voluntary transfer by the act of the owner devests it everywhere.' This is in perfect harmony with the principle that, while the 'lex loci contractus determines the validity of the contract, the lex fori controls the remedy.' Speed v. May, 17 Pa. St. 91, citing Milne v. Moreton, 6 Bin. 360, and other cases. See, also, Dehon v. Foster, 4 Allen, 545, and cases cited." In Caskie v. Webster, 2 Wall. Jr. 131, Fed. Cas. No. 2,500, it was held that a general voluntary assignment valid by the laws of one of the United States, though assumed to be void if it had been made in another state, will carry property in that other against a subsequent attaching creditor there. In the opinion it is said: "A debt is a mere incorporeal right. It has no situs, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the laws of his domicile, whether such assignment be called legal or equitable, will operate as a transfer of the debt which should be regarded in all places." In the case of Law v. Mills, 18 Pa. St. 185, Joy and Webster made a general assignment in the state of New York on November 17, 1849, for the benefit of their creditors. At the time of the assignment they had personal property in the state of Pennsylvania, which was on November 20, 1849, levied upon by writ on a foreign judgment. It was held that the validity of the assignment was to be determined by the place of its execution, and, being valid under the laws of New York, it conveyed personal property situate in Pennsylvania. In Schuler v. Israel, 27 Fed. 851, it was held that a general assignment for the benefit of creditors valid in Texas, where it was executed, would be held valid in Missouri, unless it conflicted with the rights of resident creditors. In a note to the case last cited it is said: "A voluntary general assignment for the benefit of creditors made in another state, and valid by its laws, will be recognized as valid and as effectually transferring personal property wherever the same may be situated. In re Page-Sexsmith Lumber Co. (Minn.) 16 N. W. 700; Butler v. Wendell (Mich.) 23 N. W. 460." The general rule is that a voluntary assignment of personal property, valid at the place where it is made, is valid everywhere and wherever the property may be situated, unless such transfer interferes with the domestic laws, policy, or rights of the citizens of the state in which the property is situate. Burrill, Assignm. (6th Ed.) p. 359, and cases cited in note 5. It follows that the assignment conveyed the property to plaintiff, and that at the time the attachment was served the defendants were not indebted to the corporation, but to its assignee.

The fact that notice of the assignment was not given to defendants before the attachment was served upon them is immaterial. If the debtor receives notice of the assignment pendente lite in time to avail himself of it in discharge of the suit against him, this will be sufficient. Story, Confl. Laws, § 396, and cases cited.

It is claimed that, in the absence of any statement in the stipulation as to where the assignment was made, we must presume that it was made in Minnesota. We think the presumption from the facts, as stated in the stipulation, is that it was made in Illinois. The laws of Illinois evidently apply to assignments made in the state, and the stipulation shows that the assignment was in conformity with the laws of the state. The assignee resided in Chicago, where the corporation was doing business, and is now acting under the directions of the county court of Cook county. The presumption is that the assignment was valid, that the law has been obeyed, and that the ordinary course of business has been pursued. Code Civ. Proc. § 1963.

It is contended that the assignment is void because it does not comply with title 3 of division 4 of the Civil Code of this state, providing for assignments for the benefit of creditors. We think the provisions of the Civil Code referred to apply to assignments of property situate in the state of California. This is apparent by section 3451, which, among other things, provides: "The provisions of this title do not prevent a person residing in another state or country from making there, in good faith, and without intent to evade the laws of this state, a transfer of property situated within it; but such person cannot make a general assignment of property situated in this state for the satisfaction of all his creditors, except as in this title provided." The section ex industria provides that a transfer of property by a resident of another state, made in good faith, of property situate within this state, will be treated here as valid, except that a general assignment for the benefit of creditors of property situate in this state cannot be made. As there was no attempted transfer of any property claimed to be in this state by the assignment, the rule of section 3451 cannot be applied. It is true that the section states that it is not intended to prevent a resident of another state from disposing of or transferring property situate within this state, except that a general assignment of such property cannot be made except as in the title provided; but this only strengthens the view we have already expressed, that it was not intended to interfere with any assignment made by a party residing in another state of property in such other state. It is claimed by counsel for intervener that the first part of section 3451 refers to property situated in another state. If so, the section should read: "The provisions of this title do not prevent a person residing in another state or country from making there, in good faith, and without intent to evade the laws of this state, a transfer of property situated within such other state or country." We certainly cannot think the legislature believed that the provisions of said title without the portions quoted would have prevented a person in another state from making there a transfer of property situated within such other state. If so, every provision of each of our Codes should contain such exception. The laws of this state, in relation to assignments for the benefit of creditors, refer to all persons and property within its jurisdiction, but not to persons and property in a foreign jurisdiction, and in relation to an assignment made in such jurisdiction in a case where no rights of any of its citizens are involved. We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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6 Cal. Unrep. 326

MORE v. FINGER et al. (L. A. 548.)

(Supreme Court of California. Sept. 11, 1899.)

REPLEVIN—NEGOTIABLE PAPER—TRANSFER WITHOUT INDORSEMENT—EVIDENCE—CONSPIRACY.

1. Where defendants obtained possession of a note from one whom they knew had parted with his title thereto, plaintiff is entitled to recover possession thereof, without restoring to defendants any amount which they may have paid the pledgee of the note in order that they might fraudulently gain possession of same.

2. Evidence that defendants were mutually engaged in the accomplishment of the common purpose of obtaining possession of a note, and did obtain possession of it by a deal made with plaintiff's husband, who they knew had parted with all title to the note, and while he was intoxicated, is sufficient to support a verdict in favor of plaintiff.

3. Circumstantial evidence tending to prove a conspiracy is properly admissible, with the qualification that if a conspiracy is not shown such evidence may be stricken out on motion.

4. Receipts indorsed on a promissory note, and signed by the payee, do not make the holder of the note the indorsee thereof, within the meaning of Civ. Code, § 3124, providing that the indorsee of a negotiable instrument, in due course, acquires an absolute title thereto.

5. An instruction that if the jury believe that there was known, at the time of the transfer of a note, facts sufficient to arouse the suspicions of an ordinarily prudent person, then the purchaser of the note cannot defeat the title of the true owner, is immaterial, where it appears, without conflict, that the parties so purchasing the note are not indorsees of the note, and therefore received no better title than the assignor had.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county.

Action to recover possession of a promissory note by Louise J. More against H. F. Finger, E. F. Rogers, Thomas R. More, and

Otto Kaeding. From a judgment for plaintiff, defendants Finger and Rogers appeal. Affirmed.

C. A. Storke, for appellants. Boyce & Taggart and Richards & Carrier, for respondent.

GRAY, C. This is an action of claim and delivery. The plaintiff had judgment, and defendants Finger and Rogers appeal from the same, and also from an order denying them a new trial. The amended complaint sets out the following facts: Plaintiff is the wife of Wallace H. More. On the 17th of April, 1894, Thomas R. More executed to his brother, Wallace H. More, his promissory note for $3,500, due two years after date, and thereafter paid $500 on said note. That thereafter said Wallace borrowed from defendant Kaeding $25, giving his note therefor, and delivered to Kaeding the Thomas R. More note as collateral security for said $25. That thereafter, on December 3, 1894, the plaintiff and her husband borrowed $15 from Kaeding, gave their notes for it, and agreed that the said Thomas R. More note should be held as collateral security therefor. That thereafter, on December 12, 1894, Wallace H. More gave and assigned, by an instrument in writing, the said Thomas R. More note to the plaintiff, and that plaintiff since "has been, and now is, the true and lawful owner of said promissory note, as her sole and separate property." That after notice to the defendants, and with full knowledge on their part of the said assignment to plaintiff by her husband, the defendants conspired and confederated to cheat and defraud the plaintiff out of said note; and, in pursuance of such conspiracy, the brother of Wallace, Thomas R. More, by certain tricks, separated her husband from plaintiff, and plied him with liquor until he was so drunk that he did not know what he was about, and while he was in that condition procured a transfer and assignment of the note in controversy from him to one of their number in exchange for about $290 in money, a duebill for $100, and a pretended conveyance of a piece of property of little or no value, each and all of the defendants then and there well knowing that the said note was the sole and separate property of plaintiff. The value of the note is then alleged, and plaintiff prays judgment for the return of the same to her, or the value thereof, in case a return cannot be had.

The facts set forth in this amended complaint show that the plaintiff has a good cause of action against the defendants in claim and delivery, and it is not open to the objection that two causes of action have been improperly joined therein. Nor is it amenable to any of the special objections set forth in the demurrer to it interposed by the appellants and referred to in their brief. That the amended complaint does not allege a payment or an offer to pay the amounts for which the note was pledged to the defendant Kaeding is not an objection thereto available to the appellants. Kaeding has not appealed, nor did he demur to the amended complaint.

The appellants having wrongfully acquired possession of plaintiff's property by a deal with one who they knew had parted with his title thereto, as against them plaintiff was entitled to the possession thereof without restoring to them the amount which they had voluntarily paid to the pledgee of the note, that they might, for the purpose of defrauding plaintiff, gain possession of the same. After he had transferred and surrendered the note, Kaeding had no further right to or in it.

Appellants stoutly contend that the evidence is insufficient to justify the verdict. To this we cannot consent. The main question in dispute in the case related to whether the appellants and defendants had knowledge of the transfer of the note from Wallace More to the plaintiff at the time they were making their deal with Wallace in reference thereto. The plaintiff testified that she had personally told the defendants Kaeding and More, prior to the surrender thereof to said defendant More, that she was the owner of the note; that her husband had assigned it to her; and though in this she was flatly contradicted by both those defendants, in support of the verdict and the order denying a new trial we must treat her testimony as true and decisive of that question of fact. It appears, further, that all the defendants were engaged in an effort to trade Wallace More out of the note in controversy, and that they were each and all interested and actively engaged in the accomplishment of this common purpose is plainly apparent from the evidence. That they were meeting with some difficulty at the hands of the plaintiff in accomplishing this purpose is also plainly apparent. Rogers, who was confessedly the agent for Finger in the transaction, besides being interested in it on his own account, had been told by the plaintiff that she did not want any real estate for the note, and she had plainly indicated to him that the trade which was finally accomplished with Wallace could not be made with her consent. In view of this direct evidence of notice, to some of the parties interested in the trade, of plaintiff's ownership of the note, and in view of the means and methods that were resorted to to secure the relinquishment of the note without the knowledge and consent of the plaintiff, and all the other circumstances surrounding the transaction, we cannot say that the jury, as well as the learned judge before whom the case was tried, were not warranted in reaching the conclusion that these appellants had knowledge of the previous transfer of the note to plaintiff, but proceeded with their trade with her husband upon the theory that their knowledge could not be made to appear, and they would occupy the position of bona fide purchasers of the note. The appellants, in their answer, admit that Wallace H. More did "transfer, sell, and deliver and assign to them" the note in controversy. If they accepted this assignment and delivery with knowledge of the previous assignment to plaintiff, then they could not shield themselves behind the law merchant, but the trade was a nullity for that reason, and they acquired no right whatever to the possession of the note as against the plaintiff, who was the true owner. The jury in their general verdict impliedly found that appellants took the note with knowledge of plaintiff's rights thereto and were not bona fide purchasers thereof, and, as we have already seen, there was evidence to support such a finding. This view of the case disposes of all the points in appellants' brief as to insufficiency of evidence.

It is objected that the court erred in permitting plaintiff to testify as to the acts and declarations of Thomas R. More, as against appellants, before proof of a conspiracy between these defendants and said Thomas R. More was had. The court, in overruling the objection to this evidence at the trial, said: "Of course, if there is no conspiracy shown, these remarks cannot be taken as against your client,"—meaning, evidently, the remarks of Thomas More sought to be put in evidence. The court doubtless had in mind that the plaintiff proposed to establish the conspiracy by circumstantial evidence,—that is, by showing that the defendants had pursued by their acts the same object, each with the same evident purpose in view,—and this statement of the court was a clear intimation that, if no conspiracy was made to appear, the testimony objected to was not to be considered by the jury as evidence. It was perfectly proper to admit the offered evidence with such qualification, and then, on failure to establish the conspiracy, it could have been stricken out on motion. It has been held that a conspiracy can be established by showing the conduct of the several parties to it evidencing a common purpose. People v. Bentley, 75 Cal. 407, 17 Pac. 436. But it is manifest that this could not be done if the trial court excluded the evidence of the conduct of each on the objection of the others that a conspiracy had not already been shown. The opinion which the court seems to have had at the conclusion of the evidence, that a conspiracy had been shown, was not without evidence to support it.

It is claimed that the court erred in instructing the jury that, "if the jury believe from a preponderance of the evidence that there was in the transaction sufficient to arouse the suspicions of an ordinarily prudent person, then the purchaser of the note cannot defeat the title of the true owner." It is not necessary to determine whether this instruction properly states the rule applicable, where the contention is that a party stands in the position of a bona fide purchaser of a negotiable instrument, for the reason that it appears without conflict that the appellants were not the indorsees of the note in controversy, and consequently not in a position to claim the protection of the law merchant. The note and the indorsements on it were placed in evidence, and they read as follows:

"3,500.00. Santa Barbara, April 17, 1894. For value received, two years after date I promised to pay to Wallace H. More or order the sum of thirty-five hundred dollars ($3,500) in gold coin of the United States of America, with interest thereon in like gold coin at the rate of six per cent. per annum from date until paid. Interest payable annually, and if not so paid to be added to the principal and draw a like rate of interest. Thomas R. More."

Indorsed:

"Received on the principal of the within note the sum of five hundred dollars. April 27, 1894. Wallace H. More."

"Received from Otto Kaeding twenty-five dollars. Wallace H. More."

"Received from Otto Kaeding fifteen dollars. Wallace H. More."

Receipts indorsed on a promissory note, and signed by the payee, do not make the holder of the note the indorsee thereof, within the meaning of section 3124 of the Civil Code. Central Trust Co. v. First Nat. Bank, 101 U. S. 68; McCrum v. Corby, 11 Kan. 464; Hadden v. Rodkey, 17 Kan. 429; Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473; Moore v. Miller, 6 Or. 254; Pickering v. Cording, 92 Ind. 306. The appellants, therefore, received no better title than their assignor, Wallace More, had, and he, having previously assigned the note to his wife, had nothing left to assign. This view of the case not only makes the instruction complained of immaterial and devoid of any injury to appellants, but it also makes the instruction requested by them and refused by the court immaterial, and is at the same time a complete answer to every contention made by them on the theory that they occupy the position of indorsees of the note. The evidence, without conflict, shows that they are not such indorsees. The note was assigned and delivered to them according to the admissions of their answer, but it was never indorsed to them. For these reasons we advise that the judgment and order appealed from be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

126 Cal. 30

YOAKAM v. KINGERY et al. (L. A. 683.)

(Supreme Court of California. Sept. 11, 1899.)

QUIETING TITLE—RIGHT OF ACTION—HUSBAND AND WIFE—AGREEMENTS AS TO PROPERTY—VALIDITY—FINDINGS.

1. An agreement between husband and wife, reciting that all property then standing in the name of either is community property, under

Civ. Code, §§ 158, 159, authorizing husband and wife to alter their legal relations as to property, is sufficient, if properly executed, to transmute the separate estate of either into community property.

2. A finding that husband and wife "agreed" respecting their property, on appeal, will be held to import a valid, and not an invalid, agreement.

3. In an action against an administrator to quiet title to land which defendant had purchased at a foreclosure sale, before he became administrator, to hold in trust, under an agreement between plaintiff and defendant's predecessor, in such proportions as might be determined from their interest in the decree, the findings did not show their respective rights in the decree. *Held*, that the trial court rightly refused to declare that defendant, as administrator, had no interest in the land.

4. A complainant cannot maintain an action to quiet title against one who holds the legal title in trust for him, as Code Civ. Proc. § 738, provides that such action may be brought only against one who claims an interest in realty adverse to complainant.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by George P. Yoakam against Samuel H. Kingery individually, and as administrator of Emily R. Yoakam, deceased, and others, to quiet title to land. From a judgment for defendants, plaintiff appeals. Affirmed as to the land held by defendant Kingery individually, and reversed as to that claimed by him as administrator.

Clarence A. Miller, for appellant. Flint & Barker, for respondents.

BRITT, C. This action, as it is presented on appeal, has for its object the quieting of plaintiff's title to sundry parcels of land situated in the county of Los Angeles. The plaintiff, George P. Yoakam, is the surviving husband of Emily R. Yoakam, who died March 22, 1893; and the main dispute in the case is whether at that time the property involved was community property of plaintiff and his said wife, or was her separate estate. One McKinlay first received special letters of administration of the estate of said deceased, but was superseded in the administration by the defendant Kingery upon the appointment of the latter as administrator with the will annexed in October, 1895. As to one of the parcels of land affected, the action is against Kingery both individually and as administrator aforesaid. As to the others, it is against him as administrator only. In his representative capacity he is sued professedly under section 1582, Code Civ. Proc., as amended in the year 1895, providing that an action to quiet the title to property, or to determine an adverse claim thereon, may be maintained "by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." St. 1895, p. 80. No question is raised as to misjoinder of parties defendant or of causes of action, nor whether the action is within said amendment of section 1582. The case was submitted for decision upon an agreed statement of facts. The court adopted this statement bodily as findings of fact in the case, and made some additional findings, which seem to be chiefly of the character of deductions from the facts stipulated and found. The judgment was that plaintiff take nothing, and that his complaint be dismissed.

1. Among the facts found as aforesaid, it appears that on or about February 10, 1891, said George P. Yoakam and his wife, the said Emily, agreed with each other that all property (with an immaterial exception) "then standing in the name" of either of them was community property, and that thereupon they made divers arrangements between themselves,—not necessary to be detailed here,—founded on the assumption that such agreement was effective. Within the scope of this agreement was a certain lot 15 in the Longstreet tract in the city of Los Angeles, more particularly described in the findings, which lot was conveyed by deed on said February 10, 1891, to Yoakam and wife upon a consideration rendered wholly from the separate property of the husband. Under the amendment to section 164 of the Civil Code then in force (St. 1889, p. 328), the presumption arising upon the face of this deed is that the grantees took the land as tenants in common, each one-half as his or her separate estate; but the court below was of opinion that Mrs. Yoakam took the legal title to her half interest subject to a resulting trust in favor of her husband, because the whole consideration had moved from him; and hence, it seems, the court concluded that plaintiff can have no relief in this action as to the undivided half of the lot standing in the name of his wife, for the reason that, as the holder of but an equity therein, he cannot maintain an action such as the present against the representative of the legal title. This conclusion would probably be correct, but for the agreement aforesaid, that the land was community property, which, if valid, had the effect, upon the death of Mrs. Yoakam, to vest the whole title in her husband, as survivor of the marital community. Civ. Code, § 1401. Husband and wife may, by contract with each other, "alter their legal relations as to property" (Civ. Code, §§ 158, 159); and we see no reason to doubt that the contract of Yoakam and wife was sufficient to transmute the separate estate of either of them into community property, if it was properly executed. Counsel for defendant maintain, however, that such contract rested in parol, whereas a change so radical in the character of the estate in the land could be effected by writing only. But it is to be inferred from the record that the agreement of Yoakam and wife was a written contract and duly executed. The finding is that they "agreed" that the property standing in the name of either of them was community property. In McDonald v. Association, 51 Cal. 210, a finding that a contract to sell real estate had been made was held to

import that it had been made in writing; and the decision in Lewis v. Kelton, 58 Cal. 303, was to very similar effect. We must hold that the finding here of the agreement between plaintiff and his wife means a valid and effectual agreement, not one invalid or void. It follows that said lot 15 became community property, as they intended, and plaintiff is now the owner of the whole thereof absolutely. The title to some other parcels in dispute—lot 24 of block U in West Los Angeles, and lots 53, 54, and 55 of the Kenwood Park tract—is in a situation not materially different from that of said lot 15; and for the reasons stated the plaintiff appears to be the owner of those lots, also.

2. A certain tract, containing 10 acres, was covered by a mortgage held by Yoakam and wife, at the time of the death of the latter, as security for a promissory note payable to them jointly. The consideration for such note appears to have been advanced out of the separate property of Mr. Yoakam. Subsequently Yoakam and McKinlay, the special administrator, obtained a judgment or decree in an action for the foreclosure of said mortgage, under which a sale of the premises was made for the satisfaction of the mortgage debt. At that time Kingery had not been appointed administrator, and he became the nominal purchaser at such sale, and received the sheriff's deed for the property, pursuant to an agreement with McKinlay and Yoakam whereby he (Kingery) undertook to hold the title in trust for Yoakam and McKinlay "in such proportions between them as they may determine, or as may be determined for them by law, based upon their respective interests in the said decree of foreclosure." Both Yoakam and McKinlay as special administrator made various advancements for costs, expenses, and attorney's fees in the suit which resulted in said decree, the amounts of which expenditures seem to be yet unascertained. The findings are in some respects obscure on the subject of this 10-acre piece of land. We have not attempted even an abstract of all of them, but as we understand the terms of the trust on which Kingery, in his individual character, holds the title, the beneficial interest of plaintiff therein is measured by his interest in the decree of foreclosure; but Kingery also, as administrator, has an interest in the decree to the amount, at least, of the expense paid by McKinlay in procuring it. The findings contain no sufficient data to show the extent of their respective rights in said decree, even if such matters could properly be determined in an action of this nature, and the court rightly refused to declare that Kingery, as administrator, has no interest in the land. And, since he holds individually the legal title in trust, plaintiff could not maintain this action against him as trustee in any event. Shanahan v. Crampton, 92 Cal. 9, 28 Pac. 50; McDonald v. McCoy, 121 Cal. 71, 53 Pac. 421. The judgment should be affirmed so far as it concerns the tract of land held by Kingery upon trust in his individual capacity. As to the other lands mentioned, the judgment should be reversed, with directions to the court below to render judgment quieting the title of plaintiff in those lands against all claims of Kingery as administrator.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed, so far as it concerns the tract of land held by Kingery upon trust in his individual capacity. As to the other lands mentioned in said opinion, the judgment is reversed, with directions to the court below to render judgment quieting the title of plaintiff in those lands against all claims of Kingery as administrator.

126 Cal. 54

In re EIKERENKOTTER'S ESTATE. (S. F. 1,610.)

(Supreme Court of California. Sept. 13, 1899.)

GUARDIAN AND WARD—LETTERS—VALIDITY—NOTICE OF HEARING.

1. Code Civ. Proc. § 1747, declaring that, before a court shall appoint a guardian of an infant, it must cause such notice as it deems reasonable to be given to the person having the care and custody of the infant, is mandatory; and without such notice the court has no power to make an appointment.

2. Letters of guardianship of an infant will not be set aside, after six months from their issuance, on the ground that one claiming to have had custody of the infant at the time was not notified of the hearing as required by Code Civ. Proc. § 1747, where failure to give such notice does not affirmatively appear by the record of such proceedings.

Department 1. Appeal from superior court, San Mateo county.

Application by Ioan Smith to set aside guardianship of Catharine H. Eikerenkotter and others, minors. From an order denying the application, petitioner appeals. Affirmed.

I. S. Thompson, for appellant. G. W. Fox and Geo. C. Ross, for respondent.

GAROUTTE, J. This appeal is prosecuted from an order made by the superior court refusing to set aside the letters of guardianship theretofore issued to Julius Eikerenkotter over the person of Catharine H. Eikerenkotter, a minor. The application for the order to set aside was made more than six months after the order of appointment, and, as appears by the application, was based largely upon the fact that petitioner, Ioan Smith, had the custody of the minor at the time the order of appointment was made, and no notice of the hearing was given her. The trial court refused to go into the merits of her application as to Eikerenkotter's incompetency to act as guardian and her competency to so act, but held that the application to set aside the order of his appointment, having been made more than six months after the order was made, should be denied for that reason. The judgment of the trial court is correct, if the order appointing Eikerenkotter guardian be not void upon its face. In other words, if the record discloses that the court had no jurisdiction to make the order of appointment, then the order is void upon its face, and can be attacked at any time. Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; Norton v. Railroad Co., 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452; People v. Temple, 103 Cal. 447, 37 Pac. 414. This is fully apparent, for there can be no statute of limitations which will run against an order or judgment void upon its face. In People v. Temple, supra, and also in later cases, it is held that all applications to set aside orders or judgments not void upon their face must be made within six months after the entry of such order or judgment, and that, too, whether or not the application is made under section 473 of the Code of Civil Procedure.

It follows from the foregoing that this application came too late, unless the order is void upon its face. Among other matters, section 1747 of the Code of Civil Procedure declares, "Before making such appointment the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor." By virtue of this provision of the statute, it is mandatory that the person having the custody of the minor should have notice of the hearing. Such notice is absolutely necessary to give the court jurisdiction of the proceeding, and power to make the order of appointment. But in this case, from an inspection of the record,—which consists of the petition for the appointment,—the consent of the relatives residing in the county, and the order of appointment, we find nothing showing the order of appointment to be void as beyond the power of the court to make. The fact of service, and not the proof of service, gives a court jurisdiction to hear and determine. Here there is nothing in the record to disprove the fact of service of the notice upon the person having the custody of the minor. Lack of jurisdiction must be affirmatively shown by the record. Perchance, some of the consenting relatives to the appointment of Eikerenkotter may have had the custody of the minor at the time. Perchance, Eikerenkotter himself had the custody of the minor upon the day of hearing. Again, as far as the record discloses, the fact may have been that the custody of the minor was in no one at the time the application for appointment was made, and consequently there could be no service of the notice contemplated by the statute. If this application had been made within six months after the order of appointment, then, under the authority of Norton v. Railroad Co., supra, and People v. Temple, the true state of facts could have been shown dehors the record; but, under this application, petitioner is bound to rest her case upon the facts affirmatively disclosed by the record. Upon that state of facts, we cannot say that the court lacked jurisdiction to make the order appointing the guardian. For the foregoing reasons, the order appealed from is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

(6 Cal. Unrep. 341)

PEOPLE v. MATTHEWS. (Cr. 525.)

(Supreme Court of California. Sept. 16, 1899.)

CRIMINAL LAW — HOMICIDE — EVIDENCE — HARMLESS ERROR—INSTRUCTIONS.

1. The admission of evidence not affecting substantial rights of defendant, and not prejudicial to the merits of his defense, is not ground for reversal.

2. Evidence showing that at the time of the murder defendant was sober is not prejudicial to defendant, where he and others have testified to the same effect.

3. An instruction is properly refused which is based upon a state of facts of which there is no evidence.

4. Testimony to the effect that witness, on the night of the homicide, passed a young man on the road; that afterwards she heard a wagon coming rapidly up behind, and soon after the sound ceased, and she heard a pistol shot; that she passed the place next morning, and saw a pool of blood; and that she had recognized a body at the morgue as the body of the young man she had passed on the road,—is material, and properly admitted.

5. Where the defense to homicide is that defendant, a constable, was attempting to arrest deceased, an instruction, "If the jury believe that defendant, when he fired the fatal shot, was lawfully attempting to arrest deceased, and intended to shoot over his head, they will find defendant not guilty," was properly modified to read, "If the jury believe that defendant had reasonable cause to believe, and did believe, that the deceased had committed a felony, and was attempting to arrest deceased, and fired the fatal shot intending to shoot over the defendant's head."

6. An instruction that, "if the jury had any doubt about the lawfulness of the means adopted by defendant to arrest deceased, they should acquit defendant," is properly refused, as being indefinite.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county.

John A. Matthews was convicted of murder, and appeals. Affirmed.

D. W. Burchard and C. L. Witten, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. The defendant was charged with the crime of murder, alleged to have been committed in the felonious killing of one Heinrich Hopken on the 28th day of June, 1898. It appears that defendant was, at the time of the homicide, a constable of Milpitas township, in Santa Clara county. He had been in and around the saloon of one Pancera nearly all the afternoon, and had been drinking. About 8 o'clock or later in the evening defendant was engaged in playing cards with one McCarron and others in the saloon, when Pancera came in and informed the parties in the saloon that if any of them had any articles in their vehicles outside that they did not want stolen they had better go out and see about them. Defendant and McCarron immediately went out to where defendant's horse, attached to a light spring wagon, was tied to a hitching post. Defendant looked into his wagon, and informed McCarron that his whip was missing. The defendant immediately unhitched his horse, got into his wagon, and, with McCarron, started south on the Berryessa road, and after the two had gone about a hundred yards the defendant claimed that he had discovered that his coat was also missing from the wagon. After driving rapidly along the road until they had passed Fourteenth street they overtook deceased, who was walking along the south side of the road, and, as the horse was traveling rapidly, they passed him some 10 or 12 feet, and stopped. No coat or whip was seen in the possession of deceased other than the coat he was wearing, which was not claimed to be the coat of defendant. When defendant came to within 5 or 6 feet of deceased, he addressed him, in substance, "What did you do with that whip?" The deceased said he did not have any whip, and turned and ran; whereupon defendant took out his pistol, and immediately fired, and deceased fell to the ground, some 10 or 12 steps from defendant. The defendant and McCarron immediately went up to deceased, and he was lying on his back, with blood on his face, dead. The jury, by its verdict, found the defendant guilty of manslaughter, and the court sentenced him to a term of five years in San Quentin. He made a motion for a new trial, which was denied, and this appeal is from the judgment and order. The case comes here on a bill of exceptions and the judgment roll.

1. There was no error in admitting the evidence of the witness Cothran. The witness testified that on the evening of the homicide he saw deceased at the house of his brother, E. E. Cothran, 229 Ninth street, and that deceased left about half past 9 o'clock; that he saw the dead body the next morning; and that deceased was between 17 and 18 years of age. There was nothing in the testimony of the witness that could in any way have been prejudicial to defendant. The admission of evidence not affecting the substantial rights of a

defendant, and not appearing by the record to have been prejudicial to the merits of his defense, is no ground for the reversal of a judgment. People v. Clark, 106 Cal. 32, 39 Pac. 53.

2. The witness Jones was allowed, under defendant's objection, to testify that defendant was at the saloon of witness on the morning of June 28th; that he took probably three or four drinks, but was at no time intoxicated, and left about 1 o'clock in the afternoon. While this testimony does not appear to have much to do with the issue, it could not have prejudiced the defendant. He testified in his own behalf that he was perfectly sober, and his counsel proved by McCarron, on his cross-examination, that defendant was not under the influence of liquor at the time of the homicide.

3. In the instructions of the court to the jury it was said, in effect, that a peace officer cannot legally arrest any person for petit larceny without a warrant, when the larceny was not committed in the presence of such officer; and the court refused the thirty-third instruction asked by defendant, to the effect that a peace officer may, without a warrant, arrest a person for a public offense committed in his presence. We think the instruction given by the court stated the law correctly (Pen. Code, § 836; People v. Johnson [Mich.] 48 N. W. 870); and the defendant's requested instruction was properly refused, because there was no evidence that any offense had been committed in the presence of the defendant.

4. The witness Mrs. Thompson was allowed, after objection of defendant's counsel, to testify that, on the night of the homicide, she was on the way home from San Jose, with her husband and sister; that, after 9 o'clock, they passed a young man on the Berryessa road, walking leisurely along smoking a cigar, and that he had no coat or whip, except the coat he was wearing; that, after they passed the young man, they heard a horse and wagon coming up behind them rapidly, and after they had gone some 20 or 30 rods there was a cessation of the sound of the horse and wagon, and they heard a pistol shot; that she passed the place next morning, and saw a pool of blood by the road; and that she saw the body of the boy at the morgue, and recognized it as the body of the young man she had passed in the road. This testimony was material, and was properly admitted.

5. It is said that the court erred in refusing defendant's requested instructions numbered 12, 13, 19, 24, 26, and 35. Counsel have not seen fit, in their brief, to give us the benefit of their reasons as to why the refusal to give the instructions, or either of them, was error; but we have examined them, and we discover no prejudicial error in the refusal to give any of them. The twelfth, while stating a correct proposition of law, was covered fully by other instructions. The thirteenth, as requested, was as follows: "If the jury believe that the defendant, when he fired the fatal shot, was lawfully attempting to arrest deceased, and intended to shoot over the head of deceased, and that such act on the part of defendant was a necessary and proper one for the purpose of inducing the deceased to stop, then they will find the defendant not guilty." While the court refused it as requested, it was given as modified, as follows: "If the jury believe that the defendant had reasonable cause to believe, and did believe, that the deceased had committed a felony, and was attempting to arrest deceased, and fired the fatal shot intending to shoot over the head of deceased, and that in so shooting the defendant did so for the purpose of inducing the deceased to stop, then if you find that such act on the part of defendant was necessary for the purpose of effecting such arrest, then you will find the defendant not guilty." The modification was proper, and was certainly as favorable to defendant as he could expect, or as the law would warrant. The nineteenth request was that if the jury had any doubt about the lawfulness of the means adopted by defendant to arrest the deceased they should acquit the defendant. This instruction was too indefinite in the form in which it was tendered, and would only have tended to confuse the jury. Elsewhere in the charge the jury are told that the prosecution must prove every fact and circumstance necessary to a conviction beyond a reasonable doubt, or they cannot convict the defendant. The twenty-fourth and twenty-sixth requests were fully covered by other instructions given by the court. The thirty-fifth instruction, as requested, was properly refused. It not only states an incorrect proposition of law, but it was properly refused because there was no evidence in the record upon which it could apply. The court very fully and ably stated the law as applied to the evidence in its charge to the jury, and in every part of the charge the rights of defendant were carefully guarded. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(126 Cal. 130)

MACK v. JASTRO et al. (TROWBRIDGE & CO., Intervener. L. A. 539, 545).

(Supreme Court of California. Sept. 16, 1899.)

STATUTES—REPEAL—COUNTIES—ISSUANCE AND SALE OF BONDS—CONTRACT—VOID PROVISION.

1. Where it is apparent that a later statute is revisory of the entire matter of an earlier one, and is designed as a substitute therefor, the later statute will prevail, and the earlier one will be held to have been superseded, though there be no inconsistencies or repugnancies between them.

2. County Government Act 1897 (St. 1897, p. 460, § 25, subd. 13), setting forth a full and complete plan for the issuance of bonds, providing that said bonds shall be sold in the manner prescribed by the board of supervisors, but for not less than par, repeals County Government Act 1893 (St. 1893, p. 353, § 25, subd. 14), providing that the bonds shall be delivered to the county treasurer, and his receipt taken therefor, and he shall sell or exchange the same under the direction of the board of supervisors on the best available terms, and that no sale shall be made except to the highest bidder, after advertising bids for the purchase of the same for not less than three weeks, etc., as by the earlier act the county treasurer stands charged with the duty of selling the bonds after advertising for bids, while by the later act full power in this regard is vested in the board of supervisors.

3. Where a void provision of a contract is severable, it does not invalidate the whole contract.

Department 2. Appeal from superior court, Kern county.

Action by Julius J. Mack against H. A. Jastro and others, composing the board of supervisors of the county of Kern, and Trowbridge & Co., intervener, to enjoin the board of supervisors from carrying out a contract entered into between them and the intervener relative to the sale of refunding bonds of the county. From a judgment in favor of plaintiff, defendants and intervener appeal. Reversed.

Atty. Gen. Ford and Alvin Fay, for appellants. George E. Church and T. M. McNamara, for respondent. Lockhart & Smith, for intervener.

HENSHAW, J. Plaintiff, as a resident and taxpayer of Kern county, brought this action to enjoin the defendants, the board of supervisors of the county, from carrying out a contract entered into between them and the intervener relative to the sale of refunding bonds of the county. The court decreed a perpetual injunction, and from the judgment the defendants and the intervener prosecute separate appeals, which, however, may be considered together.

Before the proposition to issue the refunding bonds in question had been submitted to, and acted upon by, the electors of the county, the supervisors had entered into this contract with Trowbridge & Co., under which the sale and purchase of these bonds was agreed upon. The right and power of the supervisors to dispose of the bonds at all is the principal question here presented. By appellants it is contended that this power is found in the county government act of 1897 (St. 1897, p. 460, § 25, subd. 13), and by the respondent that it is denied to the supervisors, and is vested in the treasurer, under the provisions of the county government act of 1893 (St. 1893, p. 353, § 25, subd. 14). By appellants it is argued that the county government act of 1897 supersedes and repeals the county government act of 1893 in these particulars, while by respondent it is insisted that the provisions of the two acts are not inharmonious; that no express repeal is declared; and that in these particulars, therefore, the two acts should be so construed that all the consistent provisions of both may stand.

We think, however, that a reading of the two sections at once discloses that the legislature in the county government act of 1897 designed and devised a new and complete scheme for the issuance of county bonds, and, while it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two. Frequently these cases arise where the later statute, covering the whole subject-matter, omits or fails to mention certain terms or requirements, found in an earlier, and it is insisted, as here, that those particular provisions of the earlier statute should be held to be still in force. But, as is said by the supreme court of the United States in Murdock v. City of Memphis, 20 Wall. 590, where a like question was presented to the consideration of that tribunal: "It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion. * * * A careful comparison of these two sections can leave no doubt that it was the intention of congress by the latter statute to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitted what was not so intended, because complete in itself, and repealed all other laws on the subject embraced within it. The authorities on this subject are clear and uniform." Upon this same subject, see Pierpont v. Crouch, 10 Cal. 315; City and County of Sacramento v. Bird, 15 Cal. 295; State v. Conkling, 19 Cal. 501; Charnock v. Rose, 70 Cal. 189, 11 Pac. 625; Black, Interp. Laws, p. 116; Sedg. St. & Const. Law, p. 124; Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312; District of Columbia v. Hutton, 143 U. S. 18, 12 Sup. Ct. 369. The facts in the case above quoted and in the one at bar are strictly analogous, and the principle declared is pertinent and decisive. It would unduly and unnecessarily prolong this consideration to set forth the two statutes for purposes of comparison and contrast, but, as has been said, a mere reading of the two will at once disclose that the legislature by the latter formulated a plan for the issuance of bonds full and complete in itself, and therefore a plan which superseded its earlier declaration on the matter. It is not so much a repeal by implication as it is that, the legislature having made a new and complete expression of its will upon the subject, this last expression must prevail, and whatever is excluded therefrom must be ignored.

This discussion has so far proceeded upon the assumption that there is no inconsistency between the two acts upon the question of the right and power to dispose of the bonds, but there is a direct conflict in this particular, and for this further reason the later act must prevail. The act of 1897 provides that "all acts and parts of acts inconsistent with this act are hereby repealed." As to the disposition of the bonds, it is provided "that said bonds shall be sold in the manner prescribed by said board of supervisors, but for not less than par." By the act of 1893 it is provided that the bonds shall be delivered to the county treasurer, and his receipt taken therefor, and he shall sell the same or exchange them, under the direction of the board of supervisors, on the best available terms, etc. And, further, that "no sale shall be made of any such bonds except to the highest bidder, after advertising bids for the purchase of the same for not less than three weeks," etc. By the earlier act it is the county treasurer who stands charged with the duty of selling the bonds after advertising for bids. By the later act full power in this regard is vested in the board of supervisors, the only limitation upon the power being that they shall not sell the bonds for less than par.

The provision in the contract that the bonds shall be payable at Wells, Fargo & Co.'s Bank at San Francisco, Cal., even if it be conceded to be void, is a severable provision, and would not invalidate the whole contract. City of Los Angeles v. Teed, 112 Cal. 319, 329, 44 Pac. 580; Johnson v. Stark Co., 24 Ill. 75; Sherlock v. Village of Winnetka, 68 Ill. 530; Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358. The act of 1897 expressly authorizes the supervisors to cause the bonds to be made payable "at the treasury of the county, or at such place as such board may designate, or both." St. 1897, p. 461. In City of Los Angeles v. Teed, supra, the discussion turned upon the provision making the bonds payable without the state of California and in the state of New York. It was there said that no law authorized the treasurer to go to New York with the money, and that to remit the money to the bank for payment would be to make the bank a depository and agent, within the constitutional inhibition. Const. art. 11, §§ 13, 16. The mere naming of a bank as the place of payment does not, however, constitute the bank the custodian of funds or the agent of either party. Hill v. Place, 48 N. Y. 520. Moreover, it appears that Trowbridge & Co. has waived this provision in the contract as to place of payment. By the contract the supervisors are called upon, as of right they should do, to issue legal bonds. If this particular provision should be void, it would not warrant a finding that the whole contract was void, nor justify the supervisors in refusing to issue bonds omitting the obnoxious provision as to place of payment. The judgment appealed from is reversed, and, as the cause was decided upon the pleadings and papers in the case, it is directed that the trial court enter judgment for defendants and intervener.

We concur: McFARLAND, J.; TEMPLE, J.

125 Cal. 580

BAXTER et al. v. GILBERT et al. (L. A. 505.)

(Supreme Court of California. Sept. 12, 1899.)

In bank. For opinion in department, see 58 Pac. 129.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this case, because I do not think it ought to be finally disposed of here without a decision of the most important question involved,—a decision upon which, if in accordance with the contention of the appellants, would necessarily demand a reversal or important modification of the judgment appealed from. The right of appellants to interfere with the lakes referred to in the opinion of the court is but one of the questions presented in the briefs of counsel, and to my mind much the less important of the two leading propositions upon which he relies. It appears from the record that the lands of the plaintiffs are riparian to the stream upon its lower course near where it empties into Owens river. The stream heads in certain small lakes near the summit of the Sierras, and is fed during the spring and early summer by the melting snows. At such seasons it carries a large amount of water,—much more than the plaintiffs can profitably use. The findings of the superior court show that there is a surplus of water when the river is high, but do not indicate the quantity of that surplus. There is evidence to the effect that it is often very large. Notwithstanding this admitted surplus of water over the needs of the plaintiffs, and the fact that it goes to waste below them, the defendants are absolutely enjoined from diverting to their lands any portion of the stream at any time. The question is thus presented whether a riparian owner upon the lower course of one of our mountain streams can insist, as against an appropriator whose land is within the watershed of the stream, but nonriparian, that the whole stream, in times of flood, when he has no use for the water himself, must come down to him. It may be that this is the riparian doctrine established in this state, but I doubt it; and, at all events, the question, when it is fairly presented, is too important to be ignored.

126 Cal. 61

MANN v. O'SULLIVAN. (S. F. 751.)

(Supreme Court of California. Sept. 13, 1899.)

MASTER AND SERVANT—FELLOW SERVANT—ACTIONS—PLEADING.

1. Under Civ. Code, § 1970, which exonerates an employer from liability for negligence of persons "employed in the same general business," a carpenter engaged in inclosing an elevator shaft within a frame for the owner of a building is a fellow servant of one operating the elevator for such owner.

2. Where a complaint is demurrable because it shows that the plaintiff was injured by the negligence of a fellow servant, such fact need not be pleaded in an answer.

3. In the absence of an express agreement, one employed to repair an elevator is not entitled to warning from the master when the elevator is about to start, where he relies upon a fellow servant, whom he has requested to give such warning.

In bank. Appeal from superior court, city and county of San Francisco.

Action by John Mann against Mary Ann O'Sullivan. There was judgment for defendant, and plaintiff appeals. Affirmed.

Gunnison, Booth & Bartnett, for appellant. Reddy, Campbell & Metson, for respondent.

GAROUTTE, J. This is an action to recover damages for personal injuries. The single question involved is, does the complaint state a cause of action? Defendant was the owner of a certain building, in which she operated and maintained an elevator. "Plaintiff was employed by said defendant to work for her in the capacity of a carpenter, and to perform the work of inclosing the elevator shaft in said premises within a glass frame." While working at this employment, "said defendant, through her servant, agent, and employé, one Emmet Carney, carelessly and negligently, and without any warning or notice * * * to plaintiff, and against his positive instructions not to operate the elevator herein mentioned at any time without notice to him, suddenly operated * * * said elevator * * * from the ground floor, where said elevator was standing, so that said elevator suddenly struck with great force the screening on which plaintiff was working as aforesaid, * * * and that by reason of the gross negligence and carelessness of said defendant in operating said elevator as aforesaid said plaintiff sustained the injuries * * * above mentioned."

The important matter presented by this appeal arises from the solution of the question as to whether or not the plaintiff and Carney, the man operating the elevator, were fellow servants. In other words, these two men being employed by defendant, were they employed "in the same general business"? Section 1970, Civ. Code. It is impossible to declare a rule of law by which all cases presenting this interesting question may be weighed and tested. In that excellent work, the American and English Encyclopædia of Law (volume 7, p. 864), it is said, "In the note will be found every authority, it is believed, determining who are and who are not fellow servants, alphabetically arranged according to the various occupations or employments." Yet, after a careful perusal of that note, we still find the same mist surrounding the question, and the legal atmosphere in no degree clarified. The authorities are widely divergent, and the text writers appear to be unable to agree upon a satisfactory rule by which it may be determined who are fellow servants, or what servants are engaged in a common employment, or, as the statute of this state has it, what servants are employed "in the same general business." Shearman & Redfield, in their work upon Negligence, declare the rule as favorably to the servant as it can be found in any standard work, and that rule is declared in section 236: "Under the generally prevailing rule, fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to injury." Testing this case by the foregoing rule, the conclusion is irresistible that plaintiff, who was employed to repair the elevator shaft, and Carney, the man who was employed to operate the elevator, were servants of defendant engaged in a common employment, or, as our statute has it, engaged "in the same general business." It was plain to the plaintiff when he began work in repairing the elevator shaft that the negligence of Carney would expose him to great danger. He recognized the fact that danger was present with him, for he instructed Carney not to raise the elevator without a notification to him, in order that he might first remove to a place of safety. The conclusion arrived at in many cases rests upon the principle that, the danger from the negligence of another employé being fairly apparent, it should be held that all other employés assume the risk incident to that danger; and this principle forms the foundation of the rule which we have quoted from Shearman & Redfield.

We will notice a few cases where the facts and principle invoked appear to be similar to those here presented. In Besel v. Railroad Co., 70 N. Y. 177, it is held that a car repairer working upon a car was in common employment with the men in charge of a train not connected with the car upon which the repairer was doing the work. To the same effect is Corcoran v. Railroad Co., 126 N. Y. 673, 27 N. E. 1022, and Campbell v. Railroad Co.

(Pa. Sup.) 2 Atl. 489. In Hasty v. Sears, 157 Mass. 123, 31 N. E. 759, a case identical in its facts with the one before us, the court said: "The plaintiff and the elevator boy were both servants of the defendant at the time of the plaintiff's injury, and, as their employment was a common employment, the negligence of the boy in running the car down upon the plaintiff was an obvious risk which the plaintiff assumed, and for which the defendant is not answerable to him. The plaintiff and the boy were both working to secure the successful operation of the elevator,—the plaintiff in repairing it, and the boy in operating the car; and they were forwarding a common enterprise for the benefit of the defendant, and were in a common employment." In Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. 437, it is held that a laborer working upon the railroad track is a fellow servant with a conductor and a track walker. In Livingston v. Packing Co., 103 Cal. 263, 37 Pac. 149, it is held that the mate of a vessel and a waiter at the table are engaged "in the same general business," in the sense of those words as used in section 1970 of the Civil Code. The court declared that the general business of the defendant was the carrying of freight and passengers upon its steamer; that in the conduct of that business a waiter was as necessary an employé as a mate, and both were essentially necessary for the profitable conduct of the business. In the case at bar it may be said that the business of defendant was operating and maintaining an elevator. A boy or man to manipulate it was a necessity, and likewise an engineer to handle the engine and furnish the power, and likewise a man to repair the machine itself when out of order. These men, in their respective lines of vocation, were necessary to the operation of the machine, and were assisting in the same general business of operating and maintaining the machine. The man to repair the elevator when it was out of order was as necessary as the waiter to the ship, or the repairer to the car, or the laborer to the railroad track. The allegation of the plaintiff that he was employed by the defendant in the capacity of a carpenter to do certain work for her, and that at the time he received the injury complained of he was doing the work for which he was employed, "under the direction of the defendant," shows that he was not an independent contractor, and precludes him from invoking the principles declared in Bennett v. Truebody, 66 Cal. 510, 6 Pac. 329. The defendant would have been liable to a stranger for any injury sustained by reason of his negligence, upon the ground that he was the servant of the defendant.

It is also claimed that from the face of the complaint it appears that the accident occurred from the negligence of the defendant herself. The pleading does not bear this construction. After stating that the accident occurred by reason of Carney operating the elevator, the pleading then declares that "defendant did thereby negligently and carelessly precipitate, with great force," etc. The complaint further declares that, "by reason of the gross negligence and carelessness of said defendant in operating said elevator as aforesaid, said plaintiff sustained the injuries," etc. It is entirely plain from these allegations that the elevator was being operated by Carney, and that by reason of his negligence in so operating it the accident occurred. By any reasonable construction of the pleading, it contains nothing indicating negligence upon the part of any one except Carney.

It is next insisted that if plaintiff and Carney were fellow servants, and engaged in the same general business, then that fact should be pleaded in the answer. It is sufficient to say that if the facts alleged in the complaint show that the servants are fellow servants, and engaged in the same general business, then that fact may be taken advantage of by demurrer

It is also declared that it was the duty of the master to warn plaintiff when the elevator was about to start. If there had been an express agreement to that effect made by the master and the servant, the plaintiff, when he was hired to do the work, there might be some force in this contention. Bradley v. Railroad Co., 62 N. Y. 99. But plaintiff went to work without any such agreement, and acted alone upon the confidence he had in a compliance with the request he made to the elevator man, Carney, to give him notice of the starting of the cage. For the foregoing reasons, the judgment is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

126 Cal. 67

WHITEHEAD et al. v. SWEET et al. (L. A. 542.)

(Supreme Court of California. Sept. 14, 1899.)

CORPORATIONS—ACTIONS BY STOCKHOLDERS—ILLEGAL ELECTIONS OF DIRECTORS—PLEADINGS—REVIEW.

1. Under Civ. Code, § 315, which provides that, upon the application of any person or body corporate aggrieved by any election held by any corporate body, the district court of the district in which such election is held may inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice, a court of equity has jurisdiction of a bill to review an election by a corporation of directors and officers, and oust those elected, if it is not conducted in conformity with the statute.

2. A complaint which states facts which entitle the plaintiff to relief, either legal or equitable, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

3. Where the complaint in an action by stockholders to review an alleged illegal election of directors, and to oust them from office, alleges that the corporation is controlled by the illegally elected directors, it need not allege a demand on the corporation that it bring the action, and its refusal to do so.

4. Where the complaint in an action by stock-

holders to review the election of officers of a corporation, and to oust them from office, alleges that defendants are not the officers of the corporation, it need not allege a demand, on persons whom plaintiffs considered the officers de jure, that the corporation bring the action in its name, and a refusal so to do, where it appears that the defendants are exercising the functions of the offices they claim.

5. Stockholders whose stock has been sold to satisfy an assessment thereon, to carry into effect an illegal contract made by a board of directors illegally elected, may maintain an action to review the illegal election and oust them from office, and to have the illegal contract set aside.

6. A complaint in an action by stockholders to review an alleged illegal election of directors is not demurrable for ambiguity, where it refers to them as the "board of directors," when it clearly appears from the whole complaint that the claim is made that they are not the legal board.

7. A complaint in an action by stockholders to review a corporate election, and to oust the illegally elected directors and officers, to set aside a contract made by them, and to cancel an assessment on the stock made by them to carry out such contract, alleged that S., one of the directors illegally elected, had, for a valuable consideration, agreed to give one of the plaintiffs an irrevocable proxy for a large block of stock, to be voted by the transferee for the benefit of the corporation; that S. had violated his agreement, and had himself voted the stock, electing a board of directors which was dominated by him; that such board had entered into a contract whereby they agreed to pay S. a large sum of money for a patent right owned by him; that for that purpose they had assessed the shares of stock owned by each stockholder; and that, in default of payment, plaintiffs' stock had been sold. *Held*, that the bill was not multifarious.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by H. C. Whitehead and others against H. P. Sweet and others to review an election by a corporation, and to oust the illegally elected directors, to set aside a contract made by them, and to annul an assessment on the corporate stock to carry it out. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Mulford & Pollard, for appellants. Goodrich & Garrison, for respondents.

COOPER, C. This is an appeal from the judgment, and comes here on the judgment roll. It is not claimed that the findings are not supported by the evidence, but it is sought by this appeal to review the order of the court overruling the defendants' demurrer to the amended complaint. As the court found all the allegations of the complaint to be true, it will be necessary to state the substance of the complaint, in order to make clear the points urged on this appeal. It appears from the complaint, in substance, that the defendant Sweet's Metal Cross-Tie Company was at all times mentioned a corporation duly incorporated under the laws of California, and that the plaintiffs and the other defendants were at all times named stockholders of defendant corporation; that in December, 1893, for a valuable consideration, the defendant Sweet agreed with the stockholders of defendant corporation that he should not control a majority of the stock of said corporation, but that he would transfer to plaintiff Baldwin 2,050 shares of the said capital stock, with proxy irrevocable, authorizing said Baldwin to vote the said stock for the benefit and protection of the corporation for five years from and after June 15, 1892; that at a special meeting, claimed to be a meeting of the stockholders of the corporation, held on the 23d day of April, 1894, without proper notice, and contrary to the by-laws of the corporation (the defendants Sweet, Jeffery, and Pollard, and no other stockholders, being present), there was a resolution illegally passed removing plaintiffs Whitehead, Carter, Mills, and Marriner from the board of directors of said corporation, and electing as directors the defendants Mulford, Pollard, McKoon, Jeffery, and Green; that on the 19th day of June, 1894, at what was claimed to be an annual meeting of the stockholders of the corporation, but held illegally, without sufficient or proper notice, and contrary to the by-laws of the corporation (the defendants Sweet, Mulford, Pollard, Jeffery, and no other stockholders, being present), the defendants Sweet, Pollard, Mulford, Green, and Jeffery, and two of the plaintiffs, Chamberlain and Hunt, were illegally declared to be the directors of said corporation; that after said last-named meeting the defendants Sweet, Pollard, Jeffery, and Green were elected by the so-called board of directors respectively president, vice president, secretary, and treasurer of the said corporation, and the defendants Mulford and Pollard were appointed attorneys for said corporation; that a majority of the so-called board of directors, to wit, Pollard, Green, McKoon, and Jeffery, are under the control of defendant Sweet, who is one of the so-called directors and president of said corporation; that on the 20th day of August, 1894, at a meeting of the board of directors so illegally elected, at which were present defendants Pollard, Sweet, Green, and Jeffery, and none others, and at the instance of defendant Sweet, the said defendants so present at said last-named meeting entered into a contract, as the contract of defendant corporation, and under its seal, with defendant Sweet, and for his benefit, under and by the terms of which the said corporation was bound to pay said defendant Sweet $16,000 for a certain patent, known as "Sweet's Metal Cross-Tie," and for other covenants to be performed by said defendant Sweet; that at a special meeting of the said directors held illegally and without notice on the 29th day of January, 1895, at which were present defendants Green, Pollard, Jeffery, and Mulford, and none others, an assessment of $4 per share on the capital stock of said corporation was illegally levied, and at the time of filing the complaint the stock of said corporation and of plaintiffs was being advertised as delinquent, and for sale under the said illegal assessment; that the said illegal assessment of $4 per share was made for the benefit of defendant Sweet, and for the purpose of paying him the said $16,000 for his said patent, as provided in the said illegal contract; that the defendant corporation is practically free of debt, and that, except for the said illegal contract with defendant Sweet, there would be no necessity for the said assessment of $4 per share on said stock; and that the threatened sale of the said stock and the said contract so made with defendant Sweet will result in great loss and irreparable injury to the plaintiffs and to defendant corporation. By a supplemental complaint filed before the trial, it appears that the capital stock of the plaintiff had been sold under said illegal assessment, and without proper notice. The demurrer to the amended complaint is upon the ground that the same does not state facts sufficient to constitute a cause of action, that there is a misjoinder of causes of action in several respects, and that the complaint is ambiguous and uncertain in some particulars.

It is urged that there is no jurisdiction in a court of equity to remove corporate officers. It is true that in general a court of equity has no inherent power or jurisdiction to entertain a bill for the purpose of reviewing a corporate election, and ousting the parties who claim to have been elected. It was not part of the original jurisdiction of chancery, and in most of the states of the Union such jurisdiction does not exist. But, in order to avoid the delays and difficulties attending the old remedy of quo warranto, statutes have been enacted in many of the states which give courts of equity the power to review corporate elections, and among such states is our own. Our Code (Civ. Code, § 315) reads as follows: "Upon the application of any person or body corporate aggrieved by any election held by any corporate body the district court of the district in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. Upon filing the petition, and before any further proceedings are had under this section, five days' notice of the hearing must be given, under the direction of the court or the judge thereof, to the adverse party or those to be affected thereby." Under the above section it was held in Wright v. Water Co., 67 Cal. 532, 8 Pac. 70, that our superior courts have jurisdiction, as courts of equity, to inquire into the validity of a corporate election, and to set it aside if not in conformity with law. In the opinion it is said: "The constitution of 1879 abolished the district court, but at the same time it created the superior court, and conferred upon it the same equity jurisdiction which had been formerly conferred upon and was exercised by the district court. Sitting as a court of equity, therefore, the superior court had jurisdiction to inquire into the validity of an election, and to set it aside, if it had not been made in conformity to law, whether the statute conferred it or not." The same rule has been laid down in other states having statutes similar in some respects to our own. In re St. Lawrence Steamboat Co., 44 N. J. Law, 529; Ex parte Holmes, 5 Cow. 426; Schoharie Val. R. Case, 12 Abb. Prac. (N. S.) 394; People v. Albany & S. R. Co., 55 Barb. 346. Under our Code there is but one form of action, and, if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. If the facts are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court sitting as a court of equity. White v. Lyons, 42 Cal. 279; Watson v. Sutro, 86 Cal. 528, 24 Pac. 172, and 25 Pac. 64.

It is said that the complaint does not state facts sufficient to constitute a cause of action because it was the duty of defendant corporation to bring the action, and, if it would not do so upon request, then it becomes necessary for the complaint to show that plaintiffs made a proper demand upon the corporation to bring the action. The complaint alleges that the business and affairs of said corporation are influenced and controlled by defendant Sweet, that said Sweet controls the board of directors, and that for this reason it would be of no avail to make a demand upon the defendant directors to bring such suit. Under the authorities, this was sufficient to excuse the necessity of alleging a demand. 2 Cook, Stock, Stockh. & Corp. Law, § 741; Wickersham v. Crittenden, 93 Cal. 33, 28 Pac. 788; Id., 106 Cal. 331, 39 Pac. 603; Ashton v. Association, 84 Cal. 70, 22 Pac. 660, and 23 Pac. 1091.

It is said the complaint alleges that defendants are not the board of directors, and that it does not avail to allege the reasons why demand was not made upon them, as the theory of the complaint is that their election was illegal, and, if so, they are not directors. The complaint alleges that the directors are influenced and controlled by defendant Sweet, without naming them; but, if it did name them as the parties claiming to be directors, we think it would be sufficient. One of the questions, and the main question, to be determined, is whether or not the defendants, other than the corporation, are legal directors of the corporation, and the plaintiffs would not be required at their peril to determine that question before bringing suit. They have the right to have that question determined by the courts.

Several pages of appellants' brief are devoted to the argument that the suit should abate by reason of the allegations of the supplemental complaint setting forth that the board of directors have caused the plaintiffs' stock to be sold since the commencement of the suit, and that, therefore, the plaintiffs have no further interest in the litigation. There would be some force in this argument if the sale were made by proper authority and were in all respects regular; but the sale is alleged to be void by reason of the illegality of the assessment, and by reason of its having been made by a board of directors who were not such in law. A sale of stock by a board of directors illegally elected, and under an invalid assessment made in violation of law, would not determine the relations of the stockholders to the corporation. The supplemental complaint alleges that the sale was made under a void and illegal assessment. The amended complaint shows that the assessment was illegal, and made by a board illegally claiming to be such. Another answer to the contention is that one of the objects of the action is to have the $16,000 contract with the defendant Sweet set aside, and, after the action is brought to remedy a wrong done to the corporation, all the stockholders, whether plaintiffs or defendants, are equally interested in the result of the suit. 2 Cook, Stock, Stockh. & Corp. Law, § 737.

The complaint is not ambiguous nor uncertain in the respects claimed by appellants. Although in some paragraphs of the complaint the defendants (other than the corporation) are referred to as the board of directors, it sufficiently appears all through the complaint that the claim is made that they are not the legal board, and that their election was illegal. When a pleading is attacked as being ambiguous or uncertain, the rule is that a general allegation, although it would not have been sufficient standing alone, may nevertheless assist to make the complaint more certain in the particulars named. Hutchinson v. McNally, 85 Cal. 619, 24 Pac. 1071. If enough appear to make the pleading easy of comprehension and free from reasonable doubt, a demurrer on the ground of ambiguity should be overruled. Salmon v. Wilson, 41 Cal. 595.

It is urged that there is a misjoinder of causes of action, and that the complaint is multifarious in several respects. The principal argument of appellants on this ground is that the sale of the stock under the alleged illegal assessment is a matter individual to each of the plaintiffs, and a matter in which the corporation has no interest, and that the revocation of the proxy given by Sweet to Baldwin in no way concerns the corporation. We do not think the complaint is obnoxious to the objections made in these respects. The gist of the action being to declare the election of the board of directors void and illegal, this being established, it follows that the acts by which the assessment was levied, the attempted sale of the stock of plaintiffs, and the contract made with defendant Sweet August 20, 1894, were all done without authority and void. The agreement of defendant Sweet with the stockholders of the corporation to transfer to plaintiff Baldwin 2,050 shares of the capital stock, with irrevocable proxy for five years, for the benefit and protection of the corporation, having been violated, its violation might properly be adjudicated in this suit. A court of equity, having acquired jurisdiction, would administer complete relief, and adjust the case in all its branches. A court of equity abhors a multiplicity of suits. No fixed rule can be laid down by which to determine whether a given bill in equity is or is not subject to the objection of multifariousness. It may be that, for the purpose of preventing a multiplicity of suits, a court of equity will retain a bill against several defendants, although there be no privity of interest between them, and although each may stand in different relations to the complainant from the others. Thomp. Corp. § 3527. Chancellor Kent sustained a bill, the object of which was to set aside fraudulent conveyances of corporate property, as well as to coerce payment of defaulting stockholders. Brinkerhoff v. Brown, 6 Johns. Ch. 139. Where a court of equity has once obtained jurisdiction, it will decide the whole case. It will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent further litigation. Watson v. Sutro, 86 Cal. 529, 24 Pac. 172, and 25 Pac. 64, and cases cited. Where all the parties in interest are, with sufficient pleadings, before a court of equity, it can and will take hold of the entire case, and give effect to their contracts legally made. Cross v. Zellerbach, 63 Cal. 643. It was said in Wickersham v. Crittenden, 93 Cal. 32, 28 Pac. 791, in discussing a demurrer to the complaint in equity: "It is no objection to the complaint that the relief sought is not single. It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means that have been employed by the defendant to produce the grievance complained of. If a trustee is shown to have been unfaithful, the court may not only compel restitution, but may also restrain him by injunction from similar acts, or, if deemed necessary, may remove him from his trust. If he has called to his aid other confederates, they also may be enjoined from further participation in the acts which infringe upon the rights of the plaintiff. A court of equity will always find the means of enforcing its decrees against a delinquent defendant, and its power in this respect is as extensive as the exigencies of the case." On well-understood principles of equity pleading, a bill is not multifarious because the plaintiffs are not entitled to a decree in their favor jointly or in solido. It is sufficient, if they are injured in a similar way, that they have common grievances to redress, and that they are entitled to relief of the same kind. 4 Thomp. Corp. § 4602.

Applying the principles above laid down

to this case, the complaint does not contain actions improperly joined. It tells one continued story, and alleges wrongs willfully perpetrated by the defendants, and the way in which they were perpetrated. No third parties appear in any way to be involved. If defendant Sweet agreed, for the benefit of the corporation, to transfer his stock, with proxy irrevocable, and has violated his contract, why should he not now, and in this action, be compelled to perform it? A bill in equity is said to be multifarious when distinct and independent matters are joined therein. If the subject-matter in the main relates to one transaction, around which the others cluster, and each party has an interest in some matters in the suit, and they are connected, even though all the parties do not have an interest in all the matters in the suit, the bill is not multifarious. Story, Eq. Pl. §§ 271, 271a; Wilson v. Castro, 31 Cal. 429. The findings refer to the complaint as amended, and to the supplemental complaint. The original complaint was superseded by the amended and supplemental complaint. We think the judgment should be affirmed, and so advise.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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126 Cal. 77

WILLIAMS et al. v. CASEBEER. (L. A. 611.)

(Supreme Court of California. Sept. 14, 1899.)

MALICIOUS PROSECUTION — DEMURRER — MISJOINDER OF PARTIES—SEVERAL CAUSES OF ACTION—UNCERTAINTY OF COMPLAINT—EVIDENCE SHOWING MALICE—EVIDENCE OF OTHER DISTINCT ACTS—STATEMENTS IN ABSENCE OF OTHER PARTY—GENERAL EXCEPTION TO INSTRUCTIONS—INSTRUCTIONS—ADVICE OF COUNSEL—EXCESSIVE VERDICT.

1. In an action by plaintiff and her husband against defendant for malicious prosecution, a demurrer to the complaint on ground of misjoinder of parties plaintiff, in that plaintiff seeks to recover damages for loss of her time, and it is sought in the same complaint to recover on a joint cause of action on the arrest of both plaintiff and her husband, will not lie, as plaintiff in such case could not sue without making her husband a party plaintiff, under Code Civ. Proc. § 370, providing, with certain exceptions, that, when a married woman is a party, her husband must be joined with her.

2. Misjoinder of parties and improperly uniting several causes of action are distinct causes of demurrer, under the Code; and where defendant demurs to a complaint on the ground of misjoinder of parties plaintiff, whereas he should have alleged a misjoinder of causes of action, he will not be permitted to support the latter ground, not alleged, by facts stated in support of the former ground.

3. Where the answer, in an action for malicious prosecution, and the trial, clearly show that defendant could not have been misled to his injury, judgment will not be reversed for uncertainty of the complaint.

4. In an action by husband and wife against defendant for malicious prosecution, the record of two deeds alleged to have been stolen by plaintiffs, one of which was made by defendant to a minor daughter of plaintiffs, and recorded some months before plaintiffs were arrested, the other from a third person to the husband, and recorded at request of defendant, were admissible to show ownership in some person other than defendant, and thus to show that he acted maliciously in charging larceny of property not his own.

5. Where it is alleged that plaintiffs were arrested and prosecuted by defendant for larceny, evidence on the part of defendant of other distinct larcenous acts of plaintiffs is not admissible.

6. Statements made some time before the present action was commenced, and in the absence of plaintiffs, by defendant to his attorney at the time he delivered to him certain papers which he had charged plaintiffs with stealing, is inadmissible.

7. A general exception to special instructions, asked by the parties and given or refused by the court, is sufficient.

8. In an action for malicious prosecution, the jury were instructed that, before defendant could shield himself by the advice of counsel, it must appear that he made, in good faith, a full statement of all the material circumstances within his knowledge to a respectable attorney in good standing, and acted on the advice of said attorney. It appeared that defendant consulted a former district attorney, who testified that he was an attorney at law, and had been engaged in the profession for about 15 years. There was other evidence that he was a respectable attorney in good standing, and nothing to the contrary. *Held* that, conceding the instruction to be erroneous, in that it puts on defendant and the jury the necessity of trying the respectability and standing of the attorney, it would not justify a reversal, since, from the evidence, defendant could not have been injured by it.

9. Where defendant set up the defense that he acted on the advice of counsel, an instruction that the burden of proof is on defendant to show that he fully, fairly, and in good faith stated to his counsel all the material facts is proper.

10. Where defendant sets up the defense that he acted on advice of counsel, an instruction that the burden of proof is on defendant to show that he fully, fairly, and in good faith stated to his counsel the material facts is not in conflict with an instruction that it is incumbent on plaintiff to show, by preponderance of evidence, that she was maliciously, and without probable cause, prosecuted and caused to be arrested.

11. An instruction requested by defendant that taking the advice of the police judge, particularly where he is also a practitioner of the law, under the same circumstances as heretofore stated, before filing the complaint in the action in the police court, is to be considered in the same manner as consulting an attorney at law, is properly refused, as it assumes that the police judge was a practitioner of the law, and the phrase, "under the same circumstances heretofore stated," leaves in doubt the facts to which the instruction alludes.

12. Where the evidence shows that the arrest of plaintiffs was made after a hasty search for the property alleged to have been stolen, and that the criminal proceeding was prosecuted with much bitterness, and that defendant withheld from the court and the jury the fact that he had found some of the property after the arrest, and had it in his possession at the trial, and there is no evidence of passion or prejudice, a verdict of $2,000 will not be set aside as excessive.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county.

Action by Kate Sonoma Williams and her husband, Isaac B. Williams, against J. W.

Casebeer for malicious prosecution. From a judgment in favor of plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

B. F. Thomas and J. W. Taggart, for appellant. S. E. Crew and Wm. J. Hunsaker, for respondents.

CHIPMAN, C. Action for malicious prosecution. Trial by jury, and plaintiffs had the verdict, with damages assessed at $2,000, for which amount and for costs of suit, taxed at $162.80, plaintiffs had judgment. Defendant appeals from the judgment in L. A. 514 (58 Pac. 1116), and from an order denying motion for new trial in this transcript (L. A. 611). The two appeals will be considered in this opinion.

It is sought to have the judgment and order reversed on the grounds: (1) Insufficiency of the evidence to justify the verdict; (2) that the judgment and verdict are against law; (3) errors of law occurring at the trial; (4) excessive damages, given under the influence of passion and prejudice.

1. Appellant demurred to the complaint for uncertainty, and now urges this as ground for reversal of the judgment. L. A. 514. In the first three paragraphs of the complaint it is alleged that: Plaintiffs are husband and wife. On June 12, 1897, at the city of Santa Barbara, defendant made complaint before the judge of the police court of that city charging plaintiffs with the crime of grand larceny, and then and there procured said judge to issue a warrant of arrest of plaintiffs upon said charge. In making said complaint, and procuring said warrant to issue, defendant acted maliciously and without probable cause. In the remaining portions of the complaint it is charged that plaintiff Mrs. Williams was arrested on said warrant at Los Angeles, on June 14, 1897, by the sheriff of Santa Barbara county, and was imprisoned thereunder in the county jail of Los Angeles county, and was taken thence by said sheriff to Santa Barbara, and was there detained in his custody, under said warrant of arrest, until June 17, 1897, when she was allowed to go without bail, to appear for her examination before said judge upon said charge, until June 18, 1897, on which day her preliminary examination was commenced, and the hearing thereof continued until June 19, 1897, on which last-named day she was fully acquitted. It is then alleged that, by reason of the aforesaid malicious and wrongful acts of the defendant, the plaintiff Kate Sonoma Williams was obliged to expend the sum of $37.50 as attorney's fees in defending said proceeding, was put to loss of time during the time of said arrest and detention to her damage in the sum of $50, and was otherwise damaged thereby in the further sum of $10,000, no part of which sums has been paid. The uncertainty alleged of the complaint is: (1) It is impossible to ascertain therefrom whether the $10,000 damages is by reason of the arrest of Mrs. Williams, or by reason of the filing of the complaint against both Mr. and Mrs. Williams; that it is impossible to ascertain therefrom what portion, if any, of said damages were incurred by reason of filing the complaint against Mr. Williams, and what portion, if any, by reason of the arrest of Mrs. Williams, or whether the damages alleged are by reason of the filing of a joint complaint against both husband and wife, or whether the damage is for the separate arrest of Mrs. Williams; that it is impossible to determine therefrom in what proceeding Mrs. Williams "expended the sum of $37.50 as attorney's fees in defending,—whether said joint complaint against both said plaintiffs or in the matter of the arrest of Kate Sonoma Williams." A misjoinder of parties plaintiff is alleged, in this: That Mrs. Williams seeks to recover $50 damages for loss of time to her, and it is sought in the same complaint to recover on a joint cause of action upon the arrest of both Mr. and Mrs. Williams. The verdict was that the jury "find for the plaintiffs, and assess their damages at the sum of $2,000," and the judgment was that "Kate Sonoma Williams, and her husband, I. B. Williams, have and recover from said J. W. Casebeer," etc.

There was a right of action for malicious prosecution in each of the plaintiffs, but they could not unite their separate causes of action in one complaint and sue jointly. Each was compelled to bring a separate action. But Mrs. Williams could not sue without making her husband a party plaintiff. Code Civ. Proc. § 370; McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681. Damages for personal injury to the wife, when recovered in money, are community property of the husband and wife, and in such a case as this the verdict and judgment may properly be given in favor of the husband and wife jointly. Neale v. Railway Co., 94 Cal. 425, 29 Pac. 954. There was therefore no misjoinder of parties plaintiff.

Appellant contends that he should not lose the benefit of his demurrer as to the $50 item because he alleged a misjoinder of parties, whereas he should have alleged a misjoinder of causes of action. The Code enumerates certain distinct causes for demurrer. Misjoinder of parties is one, and improperly uniting several causes of action is another. The demurrant will not be permitted to support one of these grounds, not alleged, by facts stated in support of another and distinct ground, which is alleged. Upon the ground of uncertainty, there are no particulars stated showing wherein the complaint is uncertain as to this item of $50. We think there is no ground of demurrer to this item sufficiently sustained.

Nor do we think the ground of uncertainty in other respects sufficiently sustained to warrant a reversal of the judgment. The pleader in drawing the complaint was obliged to unite the husband as a party plaintiff. He was also compelled to state, what was the fact, that defendant made a complaint charging them jointly with the alleged larceny, and caused their arrest thereunder upon a single warrant of arrest; and the pleader could not well do otherwise than allege that the complaint was made, and the warrant was issued, maliciously and without probable cause. Thenceforward the complaint in this action deals exclusively with the single plaintiff, Mrs. Williams, and the name of the husband is not again mentioned; and it nowhere appears in the complaint that Mr. Williams was arrested, or an examination had as to him by the police judge. The allegation "that, by reason of the aforesaid malicious and wrongful acts of the defendant, the plaintiff Kate Sonoma Williams was obliged," etc., can, in view of the entire complaint, refer only to the acts as they affected the one plaintiff in whose behalf the suit is brought. The complaint made by defendant and the warrant issued thereon were essential to be alleged and proved; and to avoid the possible objection on the ground of variance, as well as to state the facts as they existed, it was proper, as necessary inducement, to set forth the making of the complaint and the issuing of the warrant just as the facts occurred, and that made necessary the allegations in the first three paragraphs of the plaintiffs' complaint. No one reading the complaint could be misled into the belief that the pleader intended to combine two causes of action, or to state any cause of action other than that sustained by Mrs. Williams by reason of her malicious prosecution. The answer and the trial clearly enough show that defendant could not have been misled to his injury, in which case the judgment will not be reversed for uncertainty of the complaint alone.

The allegation as to the $37.50 paid as attorney's fees shows that the money was expended by Mrs. Williams, and that, in alleging that it was "in defending said proceedings," reference was made to the proceedings upon the preliminary examination as to her. It does not appear in the complaint that her husband was ever arrested or was ever called upon to make any defense.

2. Appellant claims that the evidence does not justify the verdict. This point is not specially relied on, and we do not feel called upon to review the evidence in the case. Counsel for defendant do not, in their brief, attempt to show wherein it is insufficient to sustain the verdict. We have, however, given the transcript careful examination, and think the evidence fully warrants the verdict of want of probable cause for the arrest and the subsequent prosecution of plaintiff.

3. Appellant assigns certain errors of law in the admission or exclusion of testimony. We will notice these briefly. It was competent to prove by the witness Mrs. Williams that defendant admitted at the preliminary examination the authorship of the letter and telegram caused to be written by defendant and sent to plaintiffs, already referred to. The shorthand notes of the examination were not the only competent evidence of the fact. If witness heard defendant make the admission, she could so testify.

Copies of the two deeds alleged to have been stolen were admitted in evidence over defendant's objection. One of these deeds was made by defendant in 1895 to a minor daughter of plaintiffs, the consideration being love and affection, and was recorded some months before plaintiffs were arrested. The other is a deed from one Robinson to I. B. Williams, one of plaintiffs, and was recorded at the request of defendant. It is claimed by defendant that possession alone of the original deeds charged to have been stolen was at issue, and that it was immaterial whether the deeds had been recorded or not. The record of these deeds, which were recorded some time before this trouble, was admissible as tending to show ownership in some person other than defendant,—not conclusive, by any means, but in some degree showing that he acted maliciously in charging larceny of property not belonging to him.

Defendant, as a witness for himself, had testified that he got no answer to his letter and telegram sent plaintiffs June 11th, and added: "I went to the office, and the lady operator told me that it had been delivered." On motion of plaintiffs, the remark of the operator was stricken out as hearsay. Defendant claims that this was error. The answer was not in response to the question, but the objection was not made on that ground. It may be, as claimed by plaintiffs, that, if the evidence was not admissible, the court could, on its own motion, strike it out, though the ground of the objection was not sufficient. But the court did not so act. It granted the motion as made, and, it must be presumed, on the ground stated. We think the evidence was admissible. It in some degree tended to rebut the charge of malice, and also bore upon the question of probable cause. Defendant had informed plaintiffs that he would act upon their failure to reply, and we think it was competent for him to show that before he acted he was informed that the telegram had been delivered. The evidence, however, was not of such significance or importance as that its rejection would warrant a reversal of the judgment. We cannot see that defendant was prejudiced because this fact was withheld from the jury. It appeared by the evidence of plaintiffs that the telegram was received before their arrest, and that plaintiffs did not in fact answer it, and the undisputed testimony of defendant was that he did not lodge his complaint with the police court until after he was led to believe that the message had been delivered, and not until on the next day, and after he had advised with an attorney. Under these circumstances, it would not seem reasonable to assume that the jury were in the slightest degree influenced to defendant's prejudice by the ruling of the court upon the matter in question.

Defendant offered evidence of certain transactions between the parties and their relations 10 years before this arrest. Counsel stated that it was "for the purpose of showing the condition,—a similar condition to that which existed at the time of this occurrence,—thereby showing motive and right upon the part of the complainant in this criminal action to assume that the going was of the same character as of at that time." Defendant claims that this evidence should have been admitted upon the principles laid down in Lyon v. Hancock, 35 Cal. 372. We find nothing in that case warranting the admission of evidence so remote, and relating to entirely different transactions. If it were true that plaintiffs left defendant's house 10 years before this occurrence, and that he had reason to suspect that they then took some of his property, it would not tend to prove guilt at this time, or tend to show that he had probable cause at this time for believing them guilty. What took place so long ago was too remote, and, besides, was collateral, and not relevant to any issue then before the court. We see no reason why the rule where the defendant is on trial for larceny should not apply, which is that evidence of other larcenous acts is not admissible. People v. Hartman, 62 Cal. 562. Evidence of another offense cannot be given unless there is some clear connection between the two offenses by which it may be reasonably inferred that, if guilty of the one, the defendant is guilty of the other. People v. Lane, 100 Cal. 379, 34 Pac. 856.

Defendant's attorney testified that some time after this action was commenced defendant delivered to him certain of the papers he had charged plaintiffs with stealing. The court refused to allow the attorney to testify to statements made by defendant to his attorney at that time in the absence of plaintiffs. The ruling was correct. Defendant could not strengthen his defense in this manner. His declarations to his attorney were self-serving and inadmissible.

4. The exception taken to the instructions given at the request of the plaintiffs was as follows: "To all of which instructions defendant duly excepted." Respondents make the point that the exception was insufficient because it was general. The rule relied upon applies only to the charge of the judge, and does not apply to the special instructions asked by the parties, and given or refused by the court, concerning which a general exception is sufficient. Cavallaro v. Railway Co., 110 Cal. 348, 42 Pac. 918.

5. Appellant questions the correctness of certain instructions given, and objects that a certain instruction asked by him was refused. Several instructions were given as to the law touching defendant's liability, in view of his having consulted counsel before causing the arrest of plaintiffs. In one of these the court said: "Before the defendant can shield himself by the advice of counsel, it must appear from the evidence that he made, in good faith, a full, fair, and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff Kate Sonoma Williams, which were then within the knowledge of defendant, to a respectable attorney in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against plaintiff." Appellant contends that the instruction puts upon the defendant and the jury the necessity of trying the respectability and standing of the attorney; and that the instruction goes beyond the institution of the action, and "requires the same careful disclosure of all the facts in 'carrying on' the prosecution, to a 'respectable attorney of good standing.'" The instruction does not require that defendant shall continue to take advice of counsel during the subsequent prosecution. It requires that he shall subsequently act in good faith upon the advice given, after first having fully and fairly stated to the attorney all the material facts then known to defendant; and this he should do, or the advice will not shield him. Conceding error in other respects,—which we by no means wish to be understood as deciding,—it was without injury; for it appeared that defendant consulted a former district attorney, Mr. A. E. Putnam, who testified: "My occupation is attorney at law. Have been engaged in the profession of attorney at law about fifteen years." He could not be district attorney without having been admitted to practice in the superior court, and, as the Code formerly provided (and now provides), he could not be admitted to practice in the superior court except "upon strict examination in open court, * * * and upon testimonials of good character." Code Civ. Proc. § 276 (prior to the amendment of 1895). It sufficiently appeared that the requirements of the instruction were supplied by the evidence, and, as it was undisputed, we do not think the jury could have been misled to the defendant's injury, even if they understood the instruction to mean what defendant claims for it. There was some evidence tending to show that Mr. Putnam was a respectable attorney in good standing, and, as no other conclusion could be arrived at upon the evidence, the instruction, if error, will not justify a reversal. Pico v. Stevens, 18 Cal. 377.

It was proper to instruct the jury that the burden of proof was upon defendant to show that he "fully and fairly and in good faith stated to his counsel all the material facts," etc. There was no conflict between this instruction and a previous one, where the court had charged that it was incumbent upon plaintiffs to show, by preponderance of evidence, that the plaintiff Mrs. Williams was maliciously and without probable cause prosecuted and caused to be arrested, etc.

Defendant asked and was refused the following instruction: "Taking the advice of the police judge, particularly where he is also a practitioner of the law, under the same circumstances as heretofore stated, before filing the complaint in the action in the police court, is to be considered by you in the same manner, and with the same weight, as consulting an attorney at law." It is claimed upon the authority of Hahn v. Schmidt, 64 Cal. 284, 30 Pac. 818, and Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, that this instruction should have been given. It was held in Ball v. Rawles "that the advice of a justice of the peace, upon the facts stated to him by the complainant that a crime had been committed, and upon which he issued a warrant of arrest, is sufficient to exonerate the complainant from liability for the arrest." If the instruction had been properly drawn to meet the law of the case cited, it should have been given. But it is uncertain in its meaning, and assumes a fact not proven, to wit, that the police judge was "a practitioner of the law." There was no evidence showing that to have been the fact; and, while his advice and the issuance of the warrant as police judge would have been equally available to defendant if he were not a lawyer, it was error to introduce into the instruction a statement of fact which did not exist. The phrase, "under the same circumstances heretofore stated," left in doubt the facts to which the instruction alluded. None were stated in the instruction, and none definitely referred to. The instruction should have been framed upon the same lines as the one relating to the advice of an attorney. The instruction fails to state the important fact that to shield the defendant the advice of the police judge must be based upon a full, fair, and honest statement by defendant of all the material circumstances within the knowledge of the defendant at the time bearing upon the supposed guilt of plaintiff.

6. We do not think the judgment should be reversed as excessive. There is nothing in the evidence which shows the verdict to have been given under the influence of passion or prejudice. The evidence tends to show that the arrest was made after a hasty and imperfect search for the property alleged to have been stolen, and that the criminal proceeding was prosecuted with much bitterness by defendant, and that he withheld from the court the fact that he had found some of the property after the arrest, and had it in his possession at the trial. He permitted the impression to go out that he had not found the property, and in the course of his examination as a witness he declared with much emphasis: "There is not anything I would not do that would injure them, except to commit perjury." There was evidence tending to show that he had purchased the sewing machine for, and had given it to, his daughter; that the chickens were her own, either bought with her own money, or raised by her; that the deeds to which he attached the value of $4,800 were in his possession before and at the trial of the criminal action, but the fact was withheld from the jury; and it appeared at this trial that he, subsequent to the criminal trial, found the notes and mortgages which he charged plaintiff with stealing. I advise that the order refusing motion for new trial be affirmed.

We concur: BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order refusing motion for new trial is affirmed.

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126 Cal. 100

PERKINS v. METTLER. (L. A. 568.)

(Supreme Court of California. Sept. 15, 1899.)

SALES—CONDITIONAL SALES—CONTRACT—FRAUDULENT CONVEYANCE.

A contract which stipulates that the vendee "agrees to sell," and the purchaser "agrees to buy," a stock of goods; that the purchase price is to be paid in future installments; that the vendee shall take immediate possession of it, and use it in regular course of trade, but from time to time shall add to it, so it shall not diminish in value before paid for; that a bill of sale is to be made, and "absolute possession" is to be delivered in the future, after final payment; that, until such payment, the title is to remain in vendor; and that it is to be insured in the vendor's name, at the vendee's expense,—is a conditional sale, valid as to creditors, although the vendee's agreement to buy and pay the consideration is absolute, and although, on condition broken, a sale is to be made, and any surplus obtained is to be paid to the vendee.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by Gregory Perkins, Jr., receiver of the estate of A. M. Mealey and Florence Weeks Stetson, co-partners as A. M. Mealey & Co., against C. W. Mettler. Judgment for plaintiff, who, on the denial of his motion for new trial, appeals. Affirmed.

Dillon & Dunning and Curtis & Curtis, for appellant. A. R. Anable and Leonard & Morris, for respondent.

GRAY, C. The above parties named as insolvents and the defendant Mettler entered into a written agreement, of which the following is a copy: "This agreement, between C. W. Mettler, as vendor, and A. M. Mealey and Mrs. C. W. Stetson, partners under the firm name of A. M. Mealey & Company, as vendees, witnesseth: The vendor agrees to sell to the vendees, and they agree to buy from him, all that certain stock of mdse., including a general assortment of hardware, belonging to the vendor, and now in and about the branch store heretofore maintained by the vendor at Colton, together with all furniture and fixtures belonging to the vendor and now in said store. The price to be paid by the vendees to the vendor for all said property is three thousand seven hundred ninety-two and $^{82}/_{100}$ dollars, in gold coin of the United States, to be paid in installments, as follows: There shall be paid during each year, beginning on the 28th day of January, 1896, the sum of one thousand ($1,000) dollars, with interest on such one thousand ($1,000) dollars from said date until paid, at the rate of 10 per cent. per annum, which one thousand ($1,000) dollars shall be paid during each year in quarterly installments, with interest as aforesaid on each quarterly installment from said date until paid, the first three quarterly installments in each year to be two hundred (200) dollars each, and the fourth to be four hundred (400) dollars, with interest on each as aforesaid. The vendees, at their option, may pay all or any of such installments at any time before maturity. Upon the completion of the payment of the purchase price as aforesaid, the vendor will execute to the vendee a good and sufficient bill of sale of all of said property, or of so much thereof as shall then remain, and deliver to them the absolute possession thereof. The vendor retains the title to all said property until the purchase price shall be fully paid. The vendees shall take immediate possession of all said property, and, so long as they comply with the provisions hereof, they may retain such possession, and may, at their own cost and risk, conduct the business of said store, and may sell any of said property in the usual course of business; provided that they shall from time to time, upon their own account and risk, purchase other goods in lieu of those sold, so as to maintain the stock in said store of substantially the same value as at present, and all goods so purchased by them shall be regarded as taking the place of goods sold by them, and, when placed in said store, shall become the property of the vendor, and be subject to this contract. The vendees shall pay all taxes and assessments levied upon said property during the continuance of this contract. During the continuance of this contract, all said property shall be kept insured at the expense of the vendees, but in the name of the vendor as owner, to the extent of its fair insurable value; and, in case of loss, the insurance shall be retained by the vendor to the extent of the balance then unpaid under this contract, and the surplus, if any, shall be paid to the vendees. All said property shall be at the risk of the vendees, so long as the vendor is not in possession thereof, and no loss thereof or damage thereto, while not in the possession of the vendor, shall relieve them from the payment of any part of said purchase price. If the vendees fail to pay any tax or assessment upon said property when due, or fail to pay for any insurance thereon when due, then the vendor, at his option, may pay the same, and, in that case, the amount of any such payment, with interest thereon at ten (10) per cent. per annum from time of payment, shall be added to the next quarterly installment thereafter becoming due, and shall be repaid to the vendor by the vendees with such quarterly installment. If the vendees fail to make any payment herein provided for within ten days after it shall become due, or fail to comply with the requirements hereof in any respect, or shall suspend the business of said store, then, at any time thereafter, during the continuance of such default or failure or suspension, the vendor may take possession of all said property, and sell the same at public auction in the manner in which sales of like property are made under execution, and after giving like notice as is required by law for sales under execution, and the proceeds of such sale shall be applied—First, to the payment of the expenses thereof; secondly, to the payment to the vendor of the balance then unpaid under this contract; and the surplus, if any, shall be paid to the vendees. At such sale, any of the parties hereto may be purchasers. In witness whereof, the parties hereto set their hands, in duplicate, this 28th day of January, 1896. Mrs. C. W. Stetson. A. M. Mealey & Co. C. W. Mettler."

On the 28th day of June, 1897, the parties to the above contract entered into another contract, wherein they recited that, the purchase price mentioned in the first contract not having been paid, and the other conditions of the contract not having been performed, they mutually released each other from the further performance of said first contract, and that the goods mentioned in the first contract were delivered up, and the book accounts that had accrued in the mercantile business carried on under said contract by Mealey & Co. were assigned, to said Mettler. Within 30 days after the execution of this second contract, and the return of the property to Mettler, the creditors of A. M. Mealey & Co. filed a petition against that firm in involuntary insolvency, and the plaintiff was appointed receiver therein. The plaintiff soon thereafter commenced this action for the recovery of the value of the property hereinbefore mentioned, which was claimed in the complaint to be $3,700. The case was tried with a jury, the plaintiff had a verdict and judgment for $175, and from an order refusing him a new trial the plaintiff appealed. The only errors relied on by appellant are that the court erred in refusing to give the instruction requested by plaintiff numbered 8, and in giving the instruction numbered 7 requested by defendant. Instruction No. 8 reads as follows: "It is the province of the court to construe and interpret the contract (Exhibit A) in evidence between A. M. Mealey & Co. and the defendant, and the court instructs you that said contract operated to vest the title to the property therein mentioned in A. M. Mealey & Co., notwithstanding any terms in said writing to the contrary. And the only interest that defendant had therein was one of lien or security for the indebtedness owing to him thereunder, and the court instructs you that such lien was what the law denominates a secret lien, and was fraudulent and void as against the creditors of A. M. Mealey & Co., and also against their assignee in insolvency." The instruction given (No. 7) reads as follows: "If you should find for the plaintiff in this action, then, in estimating the amount of damages to which he will be entitled by your verdict, you should exclude so much of the property which was received from the defendant on January 28, 1896, as has been shown remained of the original stock on June 28, 1897." It is conceded by appellant that the correctness or incorrectness of the court's action in reference to these instructions depends upon the interpretation of the contract, a copy of which is above set out, and his opening brief is confined to that proposition entirely. His position is that the contract in question "was an attempt to circumvent the chattel mortgage statute in the guise of a conditional sale reserving title in the vendor," and that it had the effect to convey to the vendee named in it the entire ownership of the property. The trial court must have been of the opinion, on the other hand, that the written agreement evidenced a conditional sale, with the ownership of the property in the vendor until performance of conditions. From a thorough consideration of the whole contract, we are constrained to agree with the trial court. The intention of the parties, as disclosed by the whole contract, should govern the court in determining whether the sale was absolute or conditional. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339. It seems plainly apparent that if the construction is given to the contract that the parties to it intended it should receive, and that they gave to it themselves, it will be treated as a conditional sale. To begin with, the vendor "agrees to sell" and the vendees "agree to buy." This is not the language of a present executed sale. The price is to be paid in future installments. A bill of sale is to be made, and "absolute possession" is to be delivered in the future. Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597. Express agreements are made that title to all said property shall remain in the vendor, and that the vendee shall at his own expense keep the property insured in the name of the vendor. No stronger words than these could be used to indicate a purpose that the vendor should remain the owner of the property. Rodgers v. Bachman, 109 Cal. 552, 42 Pac. 448. In the case last cited, the contract therein held to be a conditional sale was similar in its terms to the contract herein considered. It contained the clause for a resale of the property on condition broken, and a return to the vendee of any amount obtained on such sale in excess of the amount due the vendee under the original contract of sale. It is true that the contract here contains an agreement on the part of the vendee to buy and pay for the goods, and there was an entire absence of any agreement of that kind in Rodgers v. Bachman, supra, and the two contracts are in that respect different in their terms, but this difference does not necessarily lead to a difference of construction. This is shown by the following quotation from the later case of Van Allen v. Francis, supra, to wit: "Nor can appellants' further contention be sustained, namely, that the fact that Langton's promise to pay is absolute is determinative and conclusive that the sale itself was absolute. In Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, a like circumstance is mentioned, but not discussed. In Rodgers v. Bachman, supra, the same fact is adverted to, but, while such a matter may be a circumstance in determining the nature of the contract, it is a circumstance, and nothing more. It never has been held to be a determinative characteristic, and it cannot be so held without undoing all the law upon the question. There can be no sale at all without an agreement, express or implied, to pay. Lacking such a promise, the contract is a mere option. * * * In truth, the purchaser's promise is usually an absolute promise." In Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, the agreement to pay for the property was absolute, and yet the transaction was held to be a conditional sale. The provisions of the contract here under consideration are not identical with those in Palmer v. Howard, supra, for in that case there was no agreement for a future bill of sale, nor was there any agreement for a delivery of absolute possession of the property upon the completion of the payment of the purchase price. Such provisions as the above are material, and are to be considered in construing the contract. Kohler v. Hayes, supra. The court, in Palmer v. Howard, based the conclusion that the intention was to vest the substantial ownership in the vendee upon the clause in the contract providing for a resale on condition broken, and a return to the vendee of any surplus obtained on such resale; but the later case of Rodgers v. Bachman, supra, is an authority to the effect that such a stipulation is not absolutely determinative of the character of the contract. We are satisfied with the construction placed upon the contract by the court below, and advise that the order appealed from be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(6 Cal. Unrep. 332)

METHVIN v. FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA, PA. (L. A. 720.)[1]

(Supreme Court of California. Sept. 13, 1899.)

INSURANCE—POLICY—CONSTRUCTION—OPERATION — DELIVERY — NONPAYMENT OF PREMIUMS — FORFEITURE — LIMITATIONS — ESTOPPEL.

1. A policy dated July 30th, calling for quarterly premiums, provided that it should not be binding until delivered and its first premium paid. It was not delivered, nor the first premium paid, until September 3d, and insured died in November following. *Held*, that the policy did not begin to run until September 3d, and was in force for three months thereafter, and hence was not forfeited for failure of assured to pay the quarterly premium, which would have been due October 30th, had the policy taken effect on the day of its date.

2. Where a policy required proof of death to be made on blank forms furnished by the company, and declared that no action should be brought on it after one year from the date of insured's death, without reference to the time of furnishing the proofs of the death, such requirements must be construed together, and, if failure to bring the action within one year was occasioned by the company's refusal to furnish the blanks required, it is not entitled to urge the limitation to defeat plaintiff's recovery.

3. Where a policy declared that proof of death should be made on blanks furnished by the company, and that no action should be begun after one year from assured's death, without reference to the time of furnishing such proofs, the words in the limitation clause, "without reference to the time of furnishing proofs of death," refer only to the time when proofs are furnished, and do not apply to a case where the making of proofs of death was prevented by the company's refusal to furnish blanks.

Department 1. Appeal from superior court, Los Angeles county.

Action by J. M. Methvin against the Fidelity Mutual Life Association of Philadelphia, Pa. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

R. L. Horton, for appellant. McKinley & Graff, for respondent.

GAROUTTE, J. This action is based upon a policy of life insurance. Plaintiff recovered, and the appeal is taken from the judgment and order denying a motion for a new trial.

Had the policy lapsed and become forfeited at the time of the death of the insured? These are the facts: While the policy was dated July 30, 1895, it was not delivered to the insured until the 3d day of the following September, at which time the first quarterly premium was paid. There is a clause in the policy providing that it would be in no way binding, or of any force or effect, until delivered to the insured and the first quarterly premium paid. It necessarily follows that the contract of insurance went into effect September 3, 1895. A quarterly premium of $24.96 was to be paid for the period of 20 years, on or before the 30th day of July, October, June, and April of each year. Upon this state of facts, it is manifest that when the insured received his policy and paid his quarterly premium he was insured for three months from September 3d, the date when the policy went into force and effect. The insured died in November, 1895, and we see no reason why his policy of insurance was not alive and in full force at that time.

It is claimed that the policy was forfeited eo instanti upon October 30, 1895, because the second quarterly premium was not paid upon that date. This contention is based upon a clause of the policy which declares that this policy "shall be ipso facto null and void if premiums are not paid when due." The construction of the policy here contended for would recognize and approve a harsh doctrine indeed. It would be carrying the doctrine of forfeiture to unconscionable lengths. By payment of the first quarterly premium, the deceased was insured for three months. This was necessarily the contract between the parties. This clause of forfeiture for nonpayment of premiums was never intended to forfeit the privileges of insurance already paid for. No insurance policy ever attempted to do such a thing. This contention, if sound, would not only result in the forfeiture of present paid-up insurance, but would result in the forfeiture of a portion of the premium already paid. Upon rules of construction even liberal to defendant, it cannot be claimed that the forfeiture clause of the policy for nonpayment of premiums was any more than a forfeiture of the policy to take place upon the expiration of the period during which there existed paid-up insurance. The insured died at a time when the policy was in full force and effect, and, there being no forfeiture at that time, his representative has a good cause of action.

It is now insisted that this action was begun too late. This insistence is based upon the following clause found in the policy: "No suit or action hereon shall be begun or maintained after the expiration of one year from the day of death of the member, without reference to the time of furnishing the proofs of death, and such lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding." This action was begun more than one year after the death of the insured. It is now claimed upon the part of plaintiff that this provision was waived by defendant. The policy contained a clause to the effect that the proofs of death and claims required shall be made upon the "blank forms furnished by the association." Another clause provided that the insurance money would be paid "within ninety days after receipt of satisfactory proof of death of the said member, and the justness of the claim hereunder, in form required by the said association." Upon the foregoing branch of the case the court found that these blank forms could not be had except from defendant; that in proper time plaintiff requested the defendant to furnish the forms upon which to make proofs of death, etc., but that defendant failed and refused to furnish them; that plaintiff has repeatedly since the death of the insured demanded of defendant such blanks, but has been continually refused and is still refused. The court further found that upon September 21, 1897, plaintiff again demanded of defendant such blanks, but was refused; whereupon plaintiff elected to treat such refusal as a waiver of the right to proofs, and thereupon began this action. Upon the foregoing facts it was held by the trial court that the clause of the policy requiring the action to be begun within one year from death was waived. By one provision of the contract of insurance, plaintiff could not bring his action until 90 days after proof of death. By another clause of the contract of insurance, blanks for this proof of death, and the form of the proof, could only be furnished by defendant. By another clause, plaintiff was bound to bring suit within one year from the death of the insured. This last clause of the contract has no superiority or ruling force over other provisions. They must all be considered together. If plaintiff could not bring his action until proofs of death were furnished defendant, and defendant prevented him from furnishing such proofs, then, clearly, a failure to bring the action within one year was occasioned by defendant's fault rather than plaintiff's, and such failure cannot be urged by defendant to defeat plaintiff's cause of action.

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[1] Rehearing granted.

Defendant attaches much importance to the phrase in this limitation clause to the effect, "without reference to the time of furnishing the proofs of death." These words do not deny the conclusion reached. They refer only to the time when the proofs are furnished, and not to a total absence of proofs, as we have in this case. The general principles here involved are fully covered by Case v. Insurance Co., 83 Cal. 473, 23 Pac. 534. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

126 Cal. 90

PLACER COUNTY BANK v. FREEMAN et al. (Sac. 529.)

(Supreme Court of California. Sept. 14, 1899.)

DRAFT—CONSIDERATION—MISTAKE—AGENCY.

1. Where plaintiff bank, having been notified of a deposit, made in another bank in favor of defendant, subject to plaintiff's draft, paid the amount to defendant, taking a receipt, and afterwards, in order to obtain the money, had defendant sign a draft on the bank where it was deposited, such draft is founded on a sufficient consideration.

2. Plaintiff bank, having been notified of a deposit in another bank, subject to its draft, in favor of defendant, paid the amount to defendant, taking his draft on the latter bank, with which plaintiff had had no previous dealings. *Held*, that plaintiff did not act as the agent of drawee bank, so as to preclude it from recovering from defendant on the draft, after drawee bank had become insolvent.

3. Plaintiff bank, having been notified of a deposit in another bank, in favor of defendant firm, subject to plaintiff's draft, paid the amount to a member of defendant firm, taking his individual receipt, and soon afterwards, in order to obtain the money, asked him to sign a draft with the firm name, which he signed without reading, supposing it to be another receipt. The bank in which the fund was deposited became insolvent, and defendant was sued on the draft. *Held* that, since the partner signing the draft was negligent in failing to read it, the fact that he signed it under a mistake was no defense.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

Action by the Placer County Bank against W. A. Freeman and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

John M. Fulweiler, for appellant. Pullen & Wallace and Tuttle & Wright, for respondents.

CHIPMAN, C. Plaintiff alleges: That defendants delivered to plaintiff, at its date, their certain bill of exchange, reading as follows: "$500.00. Auburn, Cal., Dec. 17, 1896. At sight, pay to the order of Placer County Bank five hundred dollars, value received, and charge the same to the account of Bell & Freeman. To E. S. Dreyer & Co., Chicago." That the same was presented for payment to the drawee December 23, 1896, and payment was refused, and notice of nonacceptance was duly given to defendants, but they have not paid the same. Defendants deny any indebtedness, and as a separate defense plead want of consideration, and set up certain facts in effect showing that they signed the draft believing it to be a receipt only for the money, as to which the findings are substantially as pleaded by defendants. The trial was by the court without a jury. The court found: That one Graves was indebted to Bell and Freeman each in the sum of $250, and being then in Chicago, where he resided, and desiring to transmit the money to them, he drew his check upon Dreyer & Co. in favor of plaintiff. That, to make payment to plaintiff, Graves requested Dreyer & Co. to, and they did, send the following telegram: "Chicago, Ill., Dec. 17, 1896. To Placer County Bank, Auburn, Cala.: We hold five hundred dollars subject your draft for Bell & Freeman. E. S. Dreyer & Co., Bankers." That plaintiff received the telegram, and on the same date paid to Freeman said sum, and Freeman gave plaintiff a receipt acknowledging payment. About 15 minutes later Nichols, plaintiff's cashier, who had made the payment, called Freeman back, and handed to him the instrument set forth in the complaint, and informed him the former receipt was insufficient, and requested him to sign the said instrument for Bell and himself as and for an additional receipt to evidence said payment, and that Freeman signed the same not knowing it was a draft upon Dreyer & Co., but believing it simply an additional receipt. That the draft was presented and dishonored December 23d, and at the time the draft was signed by Freeman for defendants there was no money on deposit with Dreyer & Co. subject to defendants' draft, but said money was deposited subject to the order of plaintiff, and these facts were known to plaintiff at that time. It is further found that no consideration passed from plaintiff to defendants, or either of them, for said draft. As conclusion of law, the court found that plaintiff by the payment accepted the said telegraphic order, and in so doing acted as the agent and trustee of Dreyer & Co., and not of defendants or either of them. Judgment went for defendants, from which, and from the order denying motion for a new trial, plaintiff appeals. It is claimed that the findings and decision are not supported by the evidence.

It appears from the evidence that Graves had entered into engagements with Bell & Freeman in a transaction relating to the purchase of a mine, and it became necessary that he should pay them $500 on December 17th. He placed the amount in the hands of Dreyer & Co. to be transmitted to Bell & Freeman through the Placer County Bank at Auburn, where Bell & Freeman were. Mr. Wallace, at Auburn, had been acting, as he testified, "as agent between Mr. Graves and Bell & Freeman in relation to this transaction." He had informed Graves of the necessity for sending this money. Mr. Berger, of Dreyer & Co., drew the dispatch and signed it for the firm, and Graves sent it. Mr. Wallace was expecting the remittance, and went to the Placer County Bank to learn if it had been sent, and, being told there was money there for Bell & Freeman, he sent Freeman to the bank. Prior to the sending of this telegram, the Placer County Bank had no relations with Graves or the Chicago bank, or with Bell & Freeman, so far as appears from the evidence. The Placer County Bank was brought into the transaction by this message. The finding that the money was on deposit with Dreyer & Co., subject to the order of plaintiff, and not subject to defendants' draft, is not sustained by the evidence, for the reason that it clearly appears that the money was there on deposit, as the telegram showed, and as was the undisputed fact, for Bell & Freeman, and not for plaintiff, though for the purposes of the transmission it was made subject to plaintiff's draft. Dreyer & Co. had no money belonging to plaintiff, but they had $500 left there to be transmitted for Bell & Freeman. There is some conflict in the evidence as to what occurred in getting the money into the hands of Bell & Freeman.

Nichols testified: "That telegram, at first reading, I took for a direct order to pay money from Chicago, and I took Freeman's receipt for that amount. I gave him five hundred dollars, and took his receipt. It was signed 'W. A. Freeman.' He then went out, and upon examination of the telegram afterwards, as to the meaning of it, I saw that it was not an order, but merely a notification that there was money in Chicago with E. S. Dreyer & Co." He then testifies that he called Freeman back, and told him that he (Nichols) "would have to change the advice in order to get the money." He testified: "I didn't say anything to him about signing a receipt. I said I wanted him to change it; that the paper I had wouldn't do. I don't know whether he read the paper he signed. He had opportunity to do so. I cautioned him particularly to sign it 'Bell & Freeman,' according to the telegram. He raised no objection, and went out. That was the last of it." Upon cross-examination, he testified that he supposed the draft of the Placer County Bank would have been paid, accompanied by the receipt for the money, by Bell & Freeman, but that it would not have been the proper way to do. Freeman's version as to the payment of the $500, and giving a receipt, in the first instance does not differ materially from Nichols'; but as to the second paper, signed "Bell & Freeman," he testified that he did not examine it or read it, although he says he could have done so; that he supposed it was a receipt, and did not know it was a draft; that he understood Nichols to call him back to sign a receipt, and that when he signed the paper nothing was said about a draft. He further testified: "Had I known that instrument was a draft, I would not have signed a draft for Mr. Bell. I might have signed one for myself." It was admitted of record "that in these matters defendant Freeman acted as, and was, the agent of defendant Bell." On rebuttal, Nichols testified: "I told him he would have to change the paper in order to collect the money in Chicago. I said nothing about a receipt. I don't think I mentioned the name of the draft, but I said I would have to have a different paper to collect the money in Chicago." It appears that on December 23d, when the draft reached Chicago, Dreyer & Co. had suspended business, and a receiver was in charge, and for this reason the draft was not paid.

No question of fraud or undue influence, or the existence of any confidential relations between plaintiff and defendants, is presented or claimed by defendants to arise either from the pleadings or the evidence. Defendants' position is stated in their brief as follows: "We do not ask the court to correct a draft and hold it to be a receipt, but we do ask the court to hold that the draft was given without consideration, and that it was obtained by the bank, and was expressly understood by both parties to be, for the better evidencing the payment of the money to defendants, so that plaintiff could the more readily obtain its money from the Chicago bank, to whom it had given the credit." We do not think there was lack of consideration for the only reason urged, to wit, that defendants had already received the money and receipted for it. The draft was part of the same transaction, and as much consideration existed for it as for the receipt. The evidence is that plaintiff had no interest in the matter beyond the usual exchange, and, as we have seen, the money was deposited at Chicago, to be sent to defendants. Nor do we think plaintiff was the agent of the Chicago bank in the sense urged by defendants and as the court found in its conclusions of law. It is true the telegram was authority for plaintiff to draw on Dreyer & Co., but with the direction that it was "for Bell & Freeman." Plaintiff had no authority to draw otherwise. Plaintiff was as much the agent of defendants as of Dreyer & Co.

The real question in the case, we think, is, should defendants, in view of all the undisputed facts, be permitted to avoid the consequences of their voluntary acts? Obviously, the loss in the transaction, by the plainest considerations of justice, ought not to fall upon plaintiff, and we think the rules of law call upon us so to hold. The principle governing the case has been applied many times and under a great variety of circumstances. It is this: Where a person enters into an obligation with another upon an equal footing, i. e. where he does so free from any fraud practiced upon him and not being under any undue influence, and there are no relations of confidence and trust, and the means of knowledge are equally open to both, and he executes the instrument without reading it or having it read to him, and without exercising the means of knowledge open to him, neither the courts of law nor courts of equity will relieve him from the effects of his folly. Judge Story, in his Equity Jurisprudence (section 200a), quotes the rule from Kent's Commentaries as follows: "The common law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." Among other cases found in our Reports upon the question, are Hawkins v. Hawkins, 50 Cal. 558; Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Association v. Esche, 75 Cal. 513, 17 Pac. 675; Crane v. McCormick, 92 Cal. 176, 28 Pac. 222. The judgment and order should be reversed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

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6 Cal. Unrep. 335

DE GREAYER v. FIDELITY & CASUALTY CO. OF NEW YORK. (S. F. 1,417.)

(Supreme Court of California. Sept. 15, 1899.)

INSURANCE—VOLUNTARY EXPOSURE—EVIDENCE—INSTRUCTIONS.

1. Deceased was overtaken by a policeman while driving, and, in an altercation which ensued, the policeman shot and killed him. After deceased was shot, he fired his pistol at the policeman, but there was no positive evidence that he took the pistol from his pocket until he was shot. His pistol had a white handle, and one witness testified that before the shooting he saw deceased take something from his pocket and threaten to kill the policeman, while another testified that deceased went towards the policeman, unbuttoning his overcoat with his left hand, and that he raised his right when close to him, saying, "You will not stop my horse," and had nothing in his hand that witness could see; that after deceased was shot, and had fired at the policeman, witness saw something white in his hand. *Held*, that it was not an abuse of the trial court's discretion to refuse to set aside a verdict finding that deceased had not voluntarily exposed himself to unnecessary danger, within the exception of a policy.

2. In an action on a policy excepting from its operation death by voluntary exposure to unnecessary danger, an instruction that whether the assured so exposed himself did not depend on his having exercised reasonable care or caution, or that he had been guilty of negligence or unlawful acts, but whether he voluntarily exposed himself to unnecessary danger, and death resulted in consequence thereof, is not erroneous, as misleading or confusing.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Harry G. De Greayer, by Septimus De Greayer, his guardian, against the Fidelity & Casualty Company of New York. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

S. C. Pardee, for appellant. Parker & Eells and A. G. Eells, for respondent.

HAYNES, C. The plaintiff brought suit by his guardian to recover from the defendant $5,000, the principal sum of a policy of insurance against death from bodily injuries sustained through external, violent, and accidental means, issued to one Harry De Greayer, in which the plaintiff was named as the beneficiary. Said policy contained the exception that it did not cover "voluntary exposure to unnecessary danger," and the defendant pleaded and relied upon that exception as a defense to the action. A jury trial was had, and a verdict returned for the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant appeals.

1. Appellant's principal contention is that the evidence does not justify the verdict. The general rule, that where the evidence is conflicting the verdict will not be disturbed, is conceded, but it is contended that there is no conflict in the evidence. It is true that all the witnesses called to testify to the circumstances under which De Greayer was killed were called by the defendant, but that fact is not conclusive upon the question of conflict. Many a case has been lost because of differences between a party's own witnesses. Here, however, the defense was based upon an exception in the policy, and the burden of proof was upon the defendant. Under the general provisions of the policy,

the defendant's liability is conceded, and it could be relieved from liability only by establishing its special defense by satisfactory evidence,—that evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind. Code Civ. Proc. § 1835.

De Greayer died from the effects of a pistol shot at the hands of a mounted park policeman named Harper. The homicide occurred about 5 o'clock in the afternoon of January 30, 1892. De Greayer, accompanied by a lady, had been driving in the park, and at the hour named left the main driveway, and was going to the north exit, near the terminus of the car lines, and about opposite Dickey's saloon. Two witnesses were called by the defendant, who witnessed the shooting. One (Rev. O. C. Miller) testified: That he had been walking with his wife in the park, and was also near said north exit, when he heard the swift gallop of the policeman's horse to overtake the buggy driven by De Greayer, and saw him overtake it and seize De Greayer's lines near the bridle and stop his horse. That De Greayer jumped out of his buggy, and, as he was passing round his horse towards the policeman, he "threw up his hand this way [the witness put his hand to his breast],—as I would suppose, to unbutton his coat. Then he went closer to the policeman, and I saw him raise his hand up this way [showing] and he said, 'You will not stop my horse;' and then there was a flash of a pistol, and that flash was down towards the vest of the gentleman, and the gentleman fell or sunk down to the ground, on one knee." That the lady screamed, and the horse turned and ran with the buggy back into the park, and the policeman turned and pursued the horse and buggy, and as he pursued it the gentleman fired one or two shots at the policeman. That, when the gentleman got out of his buggy and stepped towards the policeman, he had nothing in his hand that he (the witness) could see. That while he was unbuttoning his overcoat with his left hand his right hand went up "this way" (showing). That his manner was excited and threatening. The witness was asked whether he saw anything in De Greayer's hand when he shot at the policeman as he pursued the runaway horse, and he replied: "It was getting toward dark, and I only saw something white. It might have been his cuff. I cannot say as to that." Upon cross-examination this witness drew a diagram upon the blackboard showing the roads, and the relative position of himself and the other parties at the time of the shooting; but, as the diagram is not reproduced in the record, we are not aided by it, however much it may have aided the court and jury in understanding and weighing, not only his testimony, but that of the other witness who was called by the defendant to testify to the same circumstances. It does appear from his testimony, however, that the shooting occurred in the park somewhere between the main driveway and the exit, and that this witness could not have been far from the point where it occurred. Alexander McCord, the other witness to the shooting, was at the time on the platform of Dickey's saloon, nearly opposite the exit from the park, and the full width of the street—80 feet—from it. He testified in chief as follows: "He [De Greayer] jumped out of his buggy, and when he got halfway from his horse he unbuttoned his coat. He had a long ulster on, and he pulled his coat open and put his hand back in his pocket here [showing], and pulled something out. I then thought it was a pocket handkerchief. It was something white. And he made the remark, 'Damn you! I will kill you.' He went right up to the policeman. The policeman's horse backed from him,—I don't know whether the policeman pulled his horse away,—and he put his hand up to him like that. [The witness raised his right arm.] Then I heard two reports; a pistol go off twice,—what I supposed was a pistol go off twice; and as the pistol went off the woman screamed, and the horse turned around and went back into the park. The policeman turned quickly and rode right after her and the buggy, and as he did so De Greayer went down on his hands and knees, and as he got up he pulled his pistol out and fired, I think twice, after him, and that is all I saw, and then I left." Upon cross-examination he admitted that he did not testify upon the examination of Harper before the police magistrate that De Greayer said, "I will kill you," but explained that he was not asked to make a statement, but was only asked questions; that De Greayer might have said, "I will not let you stop my horse," but that would not make any impression on his mind; that, at the time the policeman fired, "De Greayer was right up close to the policeman when the first shot took place,—maybe two inches, or maybe four, but very close to him. He was right beside of his horse." It was shown that De Greayer had a white-handled pistol, and that one chamber had been discharged. There was evidence tending to prove that De Greayer was not in the habit of carrying a pistol; that a short time before he was out driving, and saw a horse badly injured in a runaway, and no one had anything to kill him with; that he was a member of the society for the prevention of cruelty to animals, and carried a pistol for the purpose above indicated. Septimus De Greayer testified that deceased carried his time book and his pocket handkerchief in his hip pocket, and invariably carried cards in his hip pocket.

The point of the controversy upon the evidence was whether De Greayer assaulted the policeman with his pistol. Upon this question there was no positive evidence that he took the pistol out of his pocket until after he was shot, when, according to the testimony of McCord, De Greayer, when he was shot, went down on his hands and knees, "and as he got up he pulled his pistol out and fired, I think twice, after him." True, he afterwards said that as De Greayer passed around the head of his horse when he saw his hand in his pocket, and when he could see the white object, that he could not tell then whether the white object was a pocket handkerchief or a pistol, but it was not cards; it was too large for that, too much of it, and it did not look like cards. The facts were submitted to the jury under full and proper instructions, directing them to take into consideration all the facts and circumstances of the case, and whether the deceased did or did not, at the time he approached the policeman, exhibit or have in his hands a pistol. The jury saw and heard the witnesses, and knew better than we possibly can the weight that should be given to their evidence. There was not only a direct conflict in their evidence as to what De Greayer said, but Miller, who was much nearer, saw nothing in De Greayer's hand until after he was shot, while McCord says De Greayer, "as he got up, pulled out his pistol and fired." We think the jury were justified in failing to find that De Greayer assaulted the policeman with a pistol, and thereby voluntarily exposed himself to unnecessary danger, within the meaning of the exception in the policy, the burden being upon the defendant to prove that fact affirmatively. The learned judge before whom the cause was tried has a much larger discretion in setting aside verdicts than is given to appellate courts, and the real question in this court is whether he abused his discretion in refusing a new trial upon the ground above considered. A doubt on our part, even if entertained, would not justify a reversal.

2. The only other question noticed in appellant's brief is an exception to the following instruction, given to the jury at plaintiff's request: "The question of whether the circumstances of a particular accident bring it within one of the exceptions by which the company has guarded itself against an accident resulting from voluntary exposure to unnecessary danger is not a question whether the person insured has exercised reasonable care or caution, nor whether he has been guilty of negligence or of unlawful acts, but it is a question whether or not the insurance company has shown—the burden being upon it to do so—that the insured voluntarily exposed himself to unnecessary danger, and that the death resulted in consequence thereof." I see no error in this instruction. It is said by counsel for appellant that it is misleading and confusing; that, while it is true that "voluntary exposure to unnecessary danger is more than negligence," yet the decisions do not hold that it is not negligence. Counsel refutes his own criticism of this instruction when he says that "voluntary exposure to unnecessary danger is more than negligence." In other instructions, to which no objection is urged, the court fully and clearly informed the jury what the words "voluntary exposure to unnecessary danger," as used in the policy, mean. I advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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126 Cal. 35

VAIL v. SAN DIEGO COUNTY. (L. A. 640.)

(Supreme Court of California. Sept. 11, 1899.)

CONSTITUTIONAL LAW—UNIFORM OPERATION—CHANGE OF COMPENSATION OF OFFICERS.

1. St. 1897, p. 577, §§ 233, 234, changing the compensation of certain county officers from a per diem fee to a fixed salary, and providing that such change shall apply to incumbents at the time of the passage of the act, and also changing the rate of compensation of other officers already receiving fixed salaries, but providing that such change should not apply to present incumbents, does not violate Const. art. 1, § 11, requiring all laws to have a uniform operation.

2. Nor does such act violate Const. art. 4, § 25, subd. 29, forbidding the passage of special laws affecting the fees or salary of any officer.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by R. M. Vail agaist San Diego county. There was judgment for defendant, and plaintiff appeals. Affirmed.

Haines & Ward, for appellant. A. H. Sweet, for respondent.

BRITT, C. Plaintiff here was the duly-elected, qualified, and acting county surveyor in and for the county of San Diego for the term commencing on the first Monday after the first day of January, 1895. When his term began the county government act of 1893 was in force, and by section 145 thereof, which seems to have been applicable to all the counties of the state, it was provided that "the county surveyor shall receive ten dollars per day for all work performed." St. 1893, p. 382. This is an action to recover from said county compensation at said rate for various services rendered by plaintiff, in virtue of his said office, at divers times from June 1, 1897, to October 29, 1897, inclusive. The court below rendered judgment for defendant. The question on appeal is whether on said June 1, 1897, the said provision of section 145 of the act of 1893 was, as regards the county of San Diego, repealed by the county government act of 1897, and replaced by the provision of section 165 of the latter act, to the effect that in counties of the class to which San Diego belongs the surveyor shall receive a salary of $2,000 per annum "in lieu of all fees and per diem now allowed by law." St. 1897, p. 513.

By the terms of the act of 1897 the compensation of a considerable number of officers was changed from a per diem for work performed, as provided in the act of 1893, to a fixed salary; in other instances salaries provided in the earlier act were, in the later, directly augmented or diminished or otherwise changed; and the purport of sections 233 and 234 of the act of 1897, so far as they concern the present case, was to put into effect, and render operative upon incumbents then in office, said changes from a daily wage for work performed to a fixed salary, on and after June 1, 1897, while in the case of existing fixed salaries said sections 233 and 234 provided that the changes should not affect the incumbents. Plaintiff's point is that these provisions which purport to make the changes declared by the act of 1897 operative upon incumbents who had previously received a per diem, but not on those who were in receipt of a fixed salary, are in conflict with those clauses of the constitution requiring all laws of a general nature to have a uniform operation (article 1, § 11), and forbidding the passage of special laws affecting the fees or salary of any officer (article 4, § 25, subd. 29), and hence that his right, under the act of 1893, to receive $10 per day for services performed, remains unaffected.

Plaintiff's contention is susceptible of more than one reply. We shall, however, content ourselves with stating the view which seems the more direct answer to his line of argument. Firstly, a statute is uniform in its operation if it applies alike to all persons or objects within the class to which it relates. Hellman v. Shoulters, 114 Cal. 136, 147, 44 Pac. 915, and 45 Pac. 1057. The general provisions of said sections 233 and 234, by which the act of 1897 was made operative on the compensation of incumbents who previously had been paid "fees or per diem," affected equally all incumbents in that category, and such operation is therefore uniform. Secondly, the mode and measure of paying county officers is, in general, peculiarly a matter of discretion in the legislature. That body certainly may provide that some officers shall receive "fees or per diem," and that others shall receive regular stipends. San Luis Obispo Co. v. Darke, 76 Cal. 92, 18 Pac. 118. Necessarily, then, there must be some regulations which apply to the one class and not to the other. The statute here complained of conforms in a reasonable manner to the diverse circumstances of the two classes of officials. Thus, it may have seemed to the legislature that all those who by the provisions of the act of 1893 had been allowed a prescribed and certain rate of compensation, annexed unqualifiedly as an incident of the title to their respective offices, ought to receive the same unaffected by changes in the law until the end of their terms, and that others, whose emoluments, as in the case of plaintiff, had no such fixity, but were contingent on the public demand for their services, and their own ability to supply it, could with less inconvenience be subjected to the rule of the new law. It follows that the legislation under view does not proceed on a mere arbitrary distinction, but on one founded in intrinsic differences which naturally suggest the propriety of different adjustments of the law. It is therefore not special, within the prohibition of the fourth article of the constitution. Rode v. Siebe, 119 Cal. 518, 51 Pac. 869; People v. Central Pac. R. Co., 105 Cal. 584, 38 Pac. 905; Darcy v. City of San José, 104 Cal. 642, 38 Pac. 500. See, also, McCabe v. Jefferds, 122 Cal. 302, 54 Pac. 897; Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081. Regarding the case of Miller v. Kister, 68 Cal. 142, 8 Pac. 813, on which the plaintiff mainly relies, it is sufficient to say that we have shown that the reasons which controlled the decision there do not exist in the present case. The judgment should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(126 Cal. 135)

BATHGATE et al. v. IRVINE et al. (L. A. 362.)

(Supreme Court of California. Sept. 18, 1899.)

RIPARIAN RIGHTS—PRIOR APPROPRIATION—PRESCRIPTION—NONUSER BY UPPER RIPARIAN OWNER—TAKING WATER BEYOND WATERSHED—RETURNING WATER—FINDINGS—EVIDENCE—NOTICE OF CLAIM OF LOWER RIPARIAN OWNER—DISCLAIMER IN ANSWER—COSTS—DISCRETION OF COURT.

1. A lower riparian owner cannot acquire by prior appropriation the right to all the waters of a stream, as against an upper proprietor who held title to his land before such appropriation was made.

2. Where a lower riparian proprietor takes the water out of the stream at a point on his own land, and uses such water only as the upper riparian proprietor permits to pass down, he can acquire no right to the water by prescription, as such use is not adverse in the sense required to give a right by prescription.

3. Nonuser of the waters of a stream by the upper riparian owner cannot be invoked to strengthen the claim of appropriation or prescription by a lower riparian owner who takes the water out of the stream at a point on his own land, and uses such water only as the upper riparian owner permits to pass down.

4. A riparian owner, under the claim alone of riparian right, cannot, to the injury of another riparian owner, take the water for any purpose beyond the natural watershed of the stream.

5. Riparian rights do not extend beyond the watershed of the stream, and lands so situated are not riparian.

6. Where the lands of upper and lower riparian owners do not join, a finding of the court that the upper riparian owner must return the waters at the upper boundary line or above the lands of the lower riparian owner is sufficient, and it need not be found that the upper riparian owner must return the waters above his lower boundary line.

7. Where the transcript in an action to quiet title to the waters of a certain creek fails to show sufficient evidence to enable the court to find the exact or approximate portion of said waters to which the parties were each entitled, it is proper to render judgment determining whether the parties had any rights or not, with leave to either party at any time to bring another action to determine the proportions of said waters to which each may be entitled.

8. In an action by lower riparian owners against an upper riparian owner to quiet their title to the waters of a creek, evidence that plaintiffs have acquired by prescription all the riparian rights of all the riparian owners below them who are not parties to the suit is properly excluded, where such evidence is insufficient to enable the court to apportion the respective rights of the parties to the waters of said creek.

9. Posting a notice making formal claim to the waters of a creek by lower riparian owners at the point of diversion by them, below the lower line of an upper riparian owner, cannot strengthen their claim to the water by adverse use, nor confer any rights on them as against the upper riparian owner.

10. A notice posted by lower riparian owners on the land of an upper riparian owner, claiming the exclusive use of the waters of a creek flowing at the head of their ditch located below the upper riparian owner's lower boundary line, and forbidding him from diverting the water of the creek, does not add to plaintiff's right to divert it.

11. Mere knowledge by an upper riparian owner that lower riparian owners were using the water of the creek, and claimed the right to use it, is not evidence of acquiescence; nor is it sufficient to establish adverse use, or to create an estoppel.

12. Where an action by lower riparian owners against an upper riparian owner to quiet their title to the waters of a creek is tried on the assumption that defendant was the owner of the land at the time the action was brought, and both parties submit evidence on that assumption, and the point that defendant, in his answer, disclaimed all riparian rights, and alleged that before the court obtained jurisdiction of his person he had parted with his title to the property described in the complaint as belonging to him, is not suggested, until on appeal, it is not error for the court, in its findings, to treat the ownership of the land and the water rights of the respective parties as issues in the case.

13. Where, in an action to quiet title, maps were prepared by experts by direction of plaintiffs alone, and not by order of the court, and were not used by defendant, except as exhibits offered by plaintiffs, it was error to award as costs to plaintiffs the expense of such maps, and expert fees to the witnesses preparing them and testifying in relation thereto.

14. Code Civ. Proc. § 1025, leaving the determination of the question of costs, with certain exceptions, to the discretion of the trial court, does not justify the court in allowing costs not properly chargeable.

Commissioners' decision. Department 1. Appeal from superior court, Orange county.

Action by William Bathgate and 274 others against James Irvine and others to quiet plaintiffs' title to the waters of Santiago creek, in Orange county, and for an injunction. From the judgment, from an order denying new trial, and from certain parts of the order disallowing plaintiffs' costs, plaintiffs appeal; and from certain parts of the order allowing costs defendant James Irvine appeals. Modified.

White & Monroe, V. Montgomery, and William T. Kendrick, for appellant. E. H. Lamme, J. G. Scarborough, and Garber, Boalt & Bishop, for respondents.

CHIPMAN, C. Action to quiet the title of plaintiffs, 275 in number, to the waters of Santiago creek, in Orange county, and for an injunction. Plaintiffs appeal from the judgment, from the order denying motion for new trial, and from certain parts of the order disallowing plaintiffs' costs. Defendant appeals from certain parts of this latter order.

Santiago creek takes its rise in high mountain elevations, on government land. It flows by a natural, well-defined channel through and over defendant's land, comprising about 48,000 acres; thence over and through a tract of land, about one mile in width owned by persons not made parties to the suit; thence enters and flows over and through plaintiffs' lands, comprising in all about 2,000 acres. The court found that the predecessors in interest of plaintiffs about the year 1872 diverted and appropriated all the waters of this creek, about one mile below defendant's land, and used the same upon their said lands for irrigation and domestic purposes, and that said waters have been so used on plaintiffs' lands continuously for the past 21 years; that plaintiffs have expended large sums of money in cementing ditches and laying pipe lines from said point of diversion; that all the waters of said creek have been used by plaintiffs during the period for purposes of irrigation, domestic uses, and watering stock, "under claim of right, openly, notoriously, and continuously and uninterruptedly, * * * but said waters have not been used adversely to defendant James Irvine, or his predecessors in interest, * * * and it is not true that the said defendant and his predecessors * * * knew that the plaintiffs * * * used said waters * * * adversely to the said defendant or his predecessors, or that said defendant and his predecessors in interest, or either of them, * * * acquiesced in said diversion and use by said plaintiffs"; that the waters diverted by plaintiffs "continue to be absolutely essential for the proper irrigation and maintenance of plaintiffs' said crops, * * * and the use * * * has been * * * reasonable, and no diversion above said plaintiffs' point of diversion has, during any of the said times, been made by the said Irvine or others except as set forth in plaintiffs' complaint, * * * but that said diversion and use by plaintiffs have not been exclusive or adverse to said Irvine or his predecessors in interest." The allegation of the complaint as to defendant's diversion of the water is that about June 24, 1893, defendant constructed a dam in said stream on his own land about three miles above plaintiffs' lands, and by means of a ditch and flumes wrongfully and without the consent of plaintiffs, and against their objections, diverted the entire surface stream, and carried the water out of the watershed in which said stream is situated, and to a point where the waters do not return to the ancient channel of said stream, and that defendant continues to so divert all of the surface flow of said water, to plaintiffs' great injury. The court further found that plaintiffs are, and have been during all the times mentioned in the complaint, as riparian owners, entitled to a portion of the waters naturally flowing in said creek, but are not entitled to all the waters, and that defendant and his predecessors are and have been entitled, as like riparian owners, to a portion of said waters, "but the court is unable to find from the evidence adduced herein what is the exact or approximate part or portion of said waters to which the parties herein are each entitled"; that about 2,200 acres of defendant's lands through which said creek flows, and lying within the watershed of said creek, are irrigable, but none of said lands have been heretofore irrigated; that it is not true that defendant is estopped from asserting any right to any part of said waters, and it is not true that defendant and his predecessors in interest acquiesced in or encouraged plaintiffs to make the improvements alleged in the complaint, or were grossly careless or negligent in omitting to give notice to plaintiffs that they claimed any interest in said waters adverse to plaintiffs; that plaintiffs were not, by the acts of defendant and his predecessors, led to believe that defendant and his predecessors had no interest in the waters of said creek, and plaintiffs had no reason to so believe, but plaintiffs' rights were exercised in the belief that they had the exclusive right to said waters, and that they had no notice of the claim of defendant and his predecessors, "except such notice as knowledge of the ownership hereinbefore found of the lands of the said ranchos by defendant and by his predecessors in interest * * * imparts, and that plaintiffs and their predecessors in interest had such knowledge, but that said belief on their part was not reasonable; that defendant and his predecessors in interest used the water at any and all times whenever necessary for domestic and stock uses, and have claimed the right so to do, and have during the years 1879 to 1892 used the lands of defendant mainly for pasturing sheep, there being at times thirty thousand thereof, and used the said water as needed for them."

As conclusions of law the court found: First, that plaintiffs and defendant are riparian owners of lands through which said creek flows, and each is entitled to divert, take, and use a portion of said waters for the purpose of irrigating their said lands, and for domestic use and watering stock; second, plaintiffs are entitled to judgment that defendant is not entitled to divert or use the whole of said waters, except for domestic and stock uses, or to divert or conduct any portion of the waters of said creek outside the watershed of said creek, nor to use any portion of said waters upon any lands, except for domestic and stock uses and purposes, from which said waters will not or cannot return to the ancient channel of said creek at or above the lands of plaintiffs as set forth in plaintiffs' complaint, and to an injunction restraining defendant therefrom. Judgment was ordered accordingly, "with leave to any party herein at any time to bring another action to determine the parts and proportions of said waters to which they are respectively so entitled." It was further ordered that plaintiffs and defendant each pay one-half of the fees of the reporter, and that plaintiffs recover their costs incurred in maintaining the issues as to defendant's taking the whole of the water at his place of diversion, and his taking the water out of the watershed for irrigating, and none others.

1. Plaintiffs contend that, as lower riparian proprietors, they acquired the right to all the waters of the creek by prior appropriation, notwithstanding defendant and his predecessors in interest were upper riparian owners long before plaintiffs made their appropriation. We understand the rule to be settled, and is no longer open to discussion, in this state, that such right cannot be thus acquired. Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18. And it is equally well settled that no right to the water can be acquired by prescription where the lower riparian proprietor has taken the water out of the stream at a point on his own land, and has used such water only as the upper riparian proprietor permitted it to pass down through his land to the lower owner. Such use by the latter is not adverse, in the sense required to give a right by prescription. Id. Nor can the nonuser of the water by the upper riparian owner of land be invoked to strengthen the claim of appropriation or prescription by the lower riparian owner under like circumstances. Id. In appropriating the water which flows across his land, the lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in no wise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to prevent. The case is quite different where the upper owner appropriates the water. The lower owner is injured at once, and the law gives him a remedy; and, if he fails to avail himself of it, the appropriation may, by lapse of time, ripen into an absolute right. The further claim of plaintiffs is in the nature of estoppel. It is alleged that the predecessors of defendant, with full knowledge that plaintiffs had diverted all the water of the creek and had appropriated it all for proper uses, and were expending large sums of money in constructing ditches and lines of pipe, stood by, without protest or objection, and acquiesced in the use of the water by plaintiffs, and abandoned their rights therein to plaintiffs, and that by their acts they are now estopped from asserting any claim to the water. The court found against plaintiffs upon this branch of the case, and these findings are supported by the evidence.

2. The court found, as conclusion of law, that defendant, as riparian owner, has the right to take water away from the watershed of the creek "for stock and domestic purposes" upon his lands which are riparian to the stream, to a point from which the water will not and cannot return to the ancient channel of the creek, but has no right to so take it for purposes of irrigation. It was said in Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066, that "no one by virtue of riparian ownership can rightfully divert water beyond the watershed of the stream from which he takes it." It is claimed by defendant that Chauvet v. Hill, supra, is not in point, because in that case the water was taken beyond the watershed for manufacturing purposes, and there would be a surplus, which, of course, should be returned to the stream, whereas, when used for domestic and stock purposes, the reason of the rule would not apply, because there would be no surplus water to return to the stream,—it would all be consumed. For like reason, defendant claims that he may take the water beyond the watershed for irrigation, provided he consumes it all. On the other hand, it is contended that land situated beyond the watershed cannot be said to be riparian, although part of a contiguous tract, some of which is riparian; that land which contributes nothing to the stream by drainage or seepage, but carries all its waters elsewhere to other streams, ought not to have the benefits attaching to lands which contribute by drainage and seepage to that stream; that, if the riparian owner may take water for any one use because he is such owner, his right to so take water for any other use, no matter what, must be governed by the same rule, and, therefore, if he cannot take it beyond the watershed for manufacturing purposes, neither can he for domestic and stock purposes nor for irrigation. The rule of the common law as to riparian rights, in its extreme rigor, has not been found to be adapted to the conditions existing in this state. At common law the riparian owner was limited in the use of the water of a stream to domestic purposes and watering stock, and might utilize it for power. We have added to these purposes that of reasonable use for irrigation (Gould v. Stafford, 77 Cal. 66, 18 Pac. 879, and other cases); but we are not aware that it has ever been held that water could be taken entirely away from the watershed for any of these purposes under the claim of riparian right. It is in evidence here (and the same situation frequently occurs in this state) that there is irrigable land within defendant's tract to which water may be profitably taken from Santiago creek where there is no outlet whatever to any stream, and which is not within the watershed of this creek. Water taken to this land, it is claimed, would be entirely consumed if used for irrigation or for domestic or stock purposes. If it be true, as defendant claims, that, where the water is consumed, it is immaterial whether it be within or without the watershed, the reason may be said to apply as well where the use is for irrigation as where it is for watering stock or domestic purposes. We think the rule should be that under the claim alone of riparian right the owner of the land cannot, to the injury of another riparian owner, take the water beyond the natural watershed of the stream for any purpose, and that riparian rights cannot extend beyond the watershed of the stream, and that lands so situated are not to

be regarded as riparian. If it ever was a rule anywhere (which we doubt) that the riparian owner, under riparian right alone, could take the water of the riparian stream to any part of his land contiguous to his riparian land, to the extent of taking the water entirely away from the watershed of such stream, provided he there consumed it all, it is a rule inapplicable to our conditions, and should not be adopted here. The contention of defendant, carried to its logical conclusion, would make all the lands embraced in a large tract riparian to any one or more of the creeks flowing through it, at the pleasure of the owner, regardless of the lateral extent of the land, and regardless of the natural barriers which divide the entire body into distinct and separate drainage systems, each drawing its natural supply of water from distinct and separate sources. Such an interpretation of the law of riparian rights can find no support from any necessity existing in this state, and would, if adopted, lead to grave abuses, and would result in serious injustice to other riparian owners. "The word 'riparian' is defined as relating to the bank of a stream or other water,—river, lake, or sea; as, riparian proprietors, rights, states." And. Dict. The Latin word "ripa" means "shore of a river." Id. Now, can it be said that land whose watershed does not drain into a stream is riparian to such stream? Does it relate to the stream, or in any sense form part of its bank? Can land be riparian to two creeks whose watershed is entirely different and have no drainage connection whatever? "The rights of a riparian proprietor, so far as they relate to any natural stream, exist jure naturæ, because his land has by nature the advantage of being washed by the stream." Lord Selden in Lyon v. Fishmongers' Co., 1 App. Cas. 662. But it cannot be said that land lying beyond the watershed of the stream has any such advantage. We think the court erred in holding that defendant could take the water of Santiago creek beyond its watershed for domestic and stock uses, and did not err in holding that he might not do so for irrigation purposes.

3. It is said that the court erred in failing to find that the defendant should not divert the water of the creek to a point where it would not flow back to the channel above his lower boundary line; citing Vernon Irrigation Co. v. City of Los Angeles (Cal.) 39 Pac. 768. In that case the upper and lower riparian tracts joined each other, and necessarily the upper owner was required to return the water at or above his lower boundary line. In the case here the court found that defendant must return the waters at the upper boundary line, or above the lands of plaintiffs. This was sufficient, under the facts disclosed in this case.

4. Error is assigned for failure to find the extent of plaintiffs' rights. The court found as to the rights of the parties as riparian owners, but that it "was unable to determine the exact or approximate part or portion of said waters to which the parties herein are each entitled." It seems to be conceded that upon the pleadings the court might have determined this question, but an examination of the transcript fails to show sufficient evidence to have enabled the court to do so. The court could do no more than pass upon the evidence as submitted to it, and if the evidence was insufficient to justify the court in making the proper decree, adjusting all the rights of the parties, it could only do as it did, namely, render judgment "with leave to any party herein at any time to bring another action to determine the proportions of said waters to which each is entitled."

5. There are numerous assignments of error in rulings upon evidence, some of which are disposed of by what has already been said. Evidence was excluded that plaintiffs had acquired by prescription all the riparian rights of all the riparian owners below them. These owners were not parties to the suit. The evidence might have been admissible to show the extent of the plaintiffs' rights, had the evidence otherwise been sufficient to enable the court to apportion the respective rights of the parties to the suit; but, as the evidence in other respects was insufficient for that purpose, we cannot see that plaintiffs were injured. The principal errors complained of relate to evidence touching adverse use, estoppel, and abandonment. Evidence was offered that plaintiffs' predecessors in interest posted a written notice at the point of diversion of the water, about a mile below defendant's lower line, making formal claim to the water of the creek. This notice was excluded upon defendant's objection on the ground of its immateriality, and that there is no evidence that it is a correct copy. This notice bears date August 5, 1878. The ditch referred to in the notice was in fact taken out, and the water was appropriated, and a witness testified that he saw this notice. He also testified that he saw a notice, bearing date November 18, 1878, posted on the door of a house on defendant's land, occupied by one Keith, a tenant of defendant's father, James Irvine. It was directed to James Irvine, George Irvine (who was manager for James), and Henry Keith. It stated, among other things, that "the undersigned claim and have acquired the right to the exclusive use of the water flowing at the head of our ditch in the Santiago creek," and forbade the parties above named from diverting the water above said ditch. This notice was signed by the same persons who signed the formal notice of appropriation first above mentioned. The evidence tends to show that both Keith and George Irvine had knowledge of this notice, but there is no evidence that the then owner of the land, James Irvine, had knowledge of it, or that his manager, George Irvine, had authority to represent him in matters of this kind. It also appeared that this witness went up about

a week later to the point where he had before found the water diverted onto defendant's land, and he then found that the water was turned back and was not being diverted, and never was again diverted by defendant's predecessors, or at all, until recently. I think it may be reasonably inferred from the evidence that defendant's predecessor knew that the water was being diverted to and used upon plaintiffs' land, and the court found that no objection was ever made to such use by any one. It appeared also from the evidence that George Irvine was informed that plaintiffs' predecessors in interest claimed the waters of the creek as they were then using them. One of the appropriators of the water was asked, as a witness, what conversation he had with George Irvine with reference to the claim made by plaintiffs to these waters, but the court refused the evidence on the ground that it was immaterial, and that it had not been shown that notice to George Irvine would bind his principal. At another point in the trial a witness was called to testify as to what he heard James Irvine, Sr., say to his attorney in San Francisco some time about 1878, at which time he consulted his attorney "with reference to his right to use waters of Santiago creek. It was simply a conversation stating facts, and speculating as what best to do." Witness was asked the following question by plaintiffs: "Did you hear Mr. Irvine state anything with reference to his intentions in relation to the use or disuse of the waters of Santiago creek?" An objection was sustained to the question as irrelevant and immaterial, and on the further ground that Mr. Irvine was dead (he died in 1886), and it had not been shown that he was fully advised of his exact rights, in accordance with the requirements of the Code of Civil Procedure, section 1853. It was stated by counsel that the purpose was to show that Irvine received certain advice from his counsel "with reference to the use of the waters of Santiago creek, and in respect to his rights in said waters, and that he made certain declarations after having so consulted with his counsel," and that he spoke of the objections which had been made to the diversion by Keith, referred to in the notice of November 18th. Counsel objected on the same grounds, and the added ground that the conversation was privileged, as between attorney and client. As to these matters it is not necessary to speak at length. Posting a notice at the point of diversion by plaintiffs could not strengthen their claim. If it had come to the notice of James Irvine at the time, it was of no more force than notice that plaintiffs had actually appropriated the water. He could no more prevent the one than the other, and neither step conferred any rights against Irvine as the upper riparian owner. And the notice posted on the Keith cabin, forbidding Irvine from diverting water, would not add to plaintiffs' right to divert it. It might have the effect and seemingly succeeded in preventing Irvine from acquiring a right by appropriation, but it could not add anything to any claim of plaintiffs. Nor would knowledge by Irvine that plaintiffs were using the water, and claimed the right to use it, be evidence of acquiescence, or establish adverse use or constitute matter of estoppel. There is no evidence in the record, and none was offered, to show that James Irvine, Sr., or his successors in interest, ever did or said anything which misled plaintiffs in making their diversion, or that they ever expended any money on any representation by Irvine that he would not claim any rights as against them, or had abandoned his rights to them, or had acquiesced in their taking the water to the exclusion of his rights. It may be that Irvine made some declarations to his counsel in the presence of the witness, as already referred to, from which some such inference might be drawn; but we think those declarations, whatever they were, were rightly excluded, if for no other reason than that the court was not informed that they were intended to prove any such state of facts. Before we can say there was error in the ruling, some injury should be pointed out. Counsel should have been more specific in explaining to the court what he desired to prove. We can see no error in the rulings or in the findings as to adverse use by plaintiffs, nor can we see any elements of estoppel in the conduct of defendant or his predecessors.

6. Plaintiff contends that defendant disclaimed in his answer all riparian rights to the waters of the creek, denied all the facts upon which riparian rights depend, and alleged that before the court obtained jurisdiction of his person he had parted with all his title to the property described in the complaint as belonging to him. For these reasons it is urged that the court erred in finding and adjudging that defendant had any riparian rights, or is owner of the property. These matters are made the subject of elaborate argument on both sides. We do not feel called upon to set out the various allegations in the complaint and its amendments and in the answer and its amendments. There is room for argument pro and con of the contention, by reason of apparent inconsistencies and denials in the answer. It appears, however, that the cause was tried on the assumption that defendant was the owner of the land at the time the action was brought. Plaintiffs and defendant submitted evidence on that assumption, and the point was not suggested until upon this appeal. Section 739, Code Civ. Proc., provides, "If the defendant in such action [to quiet title] disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." It is quite clear that no such disclaimer as is contemplated by this section was made, for plaintiffs had "judgment for their costs herein taxed at the sum of three

hundred sixty-three and $^{45}/_{100}$ dollars," and are now contending for a still greater amount. We think the court was justified in treating the ownership of the land and the water rights of the respective parties as issues in the case.

7. Plaintiffs filed a cost bill for $1,599.75, of which the court allowed $363.45. Both parties take exception to the allowance, and have appealed from the order. The cost bill was constructed on the conclusion of law found as follows: "That the plaintiffs and defendant each pay one-half of the fees of the reporter, and that plaintiffs recover of the defendant their costs incurred in maintaining the issues as to defendant's taking the whole of the water at his place of diversion, and his taking the water out of the watershed for irrigating, and none others." Among the items in plaintiffs' memorandum of costs are 50 cents notary fees; $2.75 sheriff's fees; $38.30 clerk's fees; $130.70 fees to H. C. Kellogg, and $130.70 to S. E. Keefer, and $130.10 to J. P. Leslie, attendance as experts; to J. P. Williams, $26.80 as witness; and $433.20 to Kellogg and Keefer, as surveyors, in obtaining data to enable them to compile the maps offered as exhibits by plaintiffs, and for drafting and making said maps, and for persons employed to assist them in the surveys. Defendant moved to strike out all the above items, as well as all the others in the memorandum. The court denied the motion as to the notary's, clerk's, and sheriff's fees, and witness fees of Williams, and reduced the expert's fees of Kellogg and Keefer to $26.70 each, and Leslie's to $27.10, and allowed one-half the item of $433.20 to Kellogg and Keefer, as surveyors, in obtaining data to prepare maps, and granted the motion as to other items. The evidence was that the maps referred to were not made under direction of defendant, but were prepared by direction of plaintiffs alone, and defendant made no use of them, except as exhibits at the trial, offered by plaintiffs. It appeared that the experts were not acting under direction of the court. It also appeared that defendant paid one-half of the reporter's fees in the course of the trial, which was in accordance with the order of the court. The witnesses called by plaintiffs as experts were entitled to fees for daily attendance, and for mileage as witnesses. They were not entitled to be paid as experts, nor for the expenses incurred by them in making surveys or preparing maps. It was therefore error to allow one-half the item of $433.20, and to allow fees as experts. Faulkner v. Hendy, 79 Cal. 265, 21 Pac. 754; Miller v. Ditch Co., 91 Cal. 103, 27 Pac. 536. These are the only items of cost bill called to our attention in defendant's brief, although all the items are included in his motion. In the outcome of the suit, plaintiffs failed in their principal contention, and prevailed upon the question of defendant's right to take water beyond the watershed for irrigation purposes, but failed as to his right to so take it for domestic and stock purposes. Upon these two questions we have held that the trial court was correct as to the first, but erred as to the second. The theory of the trial court in adjusting the cost bill seems to have been to award costs to plaintiffs only for expenditures in maintaining the two issues in which they prevailed. If there were costs also properly chargeable to defendant, arising out of the erroneous ruling of the trial court pointed out in this opinion, they should be given to plaintiffs. It is impossible for us to say from the evidence what these costs should be. Plaintiffs complain that the court struck out a number of items in their cost bill aggregating quite a large amount, and they claim that the evidence of witnesses whose fees are disallowed gave testimony directly bearing upon the issues found in plaintiffs' favor. This may be so, and it may also be true that the survey work done and the preparation of the maps used at the trial contributed materially to a proper decision of the case. But section 1025, Code Civ. Proc., leaves the determination of the question of costs to the discretion of the trial court, and it has been decided here that the prevailing party in a case like this is not necessarily entitled to costs. Abram v. Stuart, 96 Cal. 235, 31 Pac. 44. This section, however, would not justify the court in allowing costs not properly chargeable as such, as in the instance above noted, for surveying and making maps at the instance of one of the parties not acting under direction of the court. The judgment should be modified so as to enjoin defendant from taking water for any purpose whatever beyond the watershed of Santiago creek. As thus amended, the judgment should be affirmed, with directions to retax the cost bill in accordance with the views herein suggested.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified so as to enjoin defendant from taking water for any purpose whatever beyond the watershed of Santiago creek. As thus amended, the judgment is affirmed, with directions to retax the cost bill in accordance with the views herein suggested.

126 Cal. 107

HAYS v. PLUMMER et al. (L. A. 532.)

(Supreme Court of California. Sept. 15, 1899.)

BILLS AND NOTES—ASSIGNMENTS—BONA FIDE PURCHASERS—DEFENSES—WANT OF CONSIDERATION—EVIDENCE.

1. Where a negotiable note was assigned to the holder by a separate instrument, and not by indorsement, such holder is not a purchaser of negotiable paper in due course, so as to estop the maker to plead the defense of failure of consideration.

2. Where a note given for buildings to be constructed is assigned without indorsement to plaintiff, with knowledge that the consideration had not been performed, and no notice of the assignment is given to the maker until after the

contract has been broken by the payee, the fact that the plaintiff took the note before the payee's actual breach of contract does not prevent the maker from pleading failure of consideration thereto.

3. When a note was given in consideration of an agreement by the payee to erect buildings, and he assigned it to plaintiff as collateral security, but failed to do the work, the fact that there was an understanding between the maker and the payee that the note might be so assigned does not prevent the maker from pleading failure of consideration, as against the holder, as a defense to the note.

4. The payee of a note given for the construction of buildings executed a bond to the maker for the completion of his contract, and, before the work was begun, assigned the note to plaintiff as collateral security. The payee having failed to do the work, the maker recovered a judgment against him on the bond. *Held*, that since such damages were not connected with the note, and had no relation to the maker's defense of want of consideration in an action thereon, evidence of such recovery was not admissible.

Department 2. Appeal from superior court, Los Angeles county.

Action by M. M. Hays against Eugene R. Plummer and others. From a judgment in favor of defendants, from an order denying a new trial, and from an order denying plaintiff's motion to vacate the judgment, plaintiff appeals. Affirmed.

Murphy & Gottschalk, for appellant. Dunnegan & Dunnegan, for respondents.

McFARLAND, J. Action upon a note and mortgage made and executed August 5, 1896, by the defendants Eugene R. Plummer and his wife, Maria A. Plummer, to the defendant John P. McCormick, and assigned by him August 14, 1896, to plaintiff. Judgment was rendered in favor of the Plummers, and from this judgment, and from an order denying a new trial, and also from an order denying plaintiff's motion to vacate the judgment and to enter a judgment for plaintiff under section 663, Code Civ. Proc., plaintiff appeals.

On the said 5th day of August, 1896, the defendant Eugene R. Plummer entered into a written contract with the defendant McCormick, by which the latter agreed to construct and complete certain buildings on a lot owned by the former for a certain sum of money; the buildings to be commenced within 10 days, and finished within 50 days. It was recited in the contract that Plummer had given a note secured by a mortgage on the lot for the amount to be paid for the buildings, and he did give such note and mortgage on said day in consideration of McCormick's promise to construct the buildings. McCormick agreed to give a bond for his performance of the contract. The note was on its face negotiable in form, being payable to McCormick or order; but the mortgage referred to the note, and contained some stipulations which, if expressed on the face of the note, would perhaps have made the latter nonnegotiable. On the 14th of the month plaintiff loaned McCormick $500, for which he took the latter's note; and, to secure the loan, McCormick assigned to plaintiff the note and mortgage above mentioned, and upon which this suit is brought. At the time of the assignment, plaintiff knew all the facts as above stated, and knew that the consideration for the note and mortgage was the promise of McCormick to construct the buildings. McCormick did not construct the buildings within the time mentioned, or at any time. There was no indorsement of the note by McCormick, but the assignment of the note and mortgage was made by means of a separate written instrument. The Plummers set up a failure of consideration as a defense to the action.

The first question is whether plaintiff is in the position of one who has taken in due course a negotiable instrument before maturity, freed from any equities between the original parties, or whether he merely stands in the shoes of McCormick. Counsel for respondents contends that, even if the note be considered negotiable, as plaintiff knew its consideration when he took it he is liable to defendants' claim of want of consideration, and, moreover, that under our peculiar statutory provision (Code Civ. Proc. § 726), that there shall be only one action for the recovery of a debt secured by mortgage, in which the mortgage must be foreclosed before there can be a personal judgment, a note, though in form negotiable, is in law not negotiable, if secured by a mortgage of even date, which makes it payable primarily out of a peculiar fund, at least as against one having knowledge of the mortgage; but we need not examine these contentions, because, for another reason, plaintiff is not in the position of a holder in due course of negotiable paper. An instrument payable to a certain person or order can take its place in the hands of a subsequent holder with the peculiar qualities and incidents of negotiable paper only where it has been regularly indorsed; and such indorsement can be made only by the writing of the indorser's name on the back of the instrument, if there be room to do so, and, if not, then on a paper so attached to it as in effect to become part of it,—called sometimes an "allonge." Whether or not a name written on the face of the note might not in some instances be an indorsement need not be discussed. At all events, the name must be so written as to become in effect a part of the instrument. This is not only the rule under the general authorities, but it is so declared by our Code. Civ. Code, § 3110. In the case at bar there was merely an assignment of the mortgage and note made on a separate writing, without indorsement on the note. The general rule that such assignment without indorsement did not give plaintiff the rights of an indorser in due course is elementary. In Story on Promissory Notes (7th Ed. § 120), the author, speaking of a note payable to a person or his order, says, "If there be an assignment thereof without an indorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a note not negotiable." Many of the authorities on the point are collated in notes to Rand. Com. Paper (2d Ed.) §§ 788, 789, and the rule is stated in the text as follows: "If a bill is payable to order, and transferred without indorsement, its transfer will be subject to defenses existing against the transferror. * * * An assignment, in like manner, unaccompanied by indorsement, is subject to defense. This is true, for instance, where the assignment is contained in an assignment of the mortgage securing the note." Paragraph 788. And in paragraph 789 it is stated: "Unless a bill or note is payable to bearer, its indorsement is necessary, to constitute the holder a bona fide holder in due course of business; and the absence of such indorsement amounts to a notice of equities, and leaves the paper subject to defense in the hands of such holder." Many of the authorities are also cited in Franklin v. Twogood, 18 Iowa, 515, where the rule as stated in the above quotation from Story is declared. Authorities to the point are also cited in Osgood's Adm'rs v. Artt, 17 Fed. 575, where Mr. Justice Harlan says: "It is a settled doctrine of the law merchant that the bona fide purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes by the law merchant only the rights which the payee has, and therefore it is subject to any defense the payor may rightfully assert as against the payee." Plaintiff therefore stands in the shoes of McCormick, and the Plummers have all the defenses against the former that they would have in a suit brought by the latter; and the failure of the consideration for which the note was given is clearly a legal and just defense. The case cited by appellant, where it was held that an absolute and unconditional executed conveyance in fee of land is not invalid because the grantee fails afterwards to pay the purchase price, is not in point. Here there was a mere executory promise to pay, with an incidental mortgage, which is not a conveyance. Nor is there anything in the point that plaintiff took the note before any actual breach of the contract. In the first place, he took it with knowledge that a failure to construct the buildings would be a defense to a suit on the note; and, in the second place, there was no notice of the assignment given to Plummer until the first interest became due, which was long after the breach, and the defense therefore was one "existing * * * before notice of the assignment." Code Civ. Proc. § 368.

The court did not err in ruling out evidence that there was an understanding between Plummer and McCormick that the latter might use the note and mortgage as security for borrowed money. That did not change the fact that plaintiff took the note and mortgage simply for what it was worth as security, having knowledge of the consideration for the note as above stated.

Neither did the court err in sustaining an objection to plaintiff's offer to prove that McCormick had given a bond as provided by the contract, and that Plummer had commenced an action against McCormick and his surety on the bond, and had recovered judgment. The bond provided for in the contract was merely "for the faithful performance of this contract, and for the payment of all labor and material furnished him in the erection, construction, and completion of the buildings erected under this agreement." The bond was a distinct instrument from the note and mortgage, and merely provided for such damages as Plummer might suffer from a failure of McCormick to complete the work, or from his failure to pay for labor, materials, etc.; and a recovery upon such a bond would be for damages not connected with the note and mortgage, and having no relation to a defense of want of consideration in a suit brought upon the note. The judgment and orders appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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126 Cal. 95

In re MARCHALL'S ESTATE. (S. F. 1,706.)

(Supreme Court of California. Sept. 15, 1899.)

WITNESSES—COMPARISON OF HANDWRITING—HARMLESS ERROR.

1. One who was personally familiar with the handwriting of a deceased person is a competent witness as to such writing, although he was familiar with her signature only.

2. It is immaterial that handwriting which was submitted to a witness as the writing of a certain person had not been directly proven genuine, when such fact was afterwards fully established.

Department 1. Appeal from superior court, city and county of San Francisco.

Application for the probate of an instrument presented as the last will of Marea Marchall, deceased. From an order refusing probate, proponent appeals. Affirmed.

Geo. D. Collins, for appellant. John H. Durst and T. J. Lyons, for respondent.

GAROUTTE, J. This appeal is prosecuted from an order refusing admission to probate of a written instrument claimed by proponent to be the olographic will of Marea Marchall, deceased. The document was rejected probate upon the ground that it was not written by the deceased, and the finding of the trial court to this effect is directly assailed as unsupported in the evidence. Erroneous rulings in the admission of evidence are also relied upon to sustain an order reversing the judgment. The court found that the will was a forgery, and under the evidence we are not authorized in disturbing that finding. The evidence is not only substantially conflicting, but it may be said that it largely preponderates in favor of the finding of the court. There is no merit in appellant's second contention as to the erroneous admission of evidence. Le Breton, the witness, was qualified under the law to give an opinion as to the genuineness of the document. He was personally familiar with the handwriting of deceased. The fact that he was only familiar with her signature is not material. Again, the mere circumstance that certain exemplars which were submitted to him had not, at the time, been proven by direct evidence to be the genuine signatures of the deceased, amounts to nothing. Subsequently the fact was established by uncontradicted evidence, and the order in which the proof was placed before the court does not constitute more than technical error, even if it amounted to that. There is no merit whatever in the appeal. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

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126 Cal. 245

WHITE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 1,865.)

(Supreme Court of California. Sept. 29, 1899.)

PROCESS — ALIAS SUMMONS — MORTGAGE FORECLOSURE—DISMISSAL—LIMITATIONS—PROHIBITION.

1. Under Code Civ. Proc. § 408, providing for the issuance of alias summons where original has been lost or returned without being served, a court has no power to issue an alias summons where the original has never been served or returned, and more than four years have elapsed since it was issued.

2. In a mortgage foreclosure the original summons issued was never served or returned. Instead of voluntarily appearing with his co-defendants, the mortgagor procured a third party to pay the mortgage, and to extend the time of payment. The mortgage and cause of action were then assigned to said third party, who waited four year before procuring an alias summons to be issued and served. *Held*, that the mortgagor was entitled to have the action dismissed as to him, under Code Civ. Proc. § 581, subd. 6, providing that all actions shall be dismissed on motion of any party interested unless summons shall have been issued within one year, and served and returned within three years, after the commencement of the action, or unless appearance has been made by the defendant or defendants within said three years.

3. Where a mortgagor has a present right to the dismissal of an action of foreclosure on the ground of plaintiff's failure to serve the summons within three years after the commencement of the action, as provided by Code Civ. Proc. § 581, subd. 6, a writ of prohibition to arrest the prosecution of such action as to him will be issued, notwithstanding the mortgagor could appeal from the judgment in the foreclosure suit.

In bank.

Petition for a peremptory writ of prohibition by Charles G. White against the superior court of the city and county of San Francisco, and C. B. Hibbard, the judge thereof. Granted.

W. H. Barrows, for petitioner.

BEATTY, C. J. Original proceeding by prohibition. The petitioner made a mortgage of his land. The mortgagee commenced an action to foreclose July 8, 1893, and summons was issued the same day, but the same was never served or returned. Some parties named as co-defendants with the mortgagor, upon the ground that they claimed some interest in the mortgaged premises, voluntarily appeared in the action, but the petitioner never appeared. Instead of appearing in the action, he procured a third party to advance the money to satisfy the claims of the mortgagee, and to give him further time to make payment. Said third party paid the amount due the mortgagee, took an assignment of the mortgages and of the cause of action, and allowed matters to rest in that situation until the 7th of August, 1897, when she filed an amended complaint and procured the issuance of an alias summons. This alias summons was quashed on motion of the petitioner, and a second alias summons issued and served, which was likewise quashed for some informality. At the time of moving to quash the second alias summons the petitioner also moved the court to dismiss the action upon the ground that no summons had been served or returned within three years, and upon the ground that no new or alias summons could issue. The court refused to dismiss the action, and the judge announced that he would order the issuance of a third alias summons upon the payment to petitioner by plaintiff of the sum of $25 costs. Plaintiff tendered that sum, but petitioner refused to accept it, and commenced this proceeding to prohibit the superior court from ordering the issuance of another alias summons.

We do not see how the conclusion can be avoided that the superior court had no power to issue an alias writ (Code Civ. Proc. § 408), and no discretion to refuse to dismiss the action as against the petitioner (see last subdivision of section 581, Code Civ. Proc.). The case is in all essential respects the same as Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470, in which this provision of the statute was held to be constitutional and mandatory. Upon the facts set forth in the answer of respondents, their counsel contend that petitioner had actual notice from the very beginning of the pendency of the foreclosure suit, and that it was at his request, and for his benefit, that plaintiff therein failed to procure service of the summons; for which reason they claim petitioner is estopped from alleging the failure to make service and return of the writ. It is true that the affidavits set forth in the answer exhibit the conduct of the petitioner in a very unfavorable light. From a moral point of view, it is wholly indefensible, and we are not surprised that the judge of the superior court should have felt strongly disinclined to dismiss the action against him. But it remains true that he is only claiming what the law commands, and his case is no worse than that of any debtor who pleads the statute of limitations against a just demand. The circumstances relied upon as an estoppel are substantially the same as in the Li Po Tai Case, supra, in which the statute was strictly applied and enforced.

Respondents also claim that, notwithstanding the issuance of an alias summons may be an excess of jurisdiction, still the writ of prohibition should not issue, because the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law by appeal from any judgment that may finally be rendered against him in the action. Such remedy by appeal is, perhaps, plain, but can hardly be called speedy, or adequate. Petitioner has a present right to the dismissal of the action as against himself, and the removal of the lien by which his property is incumbered, and such right cannot be protected or enforced by an appeal from a possible judgment in the action to foreclose. We think the case is a proper one for the issuance of a peremptory writ of prohibition, and it is so ordered.

We concur: TEMPLE, J.; VAN DYKE, J.; HARRISON, J.

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126 Cal. 156

BANK OF COMMERCE OF SAN FRANCISCO v. SCOFIELD et al. (Sac. 494.)

(Supreme Court of California. Sept. 18, 1899.)

MORTGAGES—FORECLOSURE BY ACTION—OPTION TO DECLARE DEBT DUE—CONSIDERATION FOR MORTGAGE.

1. The commencement of an action to foreclose a mortgage providing that on default in the payment of interest the whole debt should become due at the mortgagee's option is notice of the exercise of the option to treat the whole debt as due, and no previous notice is necessary.

2. The compromise of an action to foreclose a mortgage, brought by one who is in position to claim that he is an equitable assignee of the mortgagee by reason of having paid the debt at the instance of mortgagor's lessees, who had agreed with the mortgagor to pay, is a good consideration for the giving of a new note and mortgage by the mortgagor to such assignee for the debt, with interest and costs.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county.

Action by Bank of Commerce of San Francisco against J. W. Scofield and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. F. Ramage, for appellants. F. W. Street, for respondent.

GRAY, C. Defendants appeal from a judgment decreeing the foreclosure of a mortgage and from an order denying a new trial.

1. The mortgage in this case provided that on default in the payment of any installment of interest as agreed the whole sum of principal and interest should become due, at the option of the mortgagee. The note which the mortgage secured was dated November 29, 1895, and the principal thereof, according to its terms, was payable "on or before five years after date," and interest at 10 per cent. per annum was payable annually. This action was commenced on December 28, 1896. It was alleged in the complaint that no part of the interest had been paid, and that the principal and interest mentioned in said note and mortgage were due and unpaid from defendants to plaintiff. The commencement of the action was notice of the exercise of the option to treat the whole amount of the note as due on default in the payment of the first annual installment of interest, and no previous notice or demand was necessary. Hewitt v. Dean, 91 Cal. 5, 28 Pac. 93. The complaint, therefore, was not defective in the respect claimed by appellants, as it appeared therefrom that the mortgage debt was due.

2. The findings fully dispose of the defense set out in the answer that the note and mortgage were given without consideration. The facts as the court found them to be are recited, and it is, in substance, stated in the findings that the note and mortgage sued on herein were given in compromise of a pending action based on a note and mortgage of defendants to one W. W. Hall, and assigned to D. W. and J. J. Scofield, and that the note and mortgage upon which the present action is based were given for the "sum of $1,494.60, being the amount due said D. W. Scofield on account of the payment made by him to said W. W. Hall of his said mortgage, with interest thereon, and costs of plaintiffs in said action."

3. The third and last contention of appellants is that "there was no consideration moving between appellants and D. W. Scofield to support the note and mortgage" on which this suit is brought. The plaintiff sues as the assignee of D. W. Scofield, who is a son of appellants. O. B. and J. J. Scofield, two other sons of appellants, some three or four years before the execution of this mortgage to D. W. Scofield, entered into an oral contract with their father and mother whereby they leased the premises described in said mortgage for five years, agreeing, among other things, to pay off a mortgage for about $1,300, which appellants had previously made upon a portion of said lands to one W. W. Hall. By the terms of this oral agreement, appellants were to deed to their sons, J. J. and O. B. Scofield, a certain 160 acres of the said lands, as alleged in appellants' answer, or one-half of all the said lands as the contract was understood by D. W. Scofield. After J. J. and O. B. Scofield had been in possession some 3½ years under the lease, Hall demanded payment of his mortgage, and, the sons announcing their inability to comply with their agreement and pay the mortgage, the father and mother went to San Francisco, and procured $1,300, the amount due on the mortgage, to be forwarded to Modesto for the purpose of discharging the mortgage debt. In the mean-

time J. J. and O. B. Scofield had applied to their brother, D. W. Scofield, for help, and at their request D. W. Scofield paid Hall $1,300, and took from him a satisfaction of the mortgage. The evidence shows that he did not procure a written assignment of the Hall mortgage. D. W. Scofield, expecting that the appellants would deed one-half of the land to J. J. Scofield, requested them to do so, that he might have a mortgage from J. J. Scofield securing him for the money paid to Hall. Appellants refused to make the deed as requested, and thereupon D. W. and J. J. Scofield, as assignees of W. W. Hall, commenced an action against the appellants to recover a balance of $1,341, together with interest due on the Hall note, and to foreclose the mortgage given by appellants to secure the same. The action came to trial, and a recess was asked, and by the court granted, for the purpose of compromising and settling the case. A meeting of the parties and their attorneys was had in the office of the attorney for J. W. and S. L. Scofield, the outcome of which was the giving by the appellants of the note and mortgage upon which the present suit is based, and the dismissal of the action then on trial. The question is, was that compromise a good consideration for the note and mortgage in suit here? We think this question will have to be answered in the affirmative. Though there was no written assignment of the mortgage, yet it appears that D. W. Scofield had paid out $1,300 of his own money, and that the appellants had received the benefit thereof in the extinguishment of a lien for that amount on their real estate. He was then in a position to claim in good faith, or at least without subjecting himself to the charge of bad faith, that he should be treated, in equity, as the assignee of Hall, and should be subrogated in the action to all the rights which Hall had in the note and mortgage at the time he executed the satisfaction. It is not necessary that his claim should have been one that he was entitled recover on beyond any question. Though the claim is doubtful, and may be held not sufficient to support an action, yet, if the action on it is brought bona fide, with any ground on which to base a fair argument that plaintiff ought to succeed, a compromise of such action is a good and valid consideration. McClure v. McClure, 100 Cal. 339, 34 Pac. 822; Pitkin v. Noyes, 48 N. H. 294. The court, on sufficient evidence, found against appellants on the issues of duress, fraud, and undue influence. For the foregoing reasons, we advise that the judgment and order appealed from be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(126 Cal. 183)

ROGERS v. SUPERIOR COURT OF RIVERSIDE COUNTY. (S. F. 1,889.)

(Supreme Court of California. Sept. 23, 1899.)

APPEAL—STAY—PROCEEDINGS ON JUDGMENT—DISSOLVING INJUNCTION.

In a suit to restrain an irrigating company from shutting off water, the decree provided that defendant be perpetually enjoined from shutting off the water, but that he might, on certain conditions, move to have the injunction set aside. Pending a motion to vacate the injunction, plaintiff appealed, whereupon the court denied the motion. *Held*, that the injunction went into effect on the rendition of the judgment, and as it could not be dissolved except by a motion, which would be a proceeding on the judgment, it was within Code Civ. Proc. § 946, providing that an appeal stays further proceedings on the judgment from which it is taken.

In bank. Application for writ of mandamus by I. D. Rogers against the superior court of the county of Riverside. Writ denied.

E. W. McGraw, for petitioner. John G. North, for respondent.

TEMPLE, J. This is an application for a writ of mandate commanding the superior court of Riverside county to entertain the motion of petitioner to vacate and set aside an injunction granted by decree in the case of J. S. Smith and others against Stearns Ranchos Company et al., and, if it shall appear that petitioner has presented to each of the plaintiffs a certain bill or statement, "then to vacate and set aside the injunction granted," etc. Suit was brought by numerous plaintiffs against the Stearns Ranchos Company, a corporation, and I. D. Rogers, for an injunction to restrain defendants from depriving the plaintiffs of water from a certain canal by reason of nonpayment of assessments levied by defendants upon water rights of plaintiffs in the North Riverside and Jurupa canal, situated in San Bernardino and Riverside counties. In their complaint said plaintiffs asserted that each plaintiff owned the right to a specified amount of water, and of such portion of the canal as would carry such water; also, that plaintiffs owned in severalty certain tracts of land planted with fruit trees and vines, which were irrigated from said canal, and that defendants claim the right to levy and collect assessments for maintaining and repairing said canal, and threaten to turn off the water for nonpayment of certain assessments so made by them. The assessments contain, plaintiffs contend, many improper charges. Issues were made by defendants, and the case was tried, and decree entered February 21, 1899. It was found and adjudged that neither of plaintiffs owns an undivided interest in the canal, but each is an owner of an easement therein to have carried the amount of water alleged as to each of the plaintiffs, "subject to the payment therefor of the proportion of expense of maintaining and repairing said canal as the number of inches of carrying capacity held by each bears to the entire amount of water flowing in said canal from time to time," and that I. D. Rogers, as lessee of the corporate defendant, has the sole right to levy assessments. It was also found that the assessments made were correct and proper, except as to one item "for abstracting," amounting to $135. It was further ordered as follows: "That the defendant I. D. Rogers, his servants, agents, and employés, be, and they are, perpetually enjoined from shutting off from plaintiffs, or either of them, for nonpayment of the assessment heretofore named, the water which said plaintiff is entitled to receive: provided, however, that said defendant I. D. Rogers may, at any time he may desire, make out and present to each and every of said plaintiffs herein a statement, claim, or bill for and on account of their proportion of the expense of the maintenance and repair of said canal during the times hereinbefore mentioned, eliminating therefrom the charge above named of one hundred and thirty-five dollars for abstracting, and that thereafter the said defendant I. D. Rogers may apply to this court to have this decree vacated and set aside as to the injunction hereinbefore granted; and upon sufficient showing to this court that such statement, claim, or bill eliminating said charge for said abstracting has been so made out and presented to plaintiffs, then said defendant I. D. Rogers shall be entitled to have this decree, so far as it grants an injunction against said defendant, vacated and set aside." Rogers complied with the terms of the decree, and made a motion, upon notice, to vacate and set aside the injunction, in pursuance of the permission given in the decree. Upon the hearing some objections were made to the proceeding, the plaintiffs contending that Rogers had not made such a showing as would entitle him to the order. The motion was taken under advisement, and before it was decided the plaintiff appeared and gave a bond on appeal. Thereafter the superior court made the following order: "The motion to dissolve the injunction heretofore argued and submitted is denied." The petitioner contends that the motion was denied solely upon the ground that the court concluded that it was deprived of jurisdiction by the appeal. Practically, this is admitted by the answer of respondent in this proceeding, in which it is stated: "The said superior court, defendant herein, in making the said order considered fully all the matters set forth in the aforesaid affidavits and briefs of counsel, and entertained said motion, and denied the same" because an appeal had been perfected to this court. It is quite forcibly argued that this return shows that the court has not refused or failed to pass upon the motion, but has acted in the matter by denying the motion, and therefore petitioner is remitted to his remedy by an appeal. As I think the mandate must be denied on other grounds, this contention need not be determined. Conceding that the court refused to entertain the motion because of the appeal, I think the action of the court must be sustained.

The parties seem in entire accord as to the law applicable to the case, but they differ as to the construction of the judgment or decree entered in the suit for an injunction. On one side it is contended that a final decree was entered granting a perpetual injunction, with a provision that on certain conditions the court would vacate the judgment, but that it was not an interlocutory order which implied another and final decree. The petitioner contends that the decree was a conditional dissolution of the injunction,—a judgment to take effect when the defendants in that action should make it appear that they had remitted the improper charge of $135. If it be admitted that the judgment entered is final, in the sense that an appeal may be taken from it, the consequences, so far as affects this application, will be the same, whichever view is adopted. Section 946, Code Civ. Proc., contains the following: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein." Certainly the injunction was in effect at once upon the rendition of the judgment. No condition was imposed upon the plaintiffs, to be performed before it became operative. When the existence of the judgment affords all the relief awarded, and there is no proceeding to be had under it, the stay provided for in section 946 does not apply to it. That section does not provide that the judgment shall be suspended, but that no further proceedings shall be had upon the judgment, or upon the matters embraced therein. The motion of petitioner to have the injunction dissolved, made in pursuance of the permission contained in the decree, was a proceeding upon the judgment and upon the matters embraced therein.

Petitioner contends that the judgment, being for an injunction, is not suspended by the appeal, and that by the terms of the decree the right to the injunction is made conditional. His injunction continues, notwithstanding the appeal, and its continuance must still be subject to the condition that it may be ended. The following cases are cited: Mining Co. v. Freemont, 7 Cal. 130; Bliss v. Superior Court, 62 Cal. 543; Heinlen v. Cross, 63 Cal. 44. In the first case Judge Burnett says the purpose of a stay is to prevent any future change in the condition of the parties. If it dissolved an injunction it might have an opposite effect. The stay, therefore, will not affect an order restraining a party from doing an act, to obtain which restraint a bond has been given. The stay only suspends that part of a judgment which commands something to be done. The language of the Code conforms to this. It stays the lower court from proceeding upon the judgment, or on the portion appealed from. In Bliss v. Superior Court it was held that an appeal from an order refusing to dissolve a temporary injunction will not deprive the superior court of jurisdiction to try the case pending the appeal. The stay is limited to the matter appealed from. In Heinlen v. Cross the question was whether, during an appeal from a judgment awarding an injunction, the lower court could proceed to punish a party for its violation during that period. It was properly held that it could. The judgment for an injunction required no writ for its execution. It was a self-executing judgment, and there were no proceedings upon it to be suspended by the appeal. Until reversed, it stands as a valid judicial command, and its violation is a contempt of court, which should be punished. The effect of the decision is that to punish for such a contempt is not a proceeding upon the judgment. The relief asked for by the petitioner cannot be granted, except by a proceeding upon the judgment. The petitioner does not, and could not successfully, contend that the decision is not of the nature of a final decree from which an appeal may be taken. As already stated, there is no condition precedent to the judgment becoming operative. No fact is to be ascertained before the court can advisedly determine the rights of the parties. It is more like a decree of specific performance, which is executed under the immediate supervision of the court. It finally determines the rights of the parties, and grants the appropriate relief. Perhaps it would have been a better decree, under the circumstances, if the court had limited the injunction to the collection of the illegal charge. But, if that be so, the decree actually made cannot be modified in this proceeding.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.

126 Cal. 154

PEOPLE v. WESTLAKE. (Cr. 529.)

(Supreme Court of California. Sept. 18, 1899.)

CRIMINAL LAW—REVIEW—INSUFFICIENT EVIDENCE.

Where the record shows that the evidence was insufficient to support a judgment of conviction, it will be reversed.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county.

Charles L. Westlake was convicted of embezzlement, and he appeals from the judgment and an order denying a new trial. Reversed.

For former opinion, see 57 Pac. 465.

C. F. Lacey and George A. Dougherty, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. The defendant was indicted by the grand jury of Monterey county on the 16th day of October, 1897, for the crime of embezzlement, charged to have been committed by him as tax collector of said county, by unlawfully and feloniously appropriating to his own use on the 1st day of July, 1897, the sum of $201, which said sum is alleged to have been paid over to defendant as tax collector between the 1st day of July and the 1st day of August, 1897. He was found guilty, and sentenced to a term of five years in the state prison. This appeal is from the judgment, and the order denying defendant's motion for a new trial. It is claimed that the verdict is not sustained by the evidence. The appellant, in his brief, has pointed out in detail the evidence of some 13 witnesses, showing the amounts paid by each to the tax collector between the dates mentioned in the indictment, and that no other moneys were paid in during said time. The amount so paid in was $272. The prosecution proved that on August 2, 1897, the defendant paid to the county, at his settlement for licenses, the sum of $297, which was $25 more than it had been proven came into his hands. The attorney general, in his reply brief, admits these figures to be correct, and says: "The case must have been very peculiarly tried, or there must have been some very important testimony omitted from the transcript. * * * We are satisfied that as a matter of fact the defendant embezzled money from the county, but, figure as we will, we cannot find evidence which will belie or refute the statement in appellant's brief that defendant turned over to the county of Monterey on August 2d more money than it is alleged he received during the time charged in the indictment." If the learned attorney general cannot "figure" out sufficient evidence to support the verdict, it cannot be expected that this court will do so. As the evidence is not sufficient to sustain the verdict, it is not necessary to discuss the many other points raised by appellant. We advise that the judgment and order be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

126 Cal. 97

In re TAYLOR'S ESTATE. (S. F. 1,897.)

(Supreme Court of California. Sept. 15, 1899.)

WILLS—CONTINUOUS DOCUMENT—EVIDENCE.

A will written upon two separate sheets of paper, dated at the beginning, and duly signed, was admitted to probate; the evidence showing that the testatrix had written both sheets, though the handwriting of the second sheet was different in style from that of the first. *Held*, that the probate will not be set aside on evidence showing that testatrix had re-examined the will some months after it was written, and some expert testimony to the effect that the two sheets were written at different times.

Department 1. Appeal from superior court, city and county of San Francisco.

This was an action to set aside the probate of the will of Deede Margaret Taylor, deceased. There was a judgment refusing to set the will aside, and an order denying a motion for new trial. From the judgment and from the order, plaintiff appeals. Affirmed.

Haven & Haven, for appellant. Reddy, Campbell & Metson, for respondent.

GAROUTTE, J. This appeal is prosecuted from a judgment refusing to set aside the probate of the will of Deede Margaret Taylor, deceased, and from an order denying a new trial. The will is olographic in character, written upon two separate sheets of paper, dated at the beginning, and signed at the end. The mere fact that the will is found upon two separate sheets of paper is immaterial. But appellant insists that the second sheet and signature were written some three months after the first sheet was written, and that therefore the will, as a whole, or as to its parts, is void as an olographic will. This contention is largely based upon the claim that, the two sheets being written at different times, the first sheet, therefore, is not signed by the deceased, and the second sheet, therefore, is not dated. For present purposes alone appellant's position as to the correct rule of law applicable to such a state of facts may be conceded. Yet, upon such assumption as to the law, we conclude the facts of the case fail to support it. Upon this point the court made the following finding: "That the document admitted to probate as the last will and testament of said Deede Margaret Taylor was and is entirely written, dated, and signed by the hand of said Deede Margaret Taylor herself, and is the last will and testament of said Deede Margaret Taylor, deceased; that the said will was written upon two sheets of paper, but that said will is one continuous instrument, and is a single document." Appellant attacks the foregoing finding as not supported by the evidence, and contends that the first sheet of the will was written in December, 1897, and the second sheet written in the following March. In view of the fact that the testatrix knew exactly what she was doing when she attempted to make her will, and did all that was done freely and voluntarily, wrote every word of the document, dated it, and signed it, the court will be slow to set aside a finding of fact to the effect that the will was her will, and was "one continuous instrument and a single document." It appears that deceased wrote her will in December. In the following March she asked for it, from a trunk where it had been kept, and at that time broke the seal of the envelope in which it was inclosed, called for ink and paper, did some writing, tore up some written papers, and returned the will, inclosed in the envelope, to be replaced in her trunk. These facts appear from the evidence of the nurses attendant at her bedside. At this time the testatrix may have changed her will by writing and substituting a second sheet in lieu of the original second sheet. She may have done this, but it is mere conjecture and speculation. There is nothing pointing directly to that conclusion. To be sure, the second sheet, when compared with the first, appears to have been written with a different pen, and possibly a different ink, but this is a circumstance of the slightest importance. It is a matter of common experience that different pens and different inks are used in the writing of a single document. In addition to the foregoing evidence, we have the testimony of an expert upon handwriting, who declares that the two sheets of paper composing the will were not written at the same time. The witness makes no attempt to definitely fix the difference in time occurring between the writing of the respective sheets. He does not even say which was written first. He does say that the person who wrote the first sheet "has her muscular movement in good condition," while the second sheet indicates that "she is completely wrecked,—nervous." From these two different physical conditions of deceased, diagnosed by an examination of her handwriting, he concludes, as an expert upon handwriting, that some considerable time intervened between the writing of one sheet and the other. The trial court weighed this expert evidence, and we are not at all disposed to impeach the accuracy of those weights. It does not amount to much. As to the length of time required for a person to pass from a condition of healthy muscular movement to a condition where he would be completely wrecked,—nervous,—or the reverse, would be a matter more satisfactorily established by the opinion of doctors than of experts upon handwriting. It may well be said that it needs neither doctors nor handwriting experts to tell us that it does not necessarily take a long time to pass from one of these conditions to the other, but that such change of condition may occur within the minute. Conceding the use of a different pen and ink was not the primary cause of the difference in the general style of writing of deceased, as exemplified by the respective sheets of the will, but that the cause was attributable to a change in her physical condition, still we are not at all prepared to say but that this physical change took place at the very time she was engaged in the laborious task of writing her own will. At least, upon the evidence before us, we are well satisfied that the finding of fact made by the trial court, to the effect that this will was "one continuous instrument and a single document," should not be set aside. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

126 Cal. 123

SWEASEY v. SWEASEY. (S. F. 796.)

(Supreme Court of California. Sept. 15, 1899.)

HUSBAND AND WIFE—SEPARATE MAINTENANCE—DESERTION—HUSBAND'S PROVISION FOR WIFE—EVIDENCE.

1. Where a wife brings action for separate maintenance under Civ. Code, § 137, which provides for separate maintenance on grounds of desertion, and a judgment in her favor is found under Id. § 136, which provides for separate maintenance where divorce is denied, such judgment will not be reversed, where the findings are in the wife's favor, although the judgment might have been founded upon the section under which the action was brought.

2. Civ. Code, § 136, which provides that where, in a suit for divorce, judgment is denied, the court may decree separate maintenance, is not repealed by Id. § 137, which provides an action for separate maintenance without seeking divorce.

3. Where defendant in an action for separate maintenance denies that he had deserted plaintiff, evidence of his relations with another woman is properly admitted.

In bank. Appeal from superior court, Humboldt county.

Action by Sarah Sweasey against Thomas W. Sweasey for separate maintenance. There was judgment for plaintiff, and defendant appeals. Affirmed.

Chamberlin & Wheeler and Frank McGowan, for appellant. J. N. Gillett and J. F. Coonan, for respondent.

TEMPLE, J. The parties are husband and wife, and the action was brought by the wife to secure a separate maintenance, under section 137, Civ. Code, charging desertion on the part of the husband. The defendant in his answer denied the alleged desertion, and also filed a cross complaint, in which he asked for a divorce on the ground of extreme cruelty. A great many acts on the part of plaintiff are specifically alleged, consisting mostly of false and slanderous charges with reference to him, well calculated, if believed, to degrade him in the community, and of filthy and obscene language addressed to him, or to others in speaking of him. These charges were generally denied by plaintiff, who, in her answer to the cross complaint, made numerous counter charges by way of recrimination. The court found that the parties intermarried in 1854, that they had $5,000 worth of community property, and that plaintiff had no separate estate. They were keeping a hotel at Hydesville, the hotel and furniture apparently constituting the bulk of their property. It was found that defendant had deserted the plaintiff, as charged in her complaint, but that defendant had not failed or refused to provide for plaintiff, and per consequence, as a conclusion of law, that "plaintiff is not entitled to permanent support and maintenance under the provisions of section 137 of the Civil Code, as prayed for in her complaint." The desertion consisted in the fact that "the defendant has willfully and without cause refused to sleep with plaintiff, or to eat his meals with her, or to talk with her, and during the whole of that time has refused to have the ordinary social and matrimonial intercourse with her that usually exists between husband and wife." The wife lived at the hotel, or at a private cottage in the village. She took her meals at the hotel, and availed herself of the credit of the defendant to buy whatever she needed or desired. Upon the charges contained in the cross complaint the court found that many of the specific charges of cruelty were true, but as to some that, though the charge was true, serious mental suffering was not caused thereby; as to other specific charges, that, although true, they "were provoked and caused by reason of the misconduct of the defendant in associating with Miss Kate McAtee." Whether they also caused grievous mental suffering to defendant was not determined. The divorce was denied to defendant, but it was decided that defendant should pay plaintiff for her maintenance, under the provisions of section 136 of the Civil Code, the sum of $35 per month.

Section 136 is: "Though judgment of divorce be denied, the court may in an action for divorce provide for the maintenance of the wife and her children, or any of them, by the husband." It is obvious that the action in which the provision for a separate maintenance is to be made, under this section, is the action in which the divorce was denied, and that the maintenance is for the person to whom such divorce was denied. If the husband sues for divorce, the wife may, by a cross complaint in that action, ask for, and in a proper case have made for her, provision for such maintenance under section 137. Section 136 would have no application to such a case. In the cross action of the husband the wife set up no such claim, unless by a curious and unnecessary retroversion her complaint can be made to perform that office. But such speculations are not required. Independently of the contention as to the sufficiency of the evidence, the question is, do the findings warrant the judgment entered? The conclusion of law that the plaintiff is not entitled to the relief under section 137, Civ. Code, but is under section 136, may be regarded as a reason for the judgment rendered, and, if that be sustained by the findings, it will not be reversed for the bad reason given. The grounds upon which the court may require the husband to provide for the wife would not be enlarged by the fact that the husband asked for a divorce, and I think the real issue here is whether the court found as a fact that the husband had made provision for his wife, or, more properly, whether the wife needs such provision. Upon this subject there is a very explicit finding: "That the plaintiff has no separate property, is without means of support, and is getting too old to earn a living by work; that the sum of thirty-five dollars per month would be a reasonable sum, under the circumstances, to be provided by the defendant for the maintenance of the plaintiff." There is no other express finding upon the subject, but apparently plaintiff resides at a cottage which belongs to the community, and gets her meals at the hotel, and, if she chose, could live at the hotel. And the finding that the desertion does not consist in the living apart from the wife, but in refusing social and matrimonial intercourse with her, seems to imply that, if she is willing to endure such treatment, she may still reside as a stranger in his house, and provide herself with necessaries upon his credit. It is said that the learned judge was of the opinion that under such circumstances the necessities of the wife were not shown, and therefore he held that she was not entitled to a provision under section 137, Civ. Code. But, if it were conceded that she could be provided for under section 136, why there should be any difference in regard to proof of her necessities is not obvious.

In this connection appellant contends that section 136 was repealed by the amendment to section 137, which gave to a wife the statutory right to apply for her separate maintenance without asking for a divorce. If we are not embarrassed by decisions, I find no difficulty in giving operation to both sections. Formerly, in England, a wife, though not entitled to a divorce, was not compelled to live with her husband who was guilty of extreme cruelty, or who had committed adultery. She could sue for a divorce a mensa et thoro, and, as a consequence, if her suit prevailed she was allowed to live in separation, and, if she needed it and the husband had the means for it, provision was made for a separate maintenance from the estate of the husband. The divorce simply authorized her to live apart from him and to refuse him conjugal rights. The maintenance was a mere incident, and was not made when by marriage settlement or otherwise the wife was already provided for. If a provision for the wife under section 137 authorizes the wife to live in separation and to deny the husband conjugal rights, a judgment to that effect has all the elements of a divorce a mensa et thoro. I presume such a decree would not have that effect, but the relation would be still subject to the provisions of section 102, Civ. Code, and, if the desertion had not continued long enough to entitle the wife to a divorce, the husband could return and reestablish the relation and rid himself of the judgment. If the lapse of time would interfere with his right to return, it is the statute and not the decree which has that effect. In that respect his condition is no worse for the decree. But if the husband has been guilty of all the offenses described in section 92, Id., except desertion, and it is found upon a recriminatory plea in defense that the wife has deserted the husband and therefore cannot have a divorce, the court would hardly send her back to live with her husband, and, I think, under section 136, might, in its discretion, compel the husband to provide for her. Something of the kind is intimated by Judge Field in Conant v. Conant, 10 Cal. 249. He says: "The true rule which should govern the court in the exercise of its discretion in this respect is this: that, to entitle to a decree of absolute divorce from the bonds of matrimony, the applicant must be an innocent party,—one who has faithfully discharged the obligations of the marriage relation, and seeks relief because aggrieved or injured by the misconduct of the other; and, on the other hand, where there are circumstances showing a disregard of those obligations, though not carried to such a degree as to constitute itself a ground of divorce, the decree should only be a divorce from bed and board." The statute then in terms authorized a partial divorce, as in effect it still does, if the allowance may be made under section 136 when the husband has not been guilty of desertion. Parties partially divorced may become reconciled and renew their relations without remarriage, but the husband cannot of his own volition resume his rights. I think it was intended by section 136 to enable the court to do just what it was said in Conant v. Conant could be done, and it matters not whether the decree effects a divorce a mensa, or a legal separation with a provision for the support of the wife. It is purely a matter of words. But in section 137, the wife having a good cause for a divorce may, if her circumstances require it, and her husband has deserted her, apply for a separate maintenance without seeking for a divorce. A husband who wishes to be freed from a deserted wife cannot starve her into the necessity of suing for a divorce, which his guilt and her innocence would alike prevent him from obtaining. If the trial court did, as surmised, rule that plaintiff could not have a provision made for her in her own suit because she can live at the hotel, and has not been prevented from the use of his credit to obtain necessaries, this was plainly error. A wife who is left otherwise unprovided for may always use his credit to obtain necessaries. It needs no decree of court to secure that right, but she may be entitled to more than what is absolutely necessary, and she is not compelled to rely upon his whim and temper for them. She is entitled to an allowance, and security for its payment, or an execution to enforce its payment, or perhaps to have a receiver appointed, as provided in section 140, Civ. Code. This is the nature of the provision which the statute authorizes. Her necessities and the husband's faculties are sufficiently found, and the proper judgment is entered, which must be affirmed.

Appellant complains of some findings against him in his cross action for divorce. If these are well founded, appellant is still not injured, for it was found that he was guilty of desertion, and no complaint is made that this finding is not sustained by the evidence. He could not, therefore, have obtained a divorce, even though the court had found in his favor upon those issues. The rulings complained of in regard to the admission of evidence all have reference to issues which, by reason of the findings of desertion, became immaterial.

The evidence of the relations between defendant and Miss McAtee was properly admitted under the issue made by defendant's denial that he had deserted plaintiff.

The temporary alimony was, until the further order of the court, to provide for plaintiff until the judgment became final and could be enforced. We will not presume that it will be continued after plaintiff can have the benefit of her judgment. The judgment is affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; GAROUTTE, J

126 Cal. 164

WESTALL v. ALTSCHUL. (S. F. 876.)

(Supreme Court of California. Sept. 19, 1899.)

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—VALIDITY—APPEAL—REVERSAL —INCONSISTENT DEFENSES.

1. St. 1889, p. 167, provides that, where it shall appear by final judgment that a suit to foreclose a street-assessment lien has been defeated by reason of some defect therein, a party in interest may within three months after the entry of final judgment obtain a new assessment. *Held*, that where plaintiff's assignor recovered judgment on an assessment, which was reversed for invalidity, and a new trial ordered, and the assignor obtained a new assessment, and plaintiff commenced an action thereon before the former suit had been dismissed, plaintiff was not entitled to recover, since such assessment was not made after the entry of final judgment declaring the former one invalid.

2. The reversal on appeal of a judgment and order denying a new trial does not operate as a final judgment against either party, but merely vacates the judgment rendered, and leaves the case standing for trial.

3. Where, after the reversal of a judgment in an action on a street assessment, a new assessment is made, and action brought thereon before the dismissal of the former action, defendant is not precluded from a defense that the subsequent assessment was not made within the time required, by setting up other inconsistent defenses, denying the making of such assessment, and that the former suit was still pending, no final judgment having been entered therein.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Joseph Westall against Ludwig Altschul. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Sullivan & Sullivan, for appellant. W. S. Goodfellow, Gunnison, Booth & Bartnett, and J. C. Bates, for respondent.

TEMPLE, J. Action to foreclose a street-assessment lien. Altschul, who was the owner of the lot, appeals from a judgment against him, and from an order refusing a new trial.

James Ryan, the assignor of plaintiff, and the contractor, brought suit upon a prior assessment, in which he recovered judgment, from which, and from an order denying a new trial, Altschul appealed; and in this court the judgment and order were reversed, and a new trial ordered. A new assessment having been made, plaintiff, as assignee of Ryan, brought this action, in which he recovered judgment, from which, and from an order refusing a new trial, this appeal was taken.

Several points are made, but two of which it will be necessary to notice, and they may be considered together. After the remittitur was received and filed in the case of Ryan v. Altschul, no new trial was had, but that case was finally dismissed on motion of the plaintiff. Before such dismissal, however, the new assessment was made, and this action to foreclose the lien was commenced. It is now contended that no new assessment could be made until after final judgment had been entered in the suit upon the first assessment, and, further, to justify a new assessment it must affirmatively appear from the judgment roll that such action was defeated by reason of some defect, error, informality, omission, irregularity, or illegality in the assessment. St. 1889, p. 167. The statute reads: "Whenever it shall appear by any final judgment of any court of this state that any suit brought to foreclose the lien," etc., has been defeated by reason of such defects, "any person interested therein may, at any time within three months after the entry of said final judgment, apply to the superintendent of streets" for another assessment. It is certainly a very crude, and, so far as I can see, a very unwise law. It would not necessarily appear by a final judgment that the suit was defeated on that ground, rather than on some other objection made by defendant; and why, after the assessment had been finally adjudged void, should the plaintiff be required to prosecute his action to an inevitable judgment against himself, before he is entitled to a new assessment? And yet it is so plainly written in the law, and the special limitation begins to run from "the entry of said final judgment." If the statute were less explicit, we should endeavor to conclude that the determination of this court, although a new trial was awarded, was such final adjudication. It certainly was final upon the only material matter,—the validity of the assessment. But here we are precluded from applying such a rule, for plainly the assessment cannot be made until after the final judgment, and the plaintiff or his assignor did not dismiss the former suit, thereby acquiescing in the decision, and making the determination end in a final judgment before the assessment. Until then we cannot say that the plaintiff did not hope, by new evidence, to show an assessment which would be valid, and the new assessment was not made within three months after the reversal of the judgment in the supreme court

The respondent contends that defendant in his answer avers that the assessment was defeated by final judgment in the supreme court. There is no such averment in the second defense, as respondent inadvertently asserts. But, if there were, we should construe the reversal of a judgment and of an order refusing a new trial according to its legal effect, which is to vacate the judgment and leave the case standing for trial. The third separate answer and defense was intended to meet the possible position that the judgment in the supreme court was a final judgment, within the meaning of the statute, and it avers that no assessment was made within three months after its rendition. It is a plea of the special limitation provided in the statute. If in that separate answer the defendant avers that the judgment of the supreme court was a final judgment, this does not deprive him of the benefit of the other inconsistent allegations set up in separate defenses. In the first defense he attempts to deny that an assessment had been made. In the second he sets up the first suit, and avers that it is still pending, and that no judgment has been entered therein. The averment in the third defense does not answer these issues. It follows that the assessment was void, and the judgment and order are reversed.

We concur: McFARLAND, J.; VAN DYKE, J.; GAROUTTE, J.; HENSHAW, J.

HARRISON, J., deeming himself disqualified, did not participate in the above decision.

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126 Cal. 150

NICKEY v. STEARNS RANCHOS CO. et al.

(L. A. 457.)

(Supreme Court of California. Sept. 18, 1899.)

DRAINS—STATUTORY PROVISIONS—CONSTITUTIONAL LAW—VALIDITY OF STATUTORY PROVISIONS.

1. Though St. 1881, p. 15, entitled "An act to provide a system of drainage," etc., and St. 1885, p. 204, entitled "An act to promote drainage," deal with the same subject-matter, namely, the drainage of surplus water injurious to land, the later act is not so inconsistent with the provisions of the earlier act that it operates as a repeal thereof, nor is the later act a revison of the earlier act.

2. The drainage act of 1881 (St. 1881, p. 15), providing that when "two or more owners shall petition the supervisors for a ditch, drain or other water course," a day for the hearing shall be appointed, and notice given, and, if the supervisors shall find that the ditch would be conducive to the "general welfare" of the petitioners, the work is to be done, costs apportioned upon the lands benefited, and private property condemned for ditch purposes, etc., violates Const. art. 1, § 14, which provides only for the taking of private property for "public use" after compensation paid.

Department 2. Appeal from superior court, Los Angeles county.

Action by F. P. Nickey against the Stearns Ranchos Company and others. From a judgment for defendants, sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

E. E. Keech, for appellant. E. W. McGraw, for respondents.

HENSHAW, J. This action was brought, under the authority of an act of the legislature entitled "An act to provide a system of drainage for agricultural, swamp and overflowed lands" (St. 1881, p. 15), to condemn lands of the defendants for the purpose of constructing a ditch. The complaint set forth the proceedings taken in accordance with the statute under which it is asserted that the right to prosecute this action was acquired. A general demurrer to the complaint was sustained, and judgment entered for defendants.

In support of the demurrer the respondents insist that the act of 1881, above referred to, even if it be a constitutional act, was superseded by a later act passed in 1885, entitled "An act to promote drainage." St. 1885, p. 204. But, while the two acts deal with the same subject-matter,—that is to say, the drainage of surplus water which is injurious to land,—we do not think that the later act in its terms is either so repugnant or inconsistent with the provisions of the earlier act as to force the conclusion that a repeal by implication must follow. Nor do we think that the later act is designed as revisory of the earlier act, or as a later expression of the legislative will and intent upon the same subject-matter. The two acts are not inconsistent the one with the other. The later does not cover the ground occupied by the earlier, and therefore should not be held to supersede it. Both may be allowed to stand, and be given full force and effect, without doing violence to either, or to any canon of statutory construction.

It is further insisted, however, that the demurrer was properly sustained because the proceedings which are the foundation of this condemnation suit were had under an unconstitutional statute. This contention we think is sound. The act of 1881, under which these proceedings were taken, provides that when "two or more owners shall petition the board of supervisors for a ditch, drain or other water course," the supervisors shall appoint a day for a hearing, and give notice. Upon the hearing, "if the supervisors shall find that the construction of the ditch would be conducive to the general welfare of the landowners so petitioning," surveys are to be made, stakes set, the work to be ordered done, and the cost apportioned upon the lands benefited and private property condemned for ditch purposes. But in this state private property may not be taken or damaged for private use at all. It may be taken only for public use after just compensation made or paid. Const. art. 1, § 14. It is beyond question that the digging and maintaining of ditches and drains across private lands is a taking of property.

This statute may be read in vain to discover any expression or intimation that the taking in this case is for a public use. The proceedings may be initiated by two men. They are required to be landowners, but so loosely is this statute drawn that it is not required that the land which they own shall be so situated as to be affected by the proposed ditch. As authority for initiating the work, and for taking the land of a private owner for the indicated purposes, the supervisors have but to find, not even that the construction of the ditch will benefit the lands of the petitioners, but merely that it will "conduce to their general welfare." It is nowhere in the act expressed or contemplated that the interest or convenience of the public or of any community is to be subserved. Yet, excepting for these purposes, private property may not be taken. To the contrary, the very language of the statute negatives the idea that public interests are in consideration, since it imposes upon the supervisors the duty of ordering the work when they shall find that its construction will be conducive to the general welfare of the two or three or four persons who petition. Nor may this act be saved from condemnation because, while providing that only two landowners need petition, it contemplates that more may do so. It is not a question for the courts to say whether a petition by three or four or five or six or ten should be held to indicate that public necessity or convenience is involved. It is for the legislature in the first instance to show that the consideration for the taking of private property is a consideration of public necessity or convenience. Johnson v. Schmidt (Wis.) 63 N. W. 288. We are not unmindful that this statute was attacked in Holley v. Orange Co., 106 Cal. 420, 39 Pac. 790, and that its constitutionality was there upheld; but the points here presented were not in that case raised or considered. That determination was a decision, not generally as to the validity of the act, but merely that it was valid against the specific grounds of attack urged. It is of no binding force in this action, between different parties, and upon propositions neither presented to nor considered by this tribunal in the former action. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; City Council v. Fowler (S. C.) 25 S. E. 900. The judgment is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(126 Cal. 201)

ALFERITZ v. BORGWARDT. (L. A. 527.)[1]

(Supreme Court of California. Sept. 26, 1899.)

MORTGAGE ON INCREASE OF SHEEP—CONSTRUCTION—ERRONEOUS DECISION—REVERSAL—IMPAIRMENT OF CONTRACTS.

1. A mortgage (made under the authority of Civ. Code, § 2955) on the "increase" of sheep includes their offspring, merely, and not the wool grown thereon.

2. Where contracts have been made in reliance on a decision erroneously construing a statute, a reversal of the decision is not prohibited, as a law impairing contracts.

Department 2. Appeal from superior court, Kern county.

Action by Peter Alferitz against H. L. Borgwardt, Jr., for conversion. From a judgment entered on a general demurrer to the complaint and a refusal to amend, plaintiff appeals. Affirmed.

Lyman I. Mowry and Ahern & Bennett, for appellant. M. L. Short, for respondent.

TEMPLE, J. This is an appeal from a judgment entered upon a general demurrer to plaintiff's complaint, and upon his refusal to amend. In the complaint it is averred: That on the 17th day of November, 1893, one F. B. Dagany executed and delivered to plaintiff his promissory note for $9,000, with interest, due six months after date, and, to secure payment of the same, gave him a chattel mortgage, executed and recorded as required by law, upon "five thousand five hundred sheep and the increase thereof, said eighteen horses and the increase thereof, and twenty-four head of neat cattle and the increase thereof." The note is unpaid. On the 30th of April, 1897, defendant converted to his own use, and wrongfully deprived plaintiff of the use and possession of, 40 bales of wool, "which said wool was and is the increase of the five thousand five hundred sheep so mortgaged to plaintiff by F. P. Dagany as aforesaid, and was sheared from said five thousand five hundred sheep and the increase thereof." This is followed by proper allegations of damage, and prayer for judgment.

It is assumed on both sides that the wool was not taken from the actual possession of the plaintiff. If any doubt could exist as to the sufficiency of the demurrer to raise the question presented, the point is waived by appellant, who states in his opening brief, "The only question involved in the demurrer is, does a chattel mortgage of sheep and the increase thereof cover the wool, the product of the sheep?" In considering the question thus submitted, the statute authorizing chattel mortgages is of primary importance. Does it authorize a mortgage upon sheep and the wool to be thereafter grown upon and sheared from them by the mortgagor? Not all personal property can be so mortgaged, but only certain specified classes. Section 2955, Civ. Code, so far as material here, reads as follows: "Mortgages may be made upon the following personal property, and none other: * * * Sixteenth. Neat cattle, horses, mules, swine, sheep, goats, and the increase thereof." Is wool to be sheared from the sheep by the mortgagor in possession included in this list? If not so included, and plainly included, when the words are given their general and unrestricted meaning, the lien would not attach to wool, even if it were so nominated in the bond.

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[1] Rehearing denied October 23, 1899.

In addition to the fact that the presumption is against the right to mortgage personal property, and permission so to do must be clearly found in the statute, it must be admitted that the word "increase," although variously used, has acquired a special meaning when applied to domestic animals. So applied, unless expressly qualified in the context, it invariably means the young of such animals. Counsel has not found, and, I venture to say, cannot find, in legal literature or elsewhere, (save perhaps in the mortgages of this class, and in Alferitz v. Ingalls, 83 Fed. 964), an instance where the unqualified use of the word, as applied to such animals, included anything more or meant anything other than the offspring, progeny, or young of such animals. The word is often used in the decisions, and always refers, so far as I can find, to the offspring, and to nothing else. In Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487, the word is repeatedly used in reference to such animals, and in every case it means offspring. In that opinion many cases are cited in which the word is similarly used. In many places it is evident that the word would not have been used had the writer been conscious that it comprehended anything other than the young. Turning to Cobby, Chat. Mortg. § 365 et seq., I find that the author uses the phrase "offspring of mortgaged animals" and "increase of mortgaged animals" interchangeably, and the same use prevails in the numerous cases cited in the notes. In 2 Am. & Eng. Enc. Law, under "Animals," I find the word similarly used. The author speaks of "offspring or increase." Numerous cases are cited to the proposition that "increase follows the dam," and "the increase of the increase ad infinitum," and also as to the increase as between the mortgagor and mortgagee. It is true that these cases do not directly bear as authority upon the issue here, but such use of the word would be very inaccurate if it were as comprehensive as appellant contends, and if it were not true that the word is always so used in reference to domestic stock. In some of the cases cited the mortgages include the "wool and increase." See Cox v. Beck, 83 Fed. 269. It is also to be presumed that, when the mortgagor retains the possession of the sheep, he expects to make a profit from the sheep in the meanwhile. He certainly expects to make a living from such use, and to pay his debt from it,—as much so as one who mortgages his farm and retains possession. Upon the subject of use the intendments are the same. This idea is expressed in Shoobert v. De Motta, and it is said that, where the increase is not mentioned, the mortgagee might as well claim the wool as the lambs, as each may be the annual profit which the mortgagor in possession is entitled to retain unless the contrary intent is expressed. This reasoning equally applies to the statute. The same clause also authorizes a mortgage upon a dairy. Did the legislature intend by this language to authorize a mortgage upon butter and cheese to be thereafter produced? I see no difference in principle. Each is in some sense manufactured, and each becomes a merchantable commodity, to be sold separately from the mortgaged property. If the lien extended to it, there might be difficulty in determining when it became devested. Would it adhere after the product was sold by the mortgagor and had reached the hands of the consumer? I think there is much difference between the application of the mortgage to the lambs and to the wool. The lambs became at once a part of the flock, and the mortgage may be held to impart notice. Not so as to the wool. When this wool was taken by defendant, it may have been in a warehouse with much other wool, and defendant may have purchased from the mortgagor in good faith, unless the mortgage imparts notice. The word "increase," from "cresco," to grow, originally meant growth. It has acquired other meanings by use, but some are figurative, and others, which at first seem not to be growth, upon examination will be seen to be strictly so. When we speak of the "earth's increase," meaning the annual crops, it is evident that the word is used figuratively. If we speak of interest on money as increase, we refer to the sum of money at interest which is thereby increased. This is growth. Similarly, when we refer to rents, profits, and other gains as increase, it is the fortune of the owner which thereby is made to grow. When we speak of the increase of a herd of cattle or a flock of sheep, we refer to growth of the herd or flock by addition of new members. The natural increase can only mean the addition of new members by birth. Natural increase is intended by the lease when it speaks of "the increase thereof." The lease does not expressly speak of a flock of sheep, but evidently that was what was meant. If not, the description of the property is clearly insufficient. Otherwise, the lessor is provided with an adjustable description which will fit any band of sheep he may wish to save from creditors. Whether the description is good, even on that theory, I do not decide. The wool does not increase the flock of sheep. Quite possibly, because domestic animals are so frequently considered as herds, the word "increase" has acquired this partially specialized meaning in respect to them, although now it is so understood even when a single animal is spoken of. I think, therefore, whether we consider the statute or the language of the lease alone, the conclusion would be against the appellant.

Appellant further contends that the title to the property passed to the mortgagee under the terms of his mortgage. At the date of the execution of this mortgage, section 2888, Civ. Code, read as now: "Notwithstanding an agreement to the contrary, a lien, or the contract for a lien, transfers no title to the property subject to the lien." But in

1883, when this law was also in force, this court, in discussing the validity of an attachment of personal property which had been thus mortgaged, said: "The title to the furniture passed to the plaintiffs. Under the chattel mortgage, it continued vested in them until it was reinstated by the performance of the mortgage conditions." Berson v. Nunan, 63 Cal. 550. No allusion is made to section 2888, but it is contended that such section was thereby construed to mean exactly the opposite of its express and unambiguous declaration. Certainly, it was not a construction, but a failure to note the statute. But appellant contends that it states the law upon the subject, and that law was not changed until the decision of Shoobert v. De Motta, in 1896, and in the meantime his mortgage was made. It is said that to apply the rule declared in the last case, rather than that laid down in the first, would be to impair the obligation of contracts. Douglas v. Pike Co., 101 U. S. 687, and many other cases are cited. In the case named it is said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of the decision is to all intents and purposes the same in its effect on contracts as the amendment to the law by means of a legislative enactment." No rights are acquired here under a statute, in the meaning of that line of authorities which seem to refer to laws authorizing the government or some subdivision or department thereof to contract certain obligations. Beyond this the cases cited do not go. I hardly think the rule will be applied to decisions of state courts in regard to general rules of law, although they may affect contract rights. At the best they but lay down a rule for the federal courts as to how far they will be governed by decisions of the state courts in the construction of state statutes. Laws are not made by judicial decisions. The court simply determines the rights of the parties to the action in that particular controversy. It is no part of its purpose even to declare the law. It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law, except in that special controversy. In other suits it is authority more or less persuasive according to the reasonableness of the rule. Courts have never thought themselves bound by it as they are by a valid statute. And, if it is manifestly wrong, the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson Case in making a loan would show his incapacity. No doubt an appellate court assumes a very grave responsibility when it reverses a former decision which has become a rule of property or the law of contracts, and whenever this is done it must be understood that the court has not only considered the objections to the former decision, but the evils which may follow from its reversal. The matter is ably discussed in Hart v. Burnett, 15 Cal. 530, and the views there expressed have been frequently affirmed. The mere fact that an error has been made in a decision of the supreme court is no reason for perpetuating it, but in a given case to correct it may be productive of more evil than to permit it to stand; and, as stated in the above case, justice is not always on the side of him who claims under the erroneous decision. Why should one who has honestly acquired property according to the law of the land lose it because a judge, relying upon imperfect presentation, has erred? Or why should the policy of the government, adopted upon great deliberation, be so defeated? And especially so under a system where a decision was never deemed to have the force and effect of an absolute law. Kent says that a decision solemnly and deliberately made should not be set aside, "except for very cogent reasons, and upon a clear manifestation of error." 1 Kent, Comm. 476. And, we may add, the rule should not then be changed unless the court, after due deliberation, shall conclude that in the interest of justice and of the public the error should be corrected. And, as the court can only determine the law as applicable to existing or past contracts and rights, this is a conclusion that existing controversies and rights under past transactions should be governed by the law as declared in the later decision. If the supreme court of the United States shall finally go with the appellant here, in holding that the courts are prohibited from reversing an erroneous construction of a state statute because such decision is a law which impairs the obligation of contracts, then the courts can never change the erroneous construction; for a court can only pass upon existing rights, and must always look to the past for its law, and, so far as it declares the law, declares what it was and is, but cannot enact what it shall be. I do not think that august tribunal will adopt this view, which, if adopted, can result only in the perpetuation of error. The judgment is affirmed.

We concur: HENSHAW, J; McFARLAND, J.

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126 Cal. 112

In re STANFORD'S ESTATE. (S. F. 571.)

(Supreme Court of California. Sept. 15, 1899.)

TAXATION—COLLATERAL INHERITANCE TAX—VALIDITY OF EXEMPTION.

1. The act of 1897, amending the collateral inheritance tax law (Act March 23, 1893), by exempting from such tax certain persons and classes, and providing that such exemptions "shall apply to all property which has passed by will, succession or transfer since the approval of the act of which this act is amendatory," except in cases where the tax has been paid, violates Const. art. 4, § 31, providing that the legislature shall not make, or authorize the mak-

ing of, any gift of any public money or thing of value to any individual or corporation.

2. Under Act March 23, 1893, providing for a collateral inheritance tax on property devised to certain classes, and providing, in section 4, that "all taxes imposed by this act * * * shall be due and payable at the death of the decedent," the amount of the tax becomes the property of the state at the death of decedent, within the meaning of Const. art. 4, § 31, prohibiting the legislature from making a gift of any public money or thing of value.

Harrison, J., dissenting.

In bank. Affirmed.

For opinion in department, see 54 Pac. 259.

Wilson & Wilson, for executors. Edward R. Taylor, for unrepresented parties. A. N. Drown, for Stanford and Stanford, legatees. Francis E. Spencer, for trustees. William S. Barnes, for treasurer.

VAN DYKE, J. Leland Stanford died June 21, 1893, leaving a last will and testament, by which he gave the sum of $2,500,000 to certain trustees for the benefit of Leland Stanford Junior University, and also legacies amounting to $2,200,000 to certain of his nephews and nieces. April 14, 1896, the superior court of San Francisco, in which the settlement of said estate was pending, on application of the treasurer of the city and county of San Francisco, made an order requiring Jane L. Stanford, as executrix of the last will and testament of said Leland Stanford, deceased, to pay into the treasury of the said city and county $235,750, as and for a tax on collateral inheritances. From this order an appeal was taken May 18, 1896. The act under which the order directing the inheritance tax to be paid over was approved March 23, 1893, and took effect 60 days thereafter. St. 1893, p. 193. It is entitled "An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of the proceeds." The first section reads as follows:

"Section 1. After the passage of this act, all property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein or income therefrom which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of California, and any lineal descendant of such decedent, born in lawful wedlock, or the societies, corporations, and institutions now exempted by law from taxation, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property, or to the income thereof, shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property, and at a proportionate rate for any less amount, to be paid to the treasurer of the proper county, as hereinafter defined, for the use of the state; and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid, as hereinafter directed: provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax."

Section 4 reads: "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued; provided that if said tax is paid within six months after the accruing thereof a discount of five per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators, or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond, in the form and to the effect prescribed in section 2 of this act, for the payment of said tax, together with interest." In another section it is provided that if litigation becomes necessary, or because of other unavoidable cause for delay the estate cannot be settled at the end of 18 months, then only 7 per cent. should be charged. The tax paid over to, or collected by, the county treasurer is by him required to be paid into the treasury of the state for the use of the state school fund.

After the appeal herein was perfected, this court, in Re Wilmerding's Estate, had occasion to consider the nature and character of this collateral inheritance tax, and therein, also, held the act in question to be constitutional. 117 Cal. 281, 49 Pac. 181. In the opinion in that case it is said: "Similar statutes have been enacted in other states, and, with the exception of New Hampshire, have been sustained by the courts in those states, upon the ground that the charge thus imposed is in the nature of an excise tax, or a tax upon the right of succession, and is within the constitutional power of the legislature. [Citing a number of cases of the various states.] The principles upon which the tax is upheld have been so fully and clearly elaborated in the above cases that it is necessary to do no more than to refer to the cases. The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion." And again: "As this tax is not upon property, but upon the right of succession, the constitutional provision that all property shall be taxed according to its value is inapplicable. The right of the legislature to impose an excise tax includes the right to select the subjects upon which it shall be imposed." In Re Swift, 137 N. Y. 83, 32 N. E. 1097, cited by appellants, that court, in speaking of this question, says: "The precise definition of the nature of this tax is not essential, if it is susceptible of exact definition. Thus far in this court we have not thought it necessary in the cases coming before us to determine whether the object of taxation is the property which passes or not, though, in some, expressions may be found which seem to regard the tax in that light. [Referring to a number of cases in that state.] The idea of this 'succession tax,' as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of the owner, to a diminution, by the state reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property."

The decision in the Wilmerding Case would have disposed of this appeal were it not that the act in question was amended by the legislature of 1897. The act of 1897 is entitled "An act to amend an act entitled 'An act to establish a tax on collateral inheritances, bequests and devises, to provide for its collection, and to direct the disposition of the proceeds,' approved March 23, 1893." It amends section 1 of the act of 1893 by including among those who are exempt from the tax the niece or nephew when a resident of this state, along with certain classes of corporations, of which the above named university is one. Such amendatory act contains an independent section, numbered 2, reading as follows: "The exemptions contained in this act shall apply to all property which has passed by will, succession or transfer, since the approval of the act of which this act is amendatory, except in those cases where the tax has been paid to the treasurer of the proper county." It is claimed on the part of the appellants that the appeal herein must be determined in accordance with the act of 1893, as amended, referring, in support of such contention, to Bank v. Henderson, 101 Cal. 307, 35 Pac. 899, and other cases in the same line. Such decisions are to the effect that in certain cases where, subsequent to the appeal, matters arise affecting the same, upon proper suggestion and proof of such matters they will be considered by the appellate court; especially is this so when the action is of a penal character, as it was in the Henderson Case. On the other hand, it is contended upon the part of the respondent that the amendatory act in question, so far as it attempts to relieve these appellants, and other beneficiaries similarly situated, from the conditions or obligations contained in the act of 1893, being in effect a relinquishment to them of the sums due the state under said act, is unconstitutional and void. It will be seen by the express terms of the act of 1893 all taxes imposed thereby "shall be due and payable at the death of the decedent"; and also that such taxes "shall be immediately due and payable to the treasurer of the proper county." By section 25, art. 4, of the constitution, it is declared: "The legislature shall not pass local or special laws in the following enumerated cases, that is to say: * * * Fifteenth. Refunding money paid into the state treasury. * * * Seventeenth. Releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or person to this state, or to any municipal corporation therein." In answer to the foregoing provisions of the constitution, it may be claimed that the act in question is not local or special legislation, and in form it may not be so. But the framers of the constitution, and the people who adopted it, did not hedge about the legislature with such restraints in the matter of conferring favors, or making gifts or donations by special and local legislation, and at the same time leave the door wide open for similar abuses to enter under the guise of general legislation. By section 22 of the same article, the legislature is prohibited from making any grant or donation of property to any institution not under the exclusive management and control of the state, except institutions conducted for the care and support of orphans and half orphans, and aged indigent persons, and in such excepted cases reserving to the state the right of visitation. By section 31 of said article it is declared, among other restrictions imposed upon the legislature: "Nor shall it have the power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever: provided, that nothing in this section shall prevent the legislature granting aid pursuant to section twenty-two of this article."

In answer to the contention on the part of the respondent that by the amendatory act of 1897 it is attempted to give or donate public money or thing of value, appellant's counsel say "that the state never had possession of any part of the 'accumulations or acquisitions' of Leland Stanford, deceased; * * * and he [respondent] has not shown how the state could give away what it never had." In other words, it is claimed that one not in the possession of property is not the owner of it. The law of 1893 repeatedly declares that the portion coming to the state "shall be due and payable at the death of the decedent." And it is further provided that from that time, until paid over in the course of administration, the sum so due the state shall bear interest, and interest shall be paid on the sum so due the state. It would be absurd to exact interest for the detention or use of money or property not belonging to the party who demands it. It is elementary law that the right of inheritance, including the designation of heirs and the portions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. It is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate, and the legislature can provide that the whole or only a portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the legislature in this case having determined that 95 per cent. of the decedent's estate may go to his heirs and beneficiaries, and that 5 per cent. be retained to the state, it is too clear for argument that this 5 per cent. vested in the state at the same time that the 95 per cent. vested in the heirs or other beneficiaries. "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment." 4 Kent, Comm. 202. The state here, from the death of the decedent, had a present fixed right of future enjoyment to the 5 per cent. of his estate. This is property or a thing of value belonging to the state.

The following from the Civil Code is merely reciting the common law: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code the thing of which there may be ownership is called property." Section 654. "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, good will of a business, trade marks and signs; and of rights created or granted by statute." Section 655. It is therefore not the possession alone, but the right to possess, which constitutes the ownership; and ownership may be "of rights created or granted by statute," as the case here. It would be altogether a new definition in the law to hold that one who had not obtained possession of a thing or had parted with its possession could not be the owner of such thing. This would be contrary to the teachings of elementary law, which recognizes a right in action as well as a right in possession. The rule contended for would make ownership depend altogether upon strength and agility in obtaining and holding possession of things. The purpose of the act of 1897, as appears by its title, was merely to amend the act of 1893. Section 1 of the latter act amends section 1 of the act of 1893 by re-enacting said section at length, as required by the constitution. Thereafter is added to the act of 1897 the independent section 2, which attempts to release the payment of the taxes imposed by the act of 1893, except such as have already been paid over to the treasurer of the proper county.

Passing consideration of the question whether this section is not invalid, because not embraced in the title of the act, and for the further reason that it in effect amends other sections of the act of 1893 without re-enacting them, it would strike the ordinary mind as a strange piece of legislation. The one who had been prompt in complying with the law, and paid into the county treasury what belongs to the state, is punished for his good conduct by retaining the money so paid; whereas, he who has refused to obey the law is rewarded by giving or releasing to him that which belongs to the state, and which he unjustly withheld. The object of this unjust discrimination is apparent. To take public funds from the treasury, and give them away, would be a more bald and palpable violation of the constitution than to arrest such funds in transit and return them or give them away. The latter, however, is only an indirect mode of accomplishing the same result; but in law that which cannot be done directly may not be done indirectly. The funds in question here were never in the possession of the appellants, but in the possession of the administratrix of the estate, as an agent under the law to hand them over to the state as the owner thereof.

It is said, however, on behalf of appellants, that the legislature may not only amend, but repeal the law altogether, in which case there would be no means of obtaining possession of the sums due the state not already turned over. The legislature might, perhaps, abolish or repeal all laws for the collection of debts. This, however, would not have the effect of paying or discharging the debts, or in the least impair the obligation to pay them. Property rights and obligations would remain as before. These, by fundamental law, are placed beyond the reach of legislative interference. In substance, if not in form, to turn over the fund in question belonging to the state to the appellants would be to make a gift or donation of the same, and the law regards substance rather than form. We are therefore of the opinion that to give retroactive effect to the law of 1897 would conflict with the provisions of the constitution prohibiting the legislature from making any gift or donation of any public money or thing of value. The amendatory act of 1899 (St. 1899, p. 101), passed after the rehearing was granted herein, has no application in this case. By its terms it applies only to such property as has passed since the first amendatory act. We quite agree with appellant's counsel that "an heir or legatee must take his estate on such conditions as at the time the state may have imposed," and that subsequent legislation could not affect such vested right; and this rule, as already held, applies equally to the state, whose right to the fund in question accrued under the act of 1893. Order affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.

HARRISON, J. I dissent for the reason stated in my opinion reported in 54 Pac. 259.

McFARLAND, J., being disqualified, did not participate in the foregoing opinion.

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126 Cal. 176

FRANZ et al. v. BIELER. (S. F. 745.)

(Supreme Court of California. Sept. 22, 1899.)

CONTRACTS—COMPLAINT—SUFFICIENCY.

A complaint, in an action on a contract not to set up a rival business, providing for the payment of a certain sum in case of a breach, by alleging the establishment of a rival business shows a breach of the contract, and an allegation of nonpayment of the money is unnecessary.

In bank. Affirmed.

For opinion in department, see 56 Pac. 249.

BEATTY, C. J. The judgment of the superior court in this case was reversed by a decision in department upon the ground that the complaint failed to state a cause of action, because it contained no allegation of nonpayment. All other points involved in the appeal were ruled in favor of the respondent. After rehearing, we readopt the opinion of the department, except as to the point upon which the judgment was reversed. We think the complaint was sufficient without an allegation of nonpayment. The contract of defendant was not simply for the payment of money. It was, on the contrary, a contract not to set up a rival business, and the agreement to pay $2,000 in case of the breach of the principal covenant was merely incidental. When the plaintiff alleged the establishment of a rival business, he showed a breach of the contract and a cause of action, and was not required to allege nonpayment. Beasley v. Gillespie, 4 Bibb, 314; Hughes v. Houlton, 5 Blackf. 180. The decisions of this court cited in the commissioners' opinion are not in point, for the reason that they all relate to contracts for the payment of money only,—contracts, that is to say, which could be broken in no other way than by nonpayment. The judgment of the superior court is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.; VAN DYKE, J.; McFARLAND, J.

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126 Cal. 160

GILLIAM v. BROWN et al. (L. A. 530.)

(Supreme Court of California. Sept. 18, 1899.)

CONTRACTS—ACTION—EVIDENCE OF ACCEPTANCE—PLEADING—AMENDMENT AFTER NONSUIT.

1. Where plaintiff, suing for the contract price for the construction of a ditch, relies upon a substantial performance of the contract, he need not show an acceptance of the work by defendant.

2. An order granting a nonsuit will be sustained, if the record shows valid grounds therefor, although such grounds were not stated in the motion for nonsuit.

3. After a nonsuit and judgment for defendant, it is proper to refuse plaintiff leave to amend his complaint.

Department 2. Appeal from superior court, Kern county.

Action by T. J. Gilliam against Andrew Brown and others. From a judgment for defendants, and an order denying plaintiff's motion to amend, plaintiff appeals. Reversed.

E. Rousseau, for appellant. B. Brandage, for respondents.

McFARLAND, J. Action to recover $1,000 for the construction of a certain cut or ditch under an alleged contract between plaintiff and defendants. A jury was impaneled to try the cause, but after plaintiff had introduced his evidence the court granted a nonsuit, and judgment went for defendants. Plaintiff appeals from the judgment and order denying a new trial, and also from an order denying his motion to amend the complaint. The case was here before, and, as its main features appear in the opinion on the former appeal, they need not be noticed now in detail. 116 Cal. 454, 48 Pac. 486.

In the complaint, after averments of the contract and the completion of the ditch by plaintiff, it is further averred that the defendants "accepted said ditch so constructed"; and on the former appeal a judgment for plaintiff, which seems to have been based entirely upon the alleged acceptance of the ditch by defendants, was reversed on account of an erroneous instruction, and because there was not in the record "any evidence whatever of an acceptance of the work." But it was not held that acceptance was necessary to a recovery. On the other hand, this court said: "By the terms of this contract, as shown by the proposal for bids, plaintiff was entitled to his money when a cut was made sufficient in capacity and grade to carry all the waters of Whitney creek at all times. * * * He was not required to wait for two years, and then show that the ditch had carried all the water at all times, to enable him to recover." But at the second trial, which gave rise to this present appeal, the court below seems to have acted upon the theory that evidence of an acceptance was necessary to plaintiff's recovery. As to the matter of the nonsuit the record shows the following: "Nonsuit. The defendants' counsel here move for a nonsuit on the ground that the plaintiff has averred upon a written contract, and there is no evidence before the court of a written contract between the plaintiff and the defendants; (2) that there is no evidence of any acceptance of the work,—which motion was granted on the second ground by the court, and plaintiff's counsel excepted." From this it appears that the nonsuit was granted upon the sole ground of want of evidence of acceptance. The first ground was certainly not tenable; for plaintiff introduced a written proposal for bids to do the work,—copied in the opinion on the former appeal (116 Cal. 455, 456, 48 Pac. 486),—and a written bid by plaintiff, and his bond for the performance of the work as provided for in the proposal; and these constituted a written contract. Of course, if the record showed any other valid ground for the nonsuit, the order granting it would be maintained here, although such ground was not stated in the motion for nonsuit; but no such other ground appears. If, for instance, the plaintiff had not introduced any evidence to the point that he had done the work as provided by the contract, the nonsuit might be maintained on that ground; but it is really not seriously argued by defendants that he did not introduce such evidence. Defendants' brief deals almost entirely with the proposition that there was no evidence of "acceptance." The plaintiff, in his evidence in chief, did not undertake to prove an acceptance; but, upon the cross-examination of plaintiff when on the witness stand, the defendants asked some questions tending to show that there had not been an acceptance, and, against the objection of plaintiff, succeeded in introducing certain written reports of a meeting of the defendants, and motions and resolutions there passed, tending to show that defendants had not accepted the ditch as constructed by plaintiff; and this documentary evidence was certainly inadmissible on cross-examination. The plaintiff clearly relied upon proof that he had constructed the ditch in accordance with the contract; and his own testimony as a witness, together with the testimony of other witnesses introduced by him, certainly constituted material and strong evidence to the point that he constructed the ditch in accordance with the contract. Plaintiff was undoubtedly entitled to go to the jury upon such evidence on the issue that he had done the work in accordance with the requirements of the contract. It is true that the defendants set up in their answer a contract somewhat different from the one alleged in the complaint; but there was no evidence that there was any contract different from the one claimed by plaintiff, and as plaintiff proved the contract which he had alleged, and had introduced evidence strongly tending to prove a compliance with it, he would have been entitled to a judgment if the jury had found that there was such compliance, and the issue of compliance was, under the evidence introduced by plaintiff, one for the jury to determine. We do not deem it necessary to state here in detail the evidence introduced by plaintiff, for the reason that the court below has not held that evidence insufficient to go to the jury, but has evidently determined the case wholly upon the theory of want of proof of acceptance by defendants. For these reasons we think that the court erred in granting the nonsuit.

At the time the appellant made his motion for a new trial he moved the court to allow him to amend the complaint by striking out the averment that defendants "accepted said ditch so constructed," and the court denied the motion, and from the order denying the motion plaintiff also appealed. Under the foregoing views, this appeal is immaterial at the present time; but, the motion not having been made during the trial of the cause, we cannot say that the court erred in denying it, and therefore this order appealed from is affirmed. We think, however, that, if plaintiff before another trial should ask for such amendment, it should be allowed. The judgment and order denying a new trial are reversed, and the cause remanded for a new trial; appellant to recover his costs on this appeal.

We concur: TEMPLE, J.; HENSHAW, J.

126 Cal. 210

EDELMAN v. McDONELL et al. (L. A. 531.)

(Supreme Court of California. Sept. 28, 1899.)

CONTRACTS—VERBAL PROMISES—FEES OF PHYSICIANS.

1. In an action to recover for medical treatment, it appeared that the services were contracted for by the patient, who was not a minor, but that during the treatment his father made oral promises to pay. It did not appear what proportion of the services were rendered after these promises were made, nor that the services were continued on the faith of them. *Held*, that judgment should be rendered only against the patient, he being the party originally contracting for the services.

2. A bill of particulars, not being part of the judgment roll, can only be brought up by a bill

of exceptions, and should not be included in the transcript.

Department 2. Appeal from superior court, Los Angeles county.

Action by D. W. Edelman against A. A. McDonell and W. F. McDonell. From a judgment in favor of defendant A. A. McDonell, plaintiff appeals. Affirmed.

Max Lowenthal, for appellant. Borden & Carhart and Anderson & Anderson, for respondents.

TEMPLE, J. This action was brought upon a medical bill for services rendered by Dr. Edelman and Dr. Lasher in the treatment of defendant W. F. McDonell. All material allegations of the complaint are denied, and the court finds, in effect, that A. A. McDonell is the father of the other defendant, who was, however, not a minor when the medical services commenced. It is found that the services consisted of divers consultations, house visits, office visits, surgical operations, and surgical dressings, extending over a period of six months, and were rendered in pursuance to the request of W. F. McDonell, made on the 23d day of February, 1894, "while the first of said consultations was in progress; and said plaintiff then and there undertook the treatment of said W. F. McDonell." After plaintiff had so undertaken the treatment, on the said 23d day of February, 1894, and at divers times thereafter during the treatment, A. A. McDonell "made statements to the plaintiff and to said George W. Lasher which led them to believe, and from which they did believe, that he, the said A. A. McDonell, intended and would pay for the treatment of said W. F. McDonell, and for their said services"; and they relied upon said statements, and gave credit to A. A. McDonell "as well as to defendant W. F. McDonell." The court further found that at divers times during the course of said treatment A. A. McDonell agreed to pay for the services rendered, but the statements and promises were not in writing. The court rendered judgment in favor of plaintiff against W. F. McDonell, but also against plaintiff and in favor of A. A. McDonell. Plaintiff appeals from this portion of the judgment which is in favor of A. A. McDonell upon the judgment role.

The judgment must be affirmed. It is clearly found that W. F. McDonell contracted for the services, and that plaintiff and Dr. Lasher undertook the treatment on that employment. Afterwards the other defendant made statements which caused plaintiff and his assignor to believe that he would pay. It is not shown that such statements were made as would justify such belief, or that A. A. McDonell intended that they should so understand, or that they would not have rendered the service had such statements not been made. Perhaps the statements consisted in expressions of interest in the case, or were express oral guaranties of his son's solvency. There is nothing in that part of the finding which can help plaintiff.

It is not found what services were rendered after the promises to pay were made at divers times during the treatment. The first contract of employment having been made with W. F. McDonell, these promises were only to pay the debt of W. F. McDonell. There is no finding that the service would have been discontinued but for the promises; much less that they were made in view of a withdrawal from the case unless A. A. McDonell would be responsible.

It does not appear that W. F. McDonell was living with his father, or was being supported by him. For aught that appears, they may have been living apart for years, and the son may have his own family and business. Had the father been taking care of him, and actually supporting him as though he were still a member of his family, as minor children generally are of their parents' family, the presumptions might be very different.

I understand that a contract which a physician makes with his patient whose case he undertakes is usually one contract for the entire work, but it is immaterial in this case, for, if the alleged promises were sufficient to make A. A. McDonell responsible for the visits made after such promises, still it does not appear what service was rendered after the promises, or the value of such service. We must presume that there was no proof from which such finding could be made.

The bill of particulars throws no light upon the case, and it is improperly in the transcript. Not being a part of the judgment roll, it can only be brought here by a bill of exceptions. For many purposes a bill of particulars, when made in response to a statutory demand, is an amplification of the complaint. It makes plaintiff's demand more specific, and limits his proof to the items set out. The statute requires that it shall be delivered to the adverse party, and not a copy thereof, and does not require, or expressly authorize, it to be filed. The mode of its authentication in this case is entirely unwarranted. We have no legal evidence that such bill was ever demanded by or delivered to the adverse party. Judgment affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

6 Cal. Unrep. 345

McCLATCHY et al. v. SPERRY et al. (S. F. 2,078.)

(Supreme Court of California. Oct. 5, 1899.)

APPEAL AND ERROR—STAY BOND—FILING IN SUPREME COURT.

The supreme court may order a stay of proceedings on a judgment appealed from on the filing of a sufficient bond for the protection of the respondent.

In bank. Appeal from superior court, Sacramento county.

Action by McClatchy & Co. against Sperry & Hutchinson. From a judgment for plaintiffs, defendants appeal. Application for leave to file a stay bond. Granted.

H. G. W. Dinkelspiel, for appellants. L. T. Hatfield, for respondents.

PER CURIAM. In this case exception was taken to the sureties on the stay bond filed by appellants at the time the appeal was taken. There was a failure to justify the sureties within the time allowed by law, and we think such failure is hardly excused by the showing now made in support of the application for leave to file a stay bond here and for a supersedeas. But the respondents do not object to the supersedeas, provided they can be secured by a bond filed in this court, and at this time. It is well settled that we can order a stay upon the filing of a sufficient bond in this court. Hill v. Finnigan, 54 Cal. 493, established the practice, and it has been followed in numerous subsequent cases. Of course, it is necessarily implied that a bond so filed will protect the respondent. The bond tendered by the appellants will be approved and filed, subject to any exceptions that the respondent may take within 10 days after notice of this order. In the meantime, and until the further order of the court, all proceedings upon the judgment appealed from are stayed.

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126 Cal. 226

CITY OF TULARE v. HEVREN et al. (Sac. 540.)

(Supreme Court of California. Sept. 29, 1899.)

SUPERIOR COURT — JURISDICTION — LIQUOR BOND—CITY ORDINANCE—PLEADING—CORPORATION'S ACT—CONSTITUTIONAL LAW.

1. Deering's Gen. Laws, p. 873, provides that the city recorder's court shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance, and of all actions founded on any obligations or liability created by any ordinance. Const. art. 6, § 5, provides that the superior courts shall have jurisdiction in all cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $300. An ordinance of a city provided that a liquor seller should, before a license was issued to him, give a bond to the city in the sum of $1,000, conditioned to conduct his saloon in a quiet, orderly, and reputable manner. *Held*, that the superior court has jurisdiction of an action to recover the penalty of such a bond.

2. Under Code Civ. Proc. § 459, which provides that in pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, a complaint which attempts to plead an ordinance as "that certain ordinance of said city of T. known as 'Ordinance No. 66.'" does not sufficiently plead the ordinance.

3. Under Const. art. 4, § 25, which provides that the legislature shall not pass local or special laws regulating the practice of courts of justice, or in any case where a general law can be made applicable, Mun. Corp. Act § 765, which provides, in regard to cities of the fifth class, that it shall not be necessary in any action to plead or prove the existence or validity of any ordinance thereof, and that courts shall take judicial cognizance thereof without proof, is unconstitutional, for the reason that a general law requiring a uniform practice in regard to cities of all classes is readily applicable to the subject.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county.

Action by the city of Tulare against William H. Hevren and others on a liquor seller's bond. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

E. T. Cosper and C. R. Scott, for appellant. G. M. Zartmen and Power & Alford, for respondents.

COOPER, C. The court below sustained a demurrer to the complaint, and plaintiff declined to amend. Judgment was thereupon entered for defendants. Plaintiff appeals from the judgment.

The complainant shows substantially: That Ordinance No. 66 of the plaintiff requires all parties desiring to obtain a license for the purpose of conducting the business of selling spirituous liquors at retail in the city of Tulare to file with the board of trustees a recommendation by parties owning real estate within the block where the business is to be conducted, to the effect that the applicant is a person of good moral character, and a suitable person to conduct a place where spirituous liquors are sold. That, as a further condition precedent to issuing such license, the applicant shall give a sufficient bond in the sum of $1,000, conditioned that he shall conduct the business in a quiet, orderly, and reputable manner, and not permit any disturbance of the public order or decorum by any noisy, riotous, or disorderly conduct. On November 4, 1895, the defendant Hevren filed his recommendation and bond in the form and as prescribed by said ordinance, and the defendants Gerhardy and Finegan became sureties on said bond. A license was thereupon issued to defendant Hevren. The bond is in the sum of $1,000, and provides that Hevren shall conduct the said business in a quiet, orderly, and reputable manner, and shall not permit any disturbance of the public order or decorum by any noisy, riotous, or disorderly conduct, and that, if Hevren fails to comply with said conditions in any respect, the bond shall be in full force and effect. That after the issuance of the said license and the execution of said bond said Hevren did not conduct the business as provided for in said bond and ordinance, but conducted said business "in a riotous and disorderly manner, and so that his place of business was the scene of frequent broils, quarrels, and fights and disturbances of the public order and peace, and a place of gathering of boisterous crowds to such an extent as to obstruct travel about the place." That such disturbances and noisy and disorderly conduct became a nuisance. That a complaint in writing was filed by the city marshal, alleging such misconduct on the part of Hevren; and the board of trustees of plaintiff, after duly notifying said Hevren, and hearing witnesses, found and determined, by a resolution entered on the records of the plaintiff, that such charges were fully sustained by the evidence, and thereupon the said board of trustees duly revoked the license of Hevren, and declared the said bond forfeited to the plaintiff. The complaint asked for the recovery of $1,000 against defendants upon the said bond. The defendants demurred to the complaint upon various grounds. No questions are argued here except those raised by the demurrer, and no others will be discussed.

1. The first point urged by defendants, and upon which it is said the court below sustained the demurrer, is that the court had no jurisdiction of the subject of the action. We are cited to no authority in support of the proposition except section 806 of the municipal corporation act (Deering's Gen. Laws Cal. p. 873), which provides that the city recorder's court "shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty or forfeiture prescribed for the breach of any ordinance of such city of all actions founded upon any obligations or liability created by any ordinance and of all prosecutions for any violation of any ordinance." It does not appear to us that this case is within any of the provisions above quoted. It is not an action to recover a fine, penalty, or forfeiture for the breach of an ordinance of the plaintiff. It is not founded upon any obligation or liability created by any ordinance, and is not a prosecution for the violation of an ordinance. It is an action to recover upon the contract made by defendants with the plaintiff. The jurisdiction of the superior courts is given by the constitution, and cannot be taken away by the legislature, even if they had attempted to do so, by the provisions of said section 806. Under the constitution of this state superior courts have jurisdiction "in all cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars." Const. art. 6, § 5. It has long been settled that the amount claimed in the complaint is the test of the jurisdiction of the superior court. The amount claimed in the complaint in this case being $1,000, and upon a written contract, the superior court had jurisdiction. Section 753 of the said municipal corporation act gives the board of trustees the power to fix the amount of the bonds to be given, respectively, by the clerk, treasurer, city attorney, and marshal; and if the amount of the bond should be fixed at $300 or more, if defendants' contention is correct, then the superior court would not have jurisdiction of any suit brought upon such bond, when the amount so fixed was $300 or over. The board of trustees of such city has power, under section 764 of the said act, to purchase real estate for municipal purposes, to contract for supplying the city with water and electric lights, to build bridges, to lay out and repair streets, to construct sewers, and to purchase fire engines, besides many other things. If the contention of defendants is correct, the superior court would have no jurisdiction in any of said matters where the amount of the obligation so incurred would exceed $300. We do not think such is the law.

2. It is claimed that the complaint does not state facts sufficient to constitute a cause of action, and that it is uncertain, for the reason that the said ordinance is not referred to either by its title or the date of its passage, and not set out in hæc verba; and we think the claim will have to be sustained. The ordinance is attempted to be pleaded by referring to it as "that certain ordinance of said city of Tulare known as 'Ordinance No. 66.'" It is provided in our Code (Code Civ. Proc. § 459): "In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage." See Pen. Code, § 963. In this case we have no allegation as to the title nor the day of the passage of the ordinance. The ordinance is not set forth, nor the substance of it given, and therefore is not sufficiently pleaded. Dill. Mun. Corp. § 346; Ex parte Davis, 115 Cal. 447, 47 Pac. 258. The plaintiff does not deny the general proposition, but claims that it was not necessary to plead the ordinance by reason of the provisions of section 765 of the municipal corporation act, which provides in regard to cities of the fifth class (to which plaintiff belongs): "It shall not be necessary in any action, civil or criminal, to plead or prove the * * * existence or validity of any ordinance thereof, and courts shall take judicial cognizance thereof without proof." The portion of the section quoted is broad enough to include this case, but it is challenged as being unconstitutional for the reason that it is special legislation. Our constitution (article 4, § 25) provides that the legislature shall not pass local or special laws in any of the following enumerated cases: "Third. Regulating the practice of courts of justice. * * * Thirty-Third. In all other cases where a general law can be made applicable." We think the portion of the section of the municipal corporation act is obnoxious to both constitutional objections. The general municipal corporation act provides for the incorporation as a municipal corporation of any portion of a county containing not less than 500 population, and divides and classifies the municipal corporations that exist or that may be created under the act into six classes, according to population. It is conceded that the provisions of section 765 hereinbefore quoted do not apply to any other than the fifth class of municipal corporations. It relates to pleading in courts of justice, and

applies only to the few municipal corporations of the state that may belong to the fifth class. If the rule laid down is a good rule of pleading, why not give the other five classes of municipal corporations of the state the benefit of its privileges? If it is a pernicious rule, why should corporations of the fifth class alone be burdened with it? No reason occurs to us, and none is suggested by counsel, why a general law could not be made applicable in regard to pleading an ordinance of a municipal corporation, no matter to which class it may belong. It was the object of the framers of our constitution to prevent vicious legislation for private ends, and not for the public interest. A vicious measure might often be passed in an apparently harmless provision of a local or private statute. It was also intended that the laws for the protection of the citizens of the state and the protection of their property should be made uniform, consistent, and harmonious, that privileges given to one should be enjoyed by all, and burdens should be placed on all alike. With these objects, among others, the framers of our constitution in their wisdom adopted the salutary provisions above quoted, and legislatures are not at liberty to disregard them, and, if they do, the duty of the court is manifest. It has been uniformly held that the legislature may classify the counties of the state by population, in order that the legislation may be adapted to the needs of the people. It may also provide for the incorporation of towns and cities, and classify them according to population. But all laws of a general nature should apply to each class of such corporations, unless there is some reason why it should not. In Cullen v. Water Co., 113 Cal. 503, 39 Pac. 769, it was held that a part of the fourth section of the act of March 16, 1889, supplemental to the act generally known as the "Wright Act," which provided that in a proceeding to confirm the organization and bonds of an irrigation district "a motion for a new trial must be made upon the minutes of the court," was a special law regulating the practice of courts of justice, and therefore unconstitutional. In City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, it was held that section 870 of the municipal corporation act of 1883, requiring cities of the fifth and sixth classes to make an effort to agree with the owners of land sought to be condemned before instituting condemnation proceedings, is unconstitutional and void. In the opinion it is said: "It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth classes to make an effort to agree, while all other persons are exempt from such condition, is in plain and direct conflict with both of these constitutional inhibitions. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination." In the present case there is no conceivable reason why a corporation of the fifth class should not be subject to the same general rules in regard to pleading as all other persons and municipal corporations in the state. It does not seem to us that the ordinances of a municipal corporation of the fifth class are so sacred and of such high authority that courts will take judicial notice of them, while in all other classes of corporations the ordinances are of so little consequence that they have to be pleaded. In Darcy v. City of San Jose, 104 Cal. 643, 38 Pac. 500, it was held that an act of the legislature, requiring all cities containing a population of not less than 10,000 nor more than 25,000 inhabitants to fix by ordinance the compensation of the policemen of the city at not less than $100 nor more than $125 per month, was unconstitutional. In Bloss v. Lewis, 109 Cal. 493, 41 Pac. 1081, it was held that section 195 of the county government act, providing different clerks' fees to be paid to the county clerk in estates of deceased persons in counties of the thirty-third class from that provided for the other counties of the state, was unconstitutional. See further, Dougherty v. Austin, 94 Cal. 620, 28 Pac. 834, and 29 Pac. 1092; Rauer v. Williams, 118 Cal. 401, 50 Pac. 691; Denman v. Broderick, 111 Cal. 97, 43 Pac. 516; Turner v. Siskiyou Co., 109 Cal. 332, 42 Pac. 434; Miller v. Kister, 68 Cal. 142, 8 Pac. 813; Welsh v. Bramlet, 98 Cal. 224, 33 Pac. 66. We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(126 Cal. 252)

MEYER v. WIDBER, Treasurer (BOHEN, Intervener. S. F. 1,435).

(Supreme Court of California. Oct. 3, 1899.)

MUNICIPALITIES — SINKING FUNDS — BONDS — DEMAND—PRIORITIES—PAYMENT—TAXATION—DUTY OF COUNTY TREASURER.

1. Under Act March 23, 1876 (St. 1876, p. 439, § 13), authorizing San Francisco to widen Dupont street, and to issue bonds in payment of damages to abutters, and providing for a "Dupont Street Fund," to be paid out only in payment of the bonds, etc., it is no defense to mandamus to compel payment of a bond that other bondholders had made prior demands, which had been refused for want of funds, as the prior demandants did not thus acquire any right of priority of payment out of the fund.

2. Pol. Code, § 3753, requires the tax collector to settle with the county auditor each month for moneys collected, and to turn the same over to the county treasurer. Section 4217 requires the auditor to settle the accounts of all persons indebted to the county, and certify the amount to the treasurer. *Held* that, where the collector deposited with the treasurer certain sacks containing money received on taxes generally, the treasurer was not required to segregate the amount to be credited to a certain fund, or pay

it out to those entitled to the fund, until the collector had settled with the auditor, and the latter had certified the amount to the treasurer.

Beatty, C. J., and Temple and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Mandamus by Albert Meyer against A. C. Widber, treasurer of the city and county of San Francisco; George T. Bohen, intervener. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed.

Rosenbaum & Sheeline, for appellant. H. T. Creswell, for respondent.

GAROUTTE, J. Mandamus to compel the payment of certain Dupont street bonds and coupons. Under the act of the legislature approved March 23, 1876 (St. 1876, p. 433), the city of San Francisco was authorized to widen Dupont street, and to issue bonds in payment of damages to owners of property on said street. The bonds were each for the sum of $1,000, and the coupons called for $35 each. Plaintiff was the owner of 12 of these bonds and 408 coupons. Intervener, Bohen, was the owner of 16 bonds and 32 coupons. Plaintiff made his demand for payment upon defendant, July 3, 1897, and upon his refusal to pay brought this action the same day. Intervener, Bohen, made his demand July 28, 1897, and filed his intervention September 15, 1897. It is somewhat difficult to state precisely from the facts found the dates when funds were paid in and became applicable to demands made upon them by bond and coupon holders and the amounts thus applicable at different dates. As we think the judgment and order must be reversed, it will apparently serve all practical purposes to decide the questions of law presented.

1. When plaintiff made his demand there was money to the credit of both the bond and coupon funds which might have been applied in payment thereof, but defendant refused payment because prior to plaintiff's demand other holders of bonds and coupons had made demand and had been refused. The claim of defendant seems to be that the first presentation of bonds or coupons after he had received money belonging to the Dupont street fund gave to the said party a preferred claim against the fund which continued indefinitely, whether or not upon being refused payment he followed up his demand by repeating it or by instituting legal proceedings to enforce it. The judgment of the court rests in part upon its adoption of this theory. And the court held that, although there was a considerable amount of money to the credit of these funds on and after January 1, 1897, and at the time plaintiff made his demand, it could not be used to pay plaintiff, because prior to January 1st other demands had been made and were refused, and stood as valid and preferred claims against the funds. There is nothing in the Dupont street act giving preference to holders of bonds or coupons in the order of their presentation to the treasurer, whether there be or be not at the time money on hand to pay them. Section 13 of the act provides that: "When collected the said money shall be paid over to the treasurer of said city and county to constitute a part of the 'Dupont Street Fund,' and to be paid out by said treasurer only in payment," etc.

The demand upon the treasurer, when he had funds applicable for the purpose, gives the parties demanding, upon refusal of their demand, the right to a mandate against him. Meyer v. Porter, 65 Cal. 67, 2 Pac. 884. But these first demandants have never brought any action to enforce their claims. Perchance they never will. It may be that their claims have been abandoned, or it may be that they have been satisfied through some other channel. The law itself provides other ways by which their claims may be satisfied. There is money in the fund which has been there at least six months. The first demandants do not attempt to get it, and, as we have seen, probably do not want it. If other demandants may be found at the expiration of each respective four years equally as complaisant, then the money never can be taken from the treasurer, even though this plaintiff and this intervener were ready and anxious at all times that it should be applied to the payment of their bonds. It is not just nor right to compel these parties to wait four years before the law will allow them to ask that this money be applied to the payment of their bonds and coupons, and thus be deprived of its use for that length of time. We know of no law that stamps a portion of this fund as sacred for four years to a party who makes demand for the payment of his bonds, simply by the mere force of the demand itself. The Dupont street statute does not say anything of the kind, but does say, in effect, that the entire issue of bonds stands alike and is entitled to be paid at the same time. It was distinctly held in Meyer v. Porter, supra, that the fact that there were other creditors interested in the fund, who have not demanded payment, is no answer to the petition of a creditor who makes application for payment. We cannot see that such creditor improved his situation under the act in question by demand alone. Such demand was the condition precedent to the bringing of the action. The demand gave him the right to bring the action against the treasurer, and nothing more. There is no law requiring a record to be kept of the respective dates when demands may be made upon the treasurer for the payment of these bonds. The treasurer succeeding the present incumbent will have no knowledge whatever of any demands outstanding against the bond fund when he assumes his office. And at that time, if there be money in the fund, and demand be made upon him for the payment of certain bonds, we cannot see how he would be justified in refusing to apply these moneys to the payment of such bonds. We conclude that the court erred in holding that plaintiff could not be paid because of these outstanding and unenforced obligations. Who these creditors are, or when they made demand, we do not know. It is only found by the court that they made their demands before January 1, 1897, and it does not appear that they at any time thereafter took any steps to enforce their claims.

2. At the time plaintiff made his demand certain money had been deposited with the treasurer by the tax collector. A portion of this money was collected on account of the Dupont street fund, but it was unsegregated, and had not yet been placed to the credit of that fund, and the court held it not applicable to plaintiff's demand. Plaintiff claims that this was error. The evidence as to this money was that from May 19, 1897, to July 3, 1897, sundry sums at different times were deposited in the treasury by the tax collector with the treasurer, in certain bags, "and contained, among other tax moneys, sums collected by him [the collector] for and on account of said Dupont street fund." The above sums of money were "contained in sacks, mingled with and unseparated from the other moneys collected by said tax collector on the same days as and for general taxes of said city and county unrelated to said Dupont street fund; * * * the only mark on said deposits * * * being a tag affixed to each sack, stating the quantity and character of the money in such sack contained"; and receipt was accordingly taken. These deposits remained "undisturbed and without segregation until the 27th day of July, 1897. On July 26, 1897, the said tax collector made his report to and settled with said treasurer and auditor for all his transactions and receipts of taxes since his preceding report and settlement thereof." The report thus settled showed "that, of all deposits made by him in said treasury, * * * the sum of forty thousand five hundred and eighty-nine dollars and twenty-six cents contained therein had been collected by him for and on account of said Dupont street fund. That report conveyed * * * to said treasurer the first knowledge or information of the contents of said bags, * * * that they contained any moneys belonging to said Dupont street fund; * * * but said treasurer, by inquiring, could have ascertained from the tax collector's books how much money belonged to said Dupont street bond and coupon funds, and said tax collector's books contained said facts." In these bags were certain coupons aggregating $6,545, surrendered by the collector as money under the acts, which, deducted from the $40,589.26, "left in money $17,132.07 in said coupon fund, and $16,912.19 in said bond fund," and receipts were accordingly exchanged, and the receipts for the sacks taken up. The court held that this money was not applicable to the payment of plaintiff's bonds and coupons, but was applicable to the payment of Bohen's, and we agree with this contention.

The question of law presented by the second proposition under discussion is, was this money, which was deposited by the tax collector in bags with the county treasurer, money which the treasurer was authorized at the time of the demand to use in the payment of Meyer's bonds? In other words, was it at that time, in the eyes of the law, money in the Dupont street fund? We are clear that it was not such money. The money in these bags was held by the treasurer simply as a quasi special deposit. The treasurer had no authority to pay it out at the demand of anybody, or at the expense of any fund. Section 3753 of the Political Code provides: "On the first Monday in each month the tax collector must settle with the auditor for all moneys collected for the state or county, and pay the same to the county treasurer, and on the same day must deliver to and file in the office of the auditor a statement under oath, showing: (1) An account of all his transactions and receipts since his last settlement; (2) that all money collected by him as tax collector has been paid." Section 4217 provides: "The auditor must examine and settle the accounts of all persons indebted to the county, or holding moneys payable into the county treasury, and must certify the amount to the treasurer, and upon the presentation and filing of the treasurer's receipt therefor give to such person a discharge, and charge the treasurer with the amount received by him." It will thus be seen that all moneys passing from the tax collector to the treasurer must go via the auditor's office. It is only upon the certificate of the auditor that the treasurer may receive money which may be used in the payment of claims against the city and county. And it is only upon the receipt of the certificate accompanied by the money that the treasurer is authorized to place it to the credit of the various funds. Section 4145 of the Political Code declares in terms that the treasurer "must receive no money into the treasury unless accompanied by the certificate of the auditor provided for in section 4217." It is from the face of this certificate that the treasurer obtains the information which enables him to physically separate the money into the respective amounts to which the various funds are entitled. When the demand was made in this case the bags of money were sealed. Probably the treasurer had not even the right to break those seals; but even conceding he had the right to break them, and had exercised that right, it was not possible for him to even then say that a particular part of the money was money belonging to the Dupont street fund. He did not know that fact, and could not know it until the auditor's certificate showing a settlement with the tax collector had been presented to him. He was not called upon to undertake an investigation looking to the sources from which the money held in those bags came. He was not required to take anybody's word for it. Neither was he required to rely upon another officer's books for the information. Reduced to its simplest form, the proposition may be stated that no moneys held in the county treasury by the treasurer are subject to the payment of demands unless those moneys have come into the county treasury upon the certificate of the auditor. The money in these bags did not come that way. The fact that the tax collector delayed for three months to make his settlement with the auditor is not material here. Meyer, before making his demand upon the treasurer, could have readily required the tax collector to make his settlements, as expressly demanded by the law.

It appears from the record that certain other actions were brought by various persons, the judgments in which depend more or less upon the decision in this case. We are unable, from the facts found, to clearly define the rights of these persons. It seems, however, to be conceded that a decision upon the two points already noticed will enable the learned judge to easily dispose of the remaining cases as well as the case appealed. The judgment and order should be reversed, with direction to the court below to take such further proceedings as will be in accordance with this opinion. It is so ordered.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.

BEATTY, C. J. I dissent. The grounds upon which the judgment of the superior court are reversed are, in my opinion, absolutely inconsistent with the fundamental proposition upon which appellant's right of action is based. He proceeds by mandamus, and therefore assumes, and must maintain, that his demand for payment of his bonds and coupons cast upon the defendant the duty to pay them as far as the funds in his hands would suffice. But if a demand upon the treasurer made it his legal and imperative duty to pay, then it was his legal and imperative duty to pay those who presented the first demands, and, as their demands were more than sufficient to exhaust the fund, it could not be his duty to pay to appellant the identical money which he was already bound to pay to others, unless they had in some manner forfeited their rights. It devolved upon the appellant, therefore, to show that when he commenced this proceeding those who had made prior demands upon the treasurer had in some way lost the right of action which accrued to them when their demands were refused; for, if their right of action remained,—if it was still the duty of the treasurer to pay them,—it could not be his duty to pay the appellant. How, then, and at what time, did those other parties lose their right of action? This question the appellant has essayed, but failed, to answer. It is not pretended that it was barred by any statute of limitations, but it is said that they were guilty of inexcusable laches, because they waited six months without commencing proceedings by mandamus. No authority is cited by the court which has the remotest tendency to support this position, and those cited in the brief of appellant are decidedly against him. They show undoubtedly that the right to proceed by mandamus may be forfeited by laches, but they also show that in determining what will be deemed laches the courts are guided by the analogies furnished by the statutes of limitations, which in this case would permit a delay of four years in commencing the proceeding after the right accrued. The general doctrine, and the grounds of it, are briefly stated in section 87 of Merrill on Mandamus, as follows: "The courts require those who would avail themselves of the assistance of this writ to be prompt in demanding the enforcement of their rights. By lapse of time the necessary evidence is lost, and third parties may acquire rights growing out of the existing state of affairs. Where the parties have been guilty of unreasonable delay in applying for this writ the courts have not hesitated to refuse such relief, unless the delay was accounted for to their satisfaction. In determining what will constitute unreasonable delay, regard should be had to the circumstances which justify the delay, to the nature of the case, and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay."

To apply this doctrine, let us consider the nature of this case, and the only relief which the holders of the coupons and bonds could have demanded. In cases where an action will lie on such obligations, the action is barred by the statute in four years, and, by the analogy of the statute, a mandamus to enforce payment would be defeated by a delay of four years. If, under the circumstances, the lapse of a shorter time involved the loss of material evidence, or if rights of third parties were adversely affected, relief might be denied on that ground. But here is no pretense that any evidence was, or could be, lost in six months or six years. Nor was any right of any third party adversely affected. It was no injury to Meyer or any other claimant upon the fund if those who had secured the first right to the money then on hand chose to let it lie in the treasury. They alone were injured by the delay. The city and county was not injured, because it is in no event liable for any part of the debt. The fund was not depleted, and could not be, for the coupons are not bearing interest (Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115), and nothing is paid out of the bond fund except the face of the bonds. The court, however, holds, against the clear result of the authorities, that six months' inaction on the part of these claimants has worked a forfeiture of their rights. But if six months is fatal, why is not six weeks fatal? Or six days? Or one day? Where will the line be drawn, and upon what principle is the distinction to rest? After how short a delay in bringing suit will we conclude that perchance the party will never sue, or that his claim has been abandoned or paid through some other channel? These presumptions in which the court indulges are without anything in the record to sustain them, and are against all probability, as they are against the correctness of the judgment of the superior court.

Nor has it been pointed out how the law itself (the Dupont street act) has provided other ways by which their (the prior demandants') claims may be satisfied. Nor have I been able to see, as the court does, that they probably do not want their money. Is it upon such fanciful suppositions as these that a judgment of this court can be securely rested? The truth is, the doctrine of this case, carried to its logical conclusion, will permit the custodian of a fund in the position of this defendant to pay or refuse to pay those who make demands as his fancy inclines. As long as he is not sued, he may refuse one and pay another, irrespective of the order of their demands, or he may refuse them all until some favored claimant serves him with a writ of mandate. The doctrine is, in my opinion, without reason to support it, and is pernicious in its consequences.

We concur: TEMPLE, J.; HENSHAW, J.

(126 Cal. 219)

HEVREN v. REED et al. (Sac. 512.)

(Supreme Court of California. Sept. 29, 1899.)

PROHIBITION—PETITION—LIQUOR LICENSE—REVOCATION—POWER.

1. Under Code Civ. Proc. § 1102, which defines a writ of prohibition to be the counterpart of a writ of mandate, and its function to arrest the proceedings of any tribunal, corporation, board, or person, where such proceedings are without or in excess of the jurisdiction of such tribunal, board, corporation, or person, a writ of prohibition will not issue to arrest the action of a number of persons assuming to act as a board of trustees, where the petition for the writ alleges that the persons whose actions are sought to be restrained are neither in law or in fact a board of trustees.

2. A petition for a writ of prohibition to restrain the board of trustees of a town from revoking a liquor license, under an ordinance passed by it authorizing the license, must show that the ordinance does not authorize the board to revoke a license issued under it, as otherwise such power will be presumed.

3. Authorities authorized to issue liquor licenses have power, for good cause, to revoke the same.

4. A liquor license is neither property nor a contract, in any constitutional sense, but is subject at all times to the police powers of the state.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county.

Petition by W. H. Hevren against D. J. F. Reed and others, purporting to be acting as a board of trustees. to prevent revocation of liquor license. From a judgment sustaining a demurrer and dismissing the petition, plaintiff appealed. Affirmed.

G. W. Bartin and Power & Alford, for appellant. C. R. Scott, E. T. Cooper, and C. L. Russell, for respondents.

COOPER, C. This appeal is from a judgment dismissing a petition for a writ of prohibition after a demurrer had been sustained to said petition. The petition alleges that the petitioner is a citizen and taxpayer of certain territory described therein; that certain proceedings were taken before the board of supervisors of Tulare county, but without proper petition, order, notice, or other essential required by law, and by virtue of such illegal proceedings, and without authority of law, the said board of supervisors declared the said territory to be a municipal corporation of the fifth class, under the name of "City of Tulare"; that on the 4th day of October, 1889, a certain pretended board of trustees of said pretended city unlawfully and wrongfully, and without color of right, assuming to act as a pretended board, passed a pretended license ordinance numbered 66; that on the 4th day of November, 1895, the said pretended city, acting by its said pretended board, issued to plaintiff a permit or license to conduct the business of retailing spirituous liquors; "that defendants are not in fact the board of trustees of said city or of any city;" that defendants, without any authority whatever, assuming to act as a pretended board of trustees, are about to, and will, unless prohibited, revoke plaintiff's permit, and declare his license forfeited. Judgment is prayed that defendants, as such pretended board of trustees, be prohibited from revoking said license. The petition was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action.

We think the demurrer was properly sustained. The writ of prohibition is for the purpose of, and can only be granted for, arresting proceedings without and in excess of the jurisdiction of some inferior tribunal, corporation, board, or person. Code Civ. Proc. § 1102. The complaint or petition in any case in a proceeding against a board of trustees of a city would have to show that the persons against whom the writ was sought were a "board" either de facto or de jure, and that the proceedings were in excess of the jurisdiction of the board as a body. In this case the complaint must be taken as true, and it is the universal rule that upon demurrer the court below will consider the applicant's case to be such as he has stated in his pleadings, without investigation or inquiry touching the merits of the action. High, Extr. Rem. §

767b. The petition upon its face states and shows that defendants are not the board of trustees of the pretended city of Tulare, either in law or in fact. We know of no law authorizing the writ to issue to individuals when not acting as a board nor judicially. Our writ of prohibition is the writ as known to the common law, and its office is to restrain subordinate courts and inferior judicial tribunals from exceeding this jurisdiction. Maurer v. Mitchell, 53 Cal. 289. In this case, if the complaint or petition is true, the defendants are not the board of trustees of Tulare city, and the ordinance under which the license issued is void. If the defendants revoke a void license, what damage can it cause the plaintiff? The defendants, according to the petition, not being a board, and having no right, under the law, to revoke a void license or to grant a valid one, cannot be prohibited from such contemplated act. Purdy v. Sinton, 56 Cal. 133.

If it be conceded that the defendants are the legal and acting board of trustees of the city of Tulare, and that ordinance No. 66 is a valid ordinance, and that defendants, as such board, are about to revoke the license to plaintiff, still there is not enough alleged in the petition to show that petitioner is entitled to the writ asked. We must presume that ordinance No. 66 authorized the board of trustees to revoke or declare forfeited any license that might be issued under it, for the reason that the complaint does not allege or show to the contrary. If the board have the power to revoke a license under any circumstances, as a judicial act, this writ will not lie. It is only in cases where the inferior tribunal is about to do some act unauthorized by law that the writ will lie. High, Extr. Rem. § 764a; Murphy v. Superior Court, 84 Cal. 595, 24 Pac. 310; Powelson v. Lockwood, 82 Cal. 615, 23 Pac. 143. The general rule in the American courts is that the authorities authorized by law to grant a retail liquor license have the power, for good cause, to revoke the same. Board v. Barrie, 34 N. Y. 666; People v. Board, etc., of City of Brooklyn, 59 N. Y. 95; Com. v. Moylan, 119 Mass. 109; Hurber v. Baugh, 43 Iowa, 514; State v. Cooke, 24 Minn. 247; Boston Beer Co. v. Massachusetts, 97 U. S. 25; La Croix v. Commissioners, 50 Conn. 321. In the latter case it is said: "But, aside from this consideration, if anything can be settled by legal authorities, the doctrine is too well established to be longer called in question that a license of this character, whether revocable in terms or not, is neither a contract nor property, in any constitutional sense, but is subject at all times to the police powers of the state government." We advise that the judgment be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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126 Cal. 222

ROHRER v. BABCOCK. (Sac. 490.)

(Supreme Court of California. Sept. 29, 1899.)

LANDLORD AND TENANT—CROPPING CONTRACTS—DIVISION OF CROPS—TENANTS IN COMMON—RETENTION OF CROPS BY TENANT.

1. Where a cropping contract provides for a division of the crops between the parties, they are tenants in common of all crops raised under the contract until they are divided.

2. Under a cropping contract, whereby the landlord's half is to be stacked in a certain place, a stacking of half of it in that place is a complete division of it, and places the ownership in him.

3. Where, by a cropping contract, the landlord is to pay for certain pasturage, the tenant cannot retain his share of the crop until he pays the amount due therefor, if the contract gives no lien on the crop for the pasturage.

4. Where a landlord's right of possession of his share of the crops does not depend on his performance of certain stipulations in the contract, he need not allege or prove their performance to entitle him to recover.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county.

Action by Elizabeth J. Rohrer, as executrix of the will of John B. Rohrer, deceased, against A. L. Babcock. From a judgment for plaintiff and an order denying his motion for a new trial, defendant appeals. Affirmed.

Warren & Taylor, for appellant. Jas. F. Farraher, for respondent.

GRAY, C. This action was brought to obtain a judgment decreeing the estate of John B. Rohrer, deceased, to be the owner of certain hay, and plaintiff to be entitled to the possession thereof. Plaintiff also prayed for and obtained a temporary injunction restraining all interference with said hay pending judgment herein. An appeal was heretofore taken from an order refusing to dissolve said injunction, and said order was affirmed. Rohrer v. Babcock, 114 Cal. 124, 45 Pac. 1054. Thereafter the case was tried before the court without a jury, the plaintiff had judgment, and the defendant appeals from the same, and from an order denying a new trial.

The hay in controversy was grown, cut, and stacked by defendant on the lands of said estate under a cropping contract theretofore entered into between plaintiff and defendant. The contract provided, as to the hay in controversy, that the second party to said contract (the appellant here) "will stack, in the stackyard on the lower place, the one-half of the second-quality hay grown each year on the said hereby-leased premises; * * * it being, however, mutually agreed that, in the event of said first party desiring to have her said one-half of said second quality of hay stacked in the stackyard on the upper place, * * * said second party shall * * * haul said one-half * * * to said upper stackyard. * * * The division of hay to be stacked hereunder shall be made in the manner hereinafter mutually agreed upon by the said parties hereto. * * * That all the property to be delivered by said second party hereunder to said first party is to be delivered and division had each year, to the end that there may be a complete settlement each year covered by this lease." The contract also provided for the delivery of a share of the other crops grown on the premises to the party of the first part (the respondent herein), and that said first party should place the fences in repair, and furnish material to keep them in repair, and to construct any new fences that might be decided upon. The respondent was also to have the right part of the year to the pasturage of a portion of the premises, she to pay $10 a year therefor. Under this contract, in the cropping season of 1895, the appellant stacked one half the hay referred to in the above stipulations of the contract in the lower stackyard on said premises, and the other half thereof was stacked in another stackyard (presumably the upper one). Some time after the hay had been so stacked the appellant requested J. B. Rohrer, the son of respondent, to assist in dividing the hay; telling him, according to Rohrer's testimony, to look the hay over, and take his choice between the two yards of hay. Rohrer made measurements, and selected the hay in one of the yards as his mother's share, and informed appellant of such selection. It does not appear from the evidence which yard he selected, but, looking at the pleadings, I think it sufficiently appears that he selected the hay in the lower stackyard. About 10 minutes after this, as appellant was getting ready to leave the place, he pointed out two stacks in the yard selected by Rohrer, and forbid him to touch them, claiming that there was money due him for pasturage under the terms of the lease, and that he proposed to hold those two stacks until he was paid. Thereafter appellant commenced to haul away and feed out these two stacks of hay; whereupon this suit was begun, as we understand it, to determine the ownership and right of possession to said two stacks of hay.

We think this case was properly decided in the trial court. The parties to this suit were tenants in common of all the crops raised under the cropping contract until such crops were divided. Baughman v. Reed, 75 Cal. 319, 17 Pac. 222. After a division, each party owned that portion of the crops set apart to him. Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404. The contract between the parties did not contemplate anything as to the delivery of the hay to be grown, other than that respondent's share of it should be stacked in a certain place, to wit, in the lower stackyard, unless respondent should signify her option to have it stacked in the upper stackyard. The stacking of this hay in two places, the half of it in each place, would seem to constitute a complete division of it, and place the ownership of the hay of that season, stacked in the lower stackyard, in the estate of the decedent; but, if that be not so, surely, after the respondent had, through her agent, selected the hay at the lower stackyard, in response to a request from appellant that she make a selection, there could be no further question that a division of the property had been effected.

There was no agreement in the cropping lease or elsewhere reserving or giving to appellant any lien on any interest in the hay. His claim, therefore, that he could hold the hay, or any portion of it not belonging to him, until he was paid whatever might be due him under the lease, is without foundation. The ownership and right to possession of a share of the crops does not depend upon the performance of those agreements in the contract to pay for pasturage and to furnish certain materials, and it was not necessary to allege or to prove the performance of those agreements to entitle respondent to recover in this action. We advise that the judgment and order denying a new trial be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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126 Cal. 167

EDE v. CUNEO et al. (S. F. 905.)

(Supreme Court of California. Sept. 20, 1899.)

MUNICIPAL CORPORATIONS—STREET WORK—SECOND ASSESSMENT.

Under Street Improvement Act, § 9, as amended by St. 1889, p. 167, providing that whenever it shall appear that any suit to foreclose the lien of an assessment for street work "has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality in any assessment," or in the "recording" or "return thereof," any person interested may, within three months after final judgment, apply to the superintendent of streets, and have another assessment issued "in conformity to law," a superintendent of streets has no authority to make a second assessment for street work when the plaintiff's failure to recover on the first assessment was not by reason of any infirmity in the "assessment," but by reason of the absence of a certificate of the city engineer, and of a record thereof.

Beatty, C. J., and Van Dyke, J., dissenting.

In bank. Affirmed.

For opinions in department, see 55 Pac. 388, 772.

HARRISON, J. Action upon a street assessment. The complaint is in the ordinary form for the foreclosure of the lien of a street assessment, and alleges that the contract for doing the work was entered into August 13, 1890, and completed within the time fixed therefor, and that an assessment for the work was issued July 6, 1896. It also alleges that on December 6, 1894, the superintendent of streets made and issued an assessment for the same work, upon which an action was brought in the superior court May 29, 1896, and that on the 15th of June, 1896, that court rendered a final judgment therein that the plaintiff was not entitled to recover on said assessment; and that it appears by said final judgment that the plaintiff was defeated by reason of the fact that the city engineer of said city and county had never made any engineer's certificate of said work, and that the assessment, diagram, warrant, and purported engineer's certificate were never "duly or properly or legally" recorded in the office of the superintendent of streets, and that by reason thereof no lien was created by said assessment. A demurrer to this complaint was sustained by the court, and judgment entered in favor of the defendants, from which the plaintiff has appealed.

Section 9 of the street improvement act, as amended in 1889 (St. 1889, p. 167), provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof, made to or recorded by said superintendent of streets, any person interested therein may at any time within three months after the entry of said final judgment apply to the superintendent of streets and have issued to him another assessment in conformity to law." Proceedings for the improvement of streets are purely statutory, and the rights and obligations of the parties to be affected thereby are to be determined by the terms of the statute. The right to an assessment, as well as the lien created thereby, exist only by virtue of the statute, and can be brought into existence only in accordance with its terms. Prior to the amendment of 1889 it had been held that, when a contractor failed in his suit to foreclose the lien by reason of certain defects in the assessment, he was entitled to another assessment, freed from these defects, and that there was no statutory limitation of time for its issuance. Himmelmann v. Cofran, 36 Cal. 411; Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327; Wood v. Strother, 76 Cal. 545, 18 Pac. 766. If, however, the original assessment was in conformity with law, the superintendent had exhausted his power therein, and until that assessment was legally vacated or set aside he had no authority to issue another. By the above amendment, however, the legislature fixed the conditions upon which a second assessment might be issued, and the time within which an application therefor should be made. It must be assumed that the legislature intended thereby some change in the law as it previously existed, for if, notwithstanding the amendment, the superintendent can still issue a second assessment at any time, and under any conditions, the amendment would cease to have any operative effect. But it is evident from the terms of the amendment that the object of the legislature was to limit the time within which a second assessment might be made, as well as to prescribe the conditions under which the superintendent would be authorized to issue it. The contractor is not required, after the completion of his contract, to accept from the superintendent an incomplete or imperfect document, but may still demand of that officer that he issue to him an assessment in conformity with law, and, in case of his refusal, may even compel him to issue one that shall meet all the requirements of the statute. If, however, instead of insisting upon such an assessment, he, without objection, accepts such documents as that officer elects to deliver to him, and thereafter brings an action thereon, and is defeated, he is not entitled to another assessment, unless he brings himself within the terms of the amendment of 1889. The jurisdiction of the superintendent of streets is limited, and can be exercised only within the period of time therein named, and under the conditions therein expressed; and the final judgment of a court is made the sole evidence upon which the superintendent may determine whether these conditions exist. In Gray v. Lucas, 115 Cal. 430, 47 Pac. 354, it was said: "Under this provision of the statute the right to a second assessment does not exist unless it 'appear' by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the 'assessment,' or in the recording thereof, or in some manner connected with the return of the warrant." The complaint herein does not allege that the former "assessment" was in any respect invalid, or that the failure to recover thereon was by reason of any infirmity in the "assessment," but alleges that the plaintiff was defeated by reason of the absence of a certificate of the city engineer, and of a record of such certificate. It thus appears that the conditions under which the superintendent could issue a second assessment are not shown to have existed. The statute does not authorize its issuance in a case where the plaintiff was defeated in an action upon the former one by reason of a defect or absence of the engineer's certificate, or upon the ground that no lien had been created upon the property. The contractor could have refused to accept the assessment from the superintendent, without the certificate, but if he did accept it, and brought his action thereon, and was defeated upon this ground, the statute does not authorize the issuance of another assessment. The legislature might have authorized the issuance of a second assessment in case of the failure to recover upon the ground of any defective document, but it has not done so, and we are not at liberty to add to the statute terms or conditions which the legislature has not seen fit to include therein.

The contention of the appellant, that it was the intention of the legislature to authorize a second assessment whenever the contractor failed to establish a lien upon the property by reason of a defect in any of the documents upon which such lien depended, is untenable. Aside from the fact that such construction of the statute is at variance with its language, a consideration of the terms used indicates very clearly that it was only for some infirmity in the assessment or in its record that the legislature intended thereby to authorize a second assessment. The documents essential to the creation of the lien are distinct in themselves, and are so regarded in the various provisions of the statute. Section 7 gives specific directions for the form of the assessment, varying according to the nature of the work done; and section 8 provides that the superintendent shall "make" an assessment in conformity with the provisions of section 7, and that the assessment shall have "attached thereto" a "diagram" exhibiting the street on which the work was done, and the lots assessed therefor; and section 9 provides that a "warrant," whose form is prescribed, shall also be "attached" to said assessment, and that these three documents, together with the certificate of the city engineer, shall be recorded in the office of the superintendent, and, after being recorded, shall be delivered to the contractor. Each of these documents essential to the creation of a lien is separate and distinct, and is to be complete in itself, and the foregoing amendment to section 9 authorizes the superintendent, under the conditions there named, to make and deliver a new "assessment, diagram, and warrant." By the Vrooman act, as originally enacted in 1885, as well as by the various statutes for street improvements previously in force in this state, the superintendent of streets was required to record the assessment before delivering it to the contractor, and it was held at an early day (Himmelman v. Danos, 35 Cal. 441) that, unless recorded, and the record thereof properly authenticated, the assessment created no lien. It is reasonable to suppose that the legislature had in view this interpretation of the statute when it provided that the superintendent might make a second assessment if there was any defect in the record of the original one; and it is also reasonable to assume that, inasmuch as the provision for recording the engineer's certificate was made a part of the statute at the same time with the foregoing provision for a second assessment, if the legislature had intended that a second assessment might be made, in case there had been a defect in the record of the certificate when the former one was issued, it would have expressed such purpose in definite terms. It is a familiar rule of interpretation that a word which is used several times in the same section of a statute shall receive the same construction, unless there is something in the context indicating a different meaning. But there is nothing in the section under consideration which demands different constructions to be given to the word "assessment" in the different places in which it is used. The phrase, "any assessment hereafter to be made and issued," must refer to the assessment as distinguished from the other documents, and the term "issued" is not predicable of any action by the superintendent of streets in reference to the certificate of the engineer. The antecedent to the clause "or in the recording thereof" is the noun "assessment" in the previous clause of the same sentence, and the "assessment" which the contractor is authorized to apply for, as well as the "new assessment, diagram, and warrant" which are to be made and delivered to him, can have reference to no other documents than those to be made and issued by the superintendent. The entire scope of the provision is limited to some document made by the superintendent, and cannot be extended to matters independent thereof, or incidental thereto, and which are not named in the statute, although they may be essential to the creation of a lien.

The allegation in the complaint that the prior assessment, diagram, warrant, and purported engineer's certificate were "never duly or properly or legally recorded" in the office of the superintendent of streets is the averment of a legal conclusion, and not of a fact. This allegation imports that these documents were recorded, but whether they were "properly" or "legally" recorded was to be determined by the court upon facts shown in reference thereto, and the opinion of the plaintiff as to the effect of these facts could not be substituted for the judgment of the court. He should have pointed out the defect in the record upon which he relies, in order that the court might determine whether it impaired its sufficiency. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; McFARLAND, J.

VAN DYKE, J. I dissent. I am unable to agree with the prevailing opinion in the construction it places upon the amendment of the street law of 1889. To limit the operation of the amendment to such errors, irregularities, and illegalities as affect only the assessment as such, as contradistinguished from either of the other instruments, to wit, the diagram, warrant, and certificate of the city engineer, which are required to be recorded by the superintendent of streets, with the assessment proper, in order to constitute the lien, is, in my opinion, too strict and technical. It is true that a proceeding to enforce a lien under the street law is in invitum, and that the rule in such cases requires a strict compliance with all the provisions of the law in relation thereto. But in the construction or interpretation of the statute itself no such rule applies. The street law itself declares, "This act shall be liberally construed to effect the ends of justice." Section 12. Further, the amendment in question is remedial in its character. The purpose of the amendment evidently is to afford a remedy where a party who has fulfilled his contract is defeated in a suit to enforce a lien on property benefited by his labor, in consequence of errors, irregularities, or illegalities in any of the proceedings necessary to constitute a valid assessment. Such a statute "must, therefore, be construed liberally, and when the meaning is doubtful it must be construed to extend the remedy." White v. The Mary Ann, 6 Cal. 462; Cullerton v. Mead, 22 Cal. 96; Sedg. St. & Const. Law, 559–561. As said by Sawyer, C. J., in Himmelmann v. Cofran, 36 Cal. 412: "The case does not fall within the principle of a certain class of cases which hold that when a power is conferred, which, in the nature of things, cannot be but once exercised, a defective execution exhausts the power. In this case the statute makes it the duty of the superintendent, after the fulfillment of the contract to his satisfaction, to make an assessment to cover the sum due for the work performed, in accordance with the provisions of the act, and afterwards to issue a warrant thereon. No time is limited within which the assessment must be made. Time is, therefore, not of the essence of the power." In Shepard v. McNeil, 38 Cal. 75, the court say: "It is not material in what form he originally signed the assessment, provided that it was afterwards properly signed in due time to constitute a lien, which is the material thing to be done. * * * If the superintendent 'originally' fails to authenticate his record by his official signature, it is his duty afterwards to make a valid assessment." Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327, was an appeal from the judgment rendered on a second assessment, and the court say: "If it were true, as matter of law, that such first assessment was void, then the superintendent aforesaid could have made another assessment for the work actually authorized, and if, in doing so, he complied with the statute, —as was the case in the assessment in controversy here,—that would have been valid, since the law under which he made it does not prescribe the time within which it must be done after the work was performed." Wood v. Strother, 76 Cal. 545, 18 Pac. 766, was an appeal from a judgment awarding a writ of mandamus to compel the countersigning of a street-assessment warrant. The court below found that no valid assessment had previously been issued, and in affirming the judgment it is said: "If there was a previous assessment, which was invalid, that would not, of itself, be a reason why a valid assessment should not be made, if the prior proceedings were sufficient to support it." As stated in Rauer v. Lowe, 107 Cal. 234, 40 Pac. 339: "The statute requires four things to be recorded in order to constitute the one thing called a lien, viz. the assessment, warrant, diagram, and engineer's certificate; and these are intended to constitute one record, and should be found together. Before the amendment of the statute in 1889, these certificates formed no part of the assessment record, and, as they were intended only for the information of the superintendent of streets, the custom of placing them in a separate record was proper, though not required by the statute. That fact, however, emphasizes the intention of the statute that they should be recorded in the assessment record, of which they are an essential part." And in Gray v. Lucas, 115 Cal. 430, 47 Pac. 354, it was held that the assessment, warrant, and diagram should be attached together, but the law did not require that a certificate should be attached, but only that it "should be recorded in connection with the record of the assessment." When, therefore, there is a defective certificate, or no certificate at all, recorded, there is a defect, informality, omission, irregularity, and illegality in the assessment, because the law requires the certificate to be recorded together with the assessment, diagram, and warrant; in other words, they are parts of one assessment record. It is a harsh rule of law that defeats the party, without fault on his part, but through the blunders or negligence of a public official, from recovering the fruits of his labor; and, unless the language of the statute be so plain and mandatory as to leave no doubt as to its meaning, it ought not to be so construed as to work that result.

BEATTY, C. J. I dissent. The complaint, fairly construed, shows that actions on the first and second assessments were successively defeated upon the ground that the superintendent not only failed to record those assessments "together with" the engineer's certificate, but recorded them at a time when no engineer's certificate had ever been made. The statute requires the assessment to be recorded "together with" the certificate, and this court has decided on the former appeal in this case, and in Rauer v. Lowe, 107 Cal. 233, 40 Pac. 337, that the making of the assessment and the recording of the assessment are utterly vain and nugatory acts unless, together with the assessment, diagram, and warrant, the certificate of the engineer is also recorded. If this law is obeyed, its object is accomplished, a lien is created, and the contractor can enforce payment of the value of his work. If it is disregarded, the whole object of the statute is frustrated; the whole proceeding is void. This being so, it is, to my mind, simply impossible to hold that there is neither defect, nor error, nor informality, nor irregularity, nor illegality in the act of the superintendent in recording the assessment in the absence of any engineer's certificate, and when no such certificate has ever existed. On the contrary, I should say that his act was characterized by every one of these bad qualities, and that the right to demand a new assessment was absolutely clear and undoubted. And, even if the plaintiff were not within the very letter of the law, he certainly is within the meaning and object, and it would require very little of the liberality of construction usually accorded to remedial statutes to give him the benefit of its provisions.

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126 Cal. 232

DAVIS v. CLARK. (Sac. 544.)

(Supreme Court of California. Sept. 29, 1899.)

DISMISSAL OF ACTION—FAILURE TO PROSECUTE WITH DILIGENCE—SUBSTITUTION OF PLAINTIFF.

On August 19, 1891, V. sued C. for the possession of certain grain. On August 26, 1891, C. demurred to the complaint, and his demurrer was overruled May 21, 1892. By stipulation, time to answer was extended to July 11, 1892, when an answer was filed. On October 11, 1893, A. was substituted as V.'s attorney. On September 20, 1897, V. moved to substitute D., the assignee of the cause of action, as plaintiff, which motion was heard September 26, 1897, and granted October 4, 1897. October 8, 1897, D. filed a supplemental complaint. On October 18, 1897, the court made an order granting C. 30 days in which to answer or demur, or to take such other action as he might be advised. On November 17, 1897, C. served a motion to dismiss, which was heard November 22, 1897, and granted on February 1, 1898. It appeared that V.'s claim was assigned to D., who was the real party in interest, on December 5, 1891; that the cause of action accrued about June 12, 1891; and that the case was at issue for more than five years without being placed on the trial calendar. *Held*, that the case was properly dismissed.

Commissioners' decision. Department 2. Appeal from superior court, Glenn county.

Action by J. T. Davis, substituted, against P. H. Clark. From an order dismissing the action, plaintiff appeals. Affirmed.

H. Albery, for appellant. R. C. Minor and B. F. Geis, for respondent.

CHIPMAN, C. Motion of defendant to dismiss the action for failure to prosecute. Action ordered dismissed, and plaintiff appeals.

On August 19, 1891, E. C. Vancil filed his complaint in the superior court of Glenn county to recover possession of certain wheat and barley, or its value. On August 26, 1891, defendant appeared by demurrer, which was overruled May 21, 1892, and by stipulation the time to answer was extended to July 11, 1892, when answer was duly filed. On October 11, 1893, H. M. Albery, Esq., was substituted as attorney in place of plaintiff's attorneys. On September 20, 1897, plaintiff, by his attorney, K. Albery, served notice of a motion to substitute as plaintiff J. T. Davis, assignee of the cause of action, in place of Vancil. The minutes of the court recite that the motion came on to be heard September 26, 1897, and was taken under advisement, and an order was entered making the substitution October 4, 1897, and on October 8, 1897, Davis served and filed a supplemental complaint. On October 18, 1897, the court made an order granting defendant 30 days from that date within which "to appear, answer, and demur, or to take such other action therein as he may be advised." On November 17, 1897, defendant served notice of motion to dismiss the action upon K. Albery, Esq., which was filed November 18, 1897, and was supported by two affidavits made by two different attorneys for defendant. On November 22, 1897, the motion came on to be heard, plaintiff's attorney, K. Albery, Esq., being present, and, no testimony being offered, except the affidavits for defendant, the motion was submitted, and taken under advisement, and on February 1, 1898, the court entered its order dismissing the action. In due time plaintiff's attorney, K. Albery, Esq., gave notice of appeal on the ground that "the order is against the evidence, in this: That the record discloses that the plaintiff was vigorously pressing said action to a trial upon the merits long prior to and at the time said motion to dismiss said action was noticed, filed, or heard by said court."

Appellant urges the point that defendant expressly waived the laches of Vancil for the reason that he permitted plaintiff Davis, unchallenged, to incur costs and expense in bringing the cause to trial, from September 20, 1897 (when the notice of substitution was filed), to November 17, 1897 (when the notice to dismiss the action was served and filed), a period of two months, during which time the motion for substitution was heard, and the supplemental complaint was prepared, served, and filed, and an extension of time given defendant within which to answer; all of which shows plaintiff's commendable diligence in the prosecution of the action after he became plaintiff. The contention is that no part of the delay while Vancil was plaintiff should be considered, but that the cause should be treated, for the purposes of the motion, as having been brought at the time Davis was substituted. It appears from the undisputed evidence that Davis became the owner of Vancil's alleged claim against defendant on December 5, 1891, and that Vancil died December 31, 1891, and that Davis' true name is Mordecai Vancil, and that he is a son of said E. C. Vancil; that Davis was the attorney in fact of E. C. Vancil to the time of the latter's death, and that the action, though brought in Vancil's name, was in fact the action of Davis, and that the cause of action accrued, if at all, about June 12, 1891; that the cause of action was at issue of fact for more than five years; "and that neither said E. C. Vancil nor said J. T. Davis, either as the attorney in fact of said Vancil or for himself, have sought to have said cause placed upon the trial calendar of said court, and without reason or excuse have not prosecuted said action with any diligence whatever." It further appeared that defendant, who, at the time the action was brought, was sheriff of Glenn county, ceased to be sheriff in 1894. We do not think there was any waiver of laches. The motion must be considered as though no substitution was made. The order of the court extending the time to appear to the supplemental complaint was that defendant might "take such other action therein as he may be advised." The court had power to make the order, and the only question is, did it abuse its discretion in so doing? McLaughlin v. Clausen, 116 Cal. 487, 48 Pac. 487. Plaintiff made no counter showing whatever, except as it may be derived from the pleadings in the action. We cannot say that the court abused its discretion, and therefore advise that the order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(126 Cal. 189)

SHEEHAN v. SULLIVAN et al. (S. F. 917.)

(Supreme Court of California. Sept. 23, 1899.)

TRUSTS—FINDING—DEED—PROCUREMENT BY FRAUD OR UNDUE INFLUENCE—PRESUMPTION—HUSBAND CONVEYING TO WIFE—PAROL EVIDENCE.

1. A finding that one took property in trust for another during his lifetime, and "that after his death she continued to hold, and now holds, said real and personal property in trust for [his heirs]," is too uncertain, indefinite, and vague to show the nature and character of the trust.

2. No presumption that a deed alleged to be intended to create a trust was procured by fraud or undue influence arises from the fact that it was from a husband to his wife.

3. Oral testimony, to justify a determination that an absolute deed was intended to be in trust, must be clear, convincing, and conclusive, and something more than the modicum of evidence which might be held to establish a fact provable without overthrowing a clearly-expressed deed.

4. Testimony that, before a husband executed an absolute deed to his wife, she said to one of the children that she had asked him about it, and that she wanted him to give a deed to her, and she would take care of the property for all of them while they lived, and that after the deed was executed she said she would give this child her share when the property was divided up, and that she afterwards said she would not give her anything, is not inconsistent with the character of the deed, and is wholly insufficient to show that the deed was intended as a trust deed for the benefit of the children.

In bank. Appeal from superior court, Santa Clara county.

Action by Ellen Sheehan against Margaret Sullivan and others. From a judgment for plaintiff, and from an order denying a new trial, all defendants except Margaret Sullivan appeal. Reversed.

Jackson Hatch, for appellants. Morehouse & Hambly, for respondent.

McFARLAND, J. This is an action to have a certain alleged trust declared, and to enforce its execution. Judgment went for plaintiff, and defendants other than Margaret Sullivan appeal from the judgment and from an order denying the motion for a new trial. Margaret also appealed, but her appeal is brought here in another transcript, designated as "S. F. No. 918" (58 Pac. 1115), and exactly the same questions arise in the two appeals.

Michael Sullivan, who died intestate, November 8, 1898, was the father, and the defendant Margaret Sullivan is the mother, of plaintiff. The other defendants, six in number, are brothers and sisters of plaintiff, except James M. Sheehan, who is a brother-in-law, and they are made defendants upon the averment that they refuse to join the plaintiff in maintaining this action. All the defendants answer, denying that plaintiff has any cause of action. It is averred in the complaint that on September 14, 1887, the said Michael, since deceased, conveyed to his wife, Margaret, plaintiff's mother and defendant herein, as above stated, a certain described piece of land, containing about 114 acres, and at about the same time transferred to her certain personal property, consisting of certificates of deposit in banks, moneys, live stock, etc. It is averred that Margaret solicited her husband to make the conveyance and transfer, and there are averments indicating that she used undue influence to procure the same, and violated the confidence reposed by him in her; but, as the court does not find any of these averments to be true, they may be dismissed from consideration. The main averments to be considered are that the land and the personal property were conveyed and transferred by him to her "upon the express understanding and agreement between them" that she was to hold the same in trust; and the trust averred was that she was to hold the same "in trust for said Michael during his life, and after his death for the use and benefit of herself and the last-mentioned children," being all the children except Mary K. Sheehan, and that "within a reasonable time after his death" she would "divide and distribute two-thirds" of the property, share and share alike, to all of the children except said Mary K., and reserve to herself one-third.

Possibly, the averments of the complaint as to the disposition to be made of the property to the children after the death of Michael might be held as "indicating with reasonable certainty" the nature and purpose of the alleged trust, within the meaning of section 2221 of the Civil Code (see Wittfield v. Forster, 57 Pac. 219); but a trust as thus averred was not found by the court. The only finding of a trust is in finding 6, wherein it is stated that at the date of the deed Michael Sullivan "was in failing health, and in order to avoid the responsibility of caring for and managing his property, and for the better protection of the same," he executed the deed to his wife, and transferred to her the personal property, "to have and hold the same by said Margaret in trust for the use and benefit of said Michael," and that she took the property in trust as aforesaid, and not absolutely or otherwise, and then "agreed to take and hold the same in trust for her said husband, and not otherwise." This is the only finding of fact as to the creation of a trust. The finding says nothing whatever about a trust for the plaintiff or the other children, which latter alleged trust is the only one of importance here. It is true that among the "conclusions of law" there is a statement that she took the property in trust for Michael during his lifetime, and "that after his death she continued to hold, and now holds, said real and personal property in trust for the heirs of said Michael"; but if this, by any stretch of leniency, could be considered as a finding of fact gone astray among conclusions of law, it is too uncertain, indefinite, and vague to constitute the declaration of a trust. The duration of the estate of the trustee, the nature and quantity of the interests of the alleged beneficiaries, what duties were imposed on the trustee, what she was to do with the property, how and when she was to dispose of it, if at all, and the manner in which she should execute this supposed trust, are all left undeclared. Wittfield v. Forster, supra. Moreover, there is no finding that, as to the land, the alleged trust was created in either of the two ways in which alone a trust in relation to real property can be created, to wit, by a written instrument or by operation of law. Civ. Code, § 852. The deed in question here is upon its face an absolute conveyance of the land from Michael to Margaret, without any hint of a trust, or any condition or limitation whatever, and there is no pretense—or finding—that any other instrument in writing was ever executed, by either of said parties, referring in any way to the deed or the land. Therefore the trust contended for was not created by an instrument in writing. Neither is there any finding that Margaret got the property by fraud, accident, mistake, undue influence, or any other wrongful act, by which, under section 2224 of the Civil Code, she became an involuntary trustee,—nor any finding of any other facts or fact which would constitute her a trustee by operation of law. See Barr v. O'Donnell, 76 Cal. 471, 18 Pac. 429, and cases there cited. No presumption that the deed was procured by fraud or undue influence arises from the mere naked fact that it was from a husband to his wife, and no fraud or undue influence is found. Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691. The findings, therefore, do not warrant the judgment.

But as the case may be tried again, when there may be different findings, while the evidence may or may not be the same, it is proper to say that, waiving all the questions above discussed, the evidence disclosed by the transcript on this appeal was not sufficient to warrant the court in finding that the deed, which is on its face an absolute conveyance of the land in fee simple, was intended to be something else, namely, a conveyance in trust. The authorities are uniform to the point that to justify a court in determining from oral testimony that a deed, which purports to convey land absolutely in fee simple, was intended to be something different, as a mortgage or trust, such testimony must be clear, convincing, and conclusive,—something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly-expressed deed, solemnly executed and delivered. Language used by different courts in declaring how strong such evidence must be may be seen in the notes to Mahoney v. Bostwick, on page 180 of 31 Am. St. Rep. (s. c. 30 Pac. 1020). Some of the expressions there quoted are: "Must be clear, satisfactory, and convincing;" "clear and satisfactory;" "clear and convincing;" "very satisfactory;" "strong and convincing;" "clear, unequivocal, and convincing;" "clear, explicit, and unequivocal;" "so clear as to leave no substantial doubt;" "sufficiently strong to command the unhesitating assent of every reasonable mind." In Becker v. Howard, 75 Wis. 422, 44 N. W. 759, the court said: "To convert a deed absolute into a mortgage, the evidence should be so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage." Similar declarations on this subject have been frequently made by this court. See Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, and cases there cited; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797. In most of these cases the attempt was to show by parol evidence that an absolute deed was a mortgage under a statutory provision which expressly declares that this may be done, while there is no such statutory provision as to a trust. While in many of the cases cited the court below had found against the asserted mortgage or trust, and the judgment was affirmed, still they clearly declare that the rule as above stated should govern trial courts, and that, where an absolute deed has been found to be something else, the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule. In Wilson v. Parshall, 129 N. Y. 223, 29 N. E. 297, the court say: "The security of titles and sound public policy require that a party alleging that a deed absolute in form is, nevertheless, a mortgage, should show it by very satisfactory evidence; and, where he attempts to show it by oral evidence, his proof should amount to more than a mere guess or surmise, or even inferences which are just as consistent with one theory of the deed as the other." Fisher v. Witham, 132 Pa. St. 488, 19 Atl. 276; Coyle v. Davis, 116 U. S. 108, 6 Sup. Ct. 314. Moreover, courts have not infrequently reversed judgments declaring such deeds to be mortgages or trusts, where there was considerable evidence supporting them. In Cake v. Shull, 45 N. J. Eq. 208, 16 Atl. 434, and also in Langer v. Meservey, 80 Iowa, 158, 45 N. W. 732, a judgment deciding a deed to be a mortgage was reversed for want of sufficient evidence, and in each of those cases the evidence in support of the finding was vastly stronger than in the case at bar.

In this case there is no pretense of evidence that at the time the deed was executed there was any declaration or expression of any kind by the grantor or the grantee that it was intended to be anything else than what it purports on its face to be. The conveyancer who prepared the deed, and who was present at its execution, testified that he read it carefully to the grantor, and that the latter expressed himself as fully understanding it, and said that it was all right. Other members of the family, including the grantee herself, were present at the time of the execution of the deed, and there was no intimation by any one at that time of a trust, or that the deed was intended to be other than it purports to be. It was acknowledged on the same day, and recorded shortly afterwards. None of the brothers and sisters other than plaintiff swear to anything like a trust, and one of them testifies that on the very day of the execution of the deed his father told him that he was going "to deed everything right over to her," and the defendant Margaret, the grantee, testified to the same effect. The plaintiff introduced no evidence of any agreement as to a trust or any declaration of a trust at the time of the execution of the deed. The only evidence that can be fairly considered as tending at all to establish a trust such as is averred in the complaint is the testimony of plaintiff herself, when on the witness stand, as to a certain conversation, about the date of which she was very uncertain, which she says she had with her mother before the execution of the deed, and one or two other conversations with her mother after her father's death, and of course long after the execution of the deed. She testified that, having heard from her husband of the contemplated deed, she asked her mother about it; and her own language as to the conversation, given by her in her testimony, is as follows: "When I went up I asked her about it, and she said she had asked him about it, and she wanted him to give a deed to her, and she would take care of the property for us while he lived." A close examination of all the testimony given by plaintiff will show that her language above quoted is the sum and substance of all her mother is asserted to have said bearing in any way upon the trust here contended for, and it would be beyond all reasonable conclusion to hold that this loose and indefinite statement of the mother is sufficient to turn an absolute deed made afterwards by the father into a trust sufficiently certain and definite to be declared and enforced by a court. The declarations of the grantee, Margaret, testified to by the plaintiff as occurring after the execution of the deed and the death of Michael, were, of course, not competent for the purpose of proving the trust, and were admissible only in corroboration of plaintiff's witnesses; but, under any view, they were of little consequence. The plaintiff testified that, after the death of her father, "I asked her if she would give me my share; that I wanted to release my land; and she said she would rather leave it in the bank, and draw interest,—the bank would take better care of it. She was afraid my husband would get away with it in case she redeemed the land." Her counsel then asked her the leading question, "Did she tell you at that time that she would give you your share?" to which she answered: "Yes, sir; she promised she would give it to me, and keep it for me. She would give me my share when it was divided up." She testified that on other occasions she asked her mother for her share, and that finally, a few months before the commencement of the action, her mother positively told her that she would not give her anything, and ordered her and her husband out of the house, after which she had no further communications with her mother. All this tends to show that she repudiated the alleged trust, rather than that she acknowledged it. According to the conversations testified to, it certainly appears that she always refused to give plaintiff what the latter called her "share." All that she is asserted to have said is entirely consistent with her position that the property was all hers absolutely, to dispose of as she pleased, and that she would probably allow it to go, according to the law of descents, to the children at her death, and might possibly give a portion of it to some of the children during her life. In her testimony she denied all these conversations; but, considering them independently of her denials, they contribute nothing towards sustaining the finding here in question.

The only other evidence claimed by the respondent as tending to support the finding is the testimony of plaintiff's husband as to a statement made to him by Michael, some time before the execution of the deed, to the effect that some of the family wanted him to make the deed, and made certain threats if he did not make it. This, at best, would tend only to show that the deed was procured by fraud or undue influence; but the court does not find any facts of that kind, and, under all the evidence, could not properly have done so. The judgment really rests upon the theory of an express agreement between the parties that the deed should be considered as a trust. This witness also testified that, after the deed was made, Michael told him that "they got me drunk, and I didn't know what I was doing," and that he must get it back; but there is no finding that the deed was not properly executed, or that it was procured by any artifice of this kind, or that he was in any way incompetent to make a deed. This is not an action to set aside a deed upon the ground that it was procured through fraud or undue influence, and the judgment was not rendered upon any such theory.

Our conclusion is that the evidence was not sufficient to support the finding of a trust. The question here is not really one of conflict of evidence. The evidence introduced by plaintiff, leaving out of view the fact that it was all contradicted, is not in itself sufficient to show the declaration and creation of the trust as averred in the complaint or as found by the court. The judgment and order appealed from are reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.; VAN DYKE, J.

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126 Cal. 235

Ex parte CLARKE. (Cr. 572.)

(Supreme Court of California. Sept. 29, 1899.)

CONTEMPT—ORDER FOR PRODUCTION OF BOOKS—VALIDITY—DISCHARGE ON HABEAS CORPUS.

1. The violation of an order compelling a defendant to produce all his books for inspection on a mere suspicion, against positive evidence to the contrary that they might contain some evidence favorable to plaintiff, will not warrant a commitment for contempt, as it is clearly unauthorized.

2. A party who has been committed for contempt in violating an unauthorized order compelling him to produce all his books for inspection may be discharged on habeas corpus.

In bank. Appeal from superior court, city and county of San Francisco.

Petition for habeas corpus by Robert S. Clarke. Granted.

J. J. Burt and Jas. A. Louttit, for petitioner. E. B. Young, for respondent.

McFARLAND, J. The petition herein sets forth that while a certain cause entitled "Charles Erickson, Doing Business Under the Name of Charles Erickson & Co., Plaintiff, vs. Stockton & Tuolumne County Railroad Company, a Corporation, Defendant," was on trial in the superior court, the petitioner herein was called as a witness for the plaintiff in said cause, and testified that he was the secretary of the defendant therein, and had charge of said defendant's books; that the issues in said cause were those presented by the pleadings therein, which are attached to and made a part of the petition; that petitioner, as secretary of said defendant, upon notice served by plaintiff, had produced on the trial the minute book of defendant, which contained all the meetings and proceedings of the board of directors and stockholders of said defendant; that petitioner had testified what other books said defendant had, to wit, a ledger, a journal, a stock ledger, a stock journal, a stock certificate book, and a petty cash book, and that there was nothing in said books showing that the defendant had anything to do with the grading of a certain roadbed, which was the subject of the action; that thereupon the attorney for the plaintiff in said action requested the court to instruct the petitioner herein to bring into court all of said books, and that the said attorney, being asked by the court what he expected to prove by the books, said "that he expected to prove by said books that said corporation had been engaged in grading said roadbed on its own account," but that "no evidence was offered or introduced, or any showing made in said action, to the effect that any of said books, or any part thereof, were or was material or pertinent to any of the issues in said action"; and that thereupon "said court, as requested aforesaid, instructed your petitioner to produce all of said books in said court." It further appeared from the petition that the petitioner declined to produce said books, and stated that he had been instructed by the directors of said corporation and its president, Mrs. Annie Kline Rickert, not to take any books of said defendant out of its office, and also stated that, if plaintiff's attorney would designate what parts of any of said books he desired to introduce in evidence, he would give certified copies of such parts as were material or pertinent; and that thereupon the court adjudged the petitioner guilty of contempt for not producing said books, and committed him to the custody of the sheriff of the county, Henry S. Martin, until he should produce said books; and that he is deprived of his liberty by said Martin under said order. The return to the writ shows substantially the facts set out in the petition, except as to the declared purpose of the attorney of the plaintiff in requiring the books. The commitment, which is part of the return, recites that the attorney for plaintiff moved for the books "for the purpose of proving by said books the general course of business of said defendant corporation, and for the purpose of proving by said books that the said Annie Kline Rickert, president of said defendant corporation, had full power and authority to make contracts for and on behalf of said defendant corporation, and as its agent, and for the purpose of further proving who were the stockholders of said defendant corporation at all times since its organization, and more particularly on the 5th day of March, 1898." It merely appears that the counsel for plaintiff "moved for an order." There was no affidavit upon which the order was founded, nor does anything appear as the foundation of the order, except the testimony of Clarke, the petitioner himself, while he was a witness for plaintiff; and his entire testimony is before this court in accordance with the stipulations of the parties that it might be used on the hearing of this writ so far as it could be looked into by this court.

Under the views which we take of the case, we do not think it necessary to consider the petitioner's contention that, as the statute requires that the books of the corporation should be kept in its office, the petitioner could not be required to remove them from such office, as was held in La Farge v. Insurance Co., 14 How. Prac. 26. Neither will we consider whether or not petitioner, as a mere officer of the corporation, could be compelled, as against the orders of the authorities of the corporation, to produce its books in court, nor how a corporation could be proceeded against upon its refusal to produce a document which it ought to produce. For the purposes of this case, we will consider the petitioner as if he were bound to produce the books of the corporation in a proper case, as if he stood in the place of any individual or business firm who was a party to the action, and as if the question were whether a party to an action could be deprived of his liberty for violating such an order as that here presented for consideration. The question here presented is of great importance to all citizens, for it involves the constitutional right of the people to "be secure in their persons, houses, papers and effects against unreasonable seizures and searches." State Const. art. 1, § 19. To compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision. As was said by Lord Camden in the celebrated case of Entick v. Carrington, 19 State Tr. p. 1066, which was an action to recover damages for breaking into a private house and seizing private papers: "Papers are the owner's goods and chattels. They are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of these goods will be an aggravation of the trespass." The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations. The exposure of a man's methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated except where the power to do so clearly appears. In many of the states there are statutes on the subject of the production of books and papers in court during a trial, and providing in detail under what circumstances orders for their production may be made. In this state about all there is on the subject is to be found in sections 1000 and 1985 of the Code of Civil Procedure. Section 1000 provides for an order, in certain cases, upon notice, that a party to a pending action may have an "inspection" and copy of accounts in any book, or of a document or paper "containing evidence relating to the merits of the action or the defense therein," and prescribing a certain penalty for a refusal; and there is a provision at the end of the section that it shall not be construed "to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness." But the proceeding in the case at bar was not under that section, and, moreover, it is applicable only to proper cases; for no one would claim that it gives unbridled license for the examination or production of all such private papers as the caprice, or curiosity, or ulterior design of a party might suggest. Section 1985 provides for what is usually called a "subpœna duces tecum," by which a witness is required to bring with him any books, documents, etc., "which he is bound by law to produce in evidence"; but the proceedings in the case at bar were not under that section, and, moreover, it does not prescribe what things he is "bound by law to produce." It may be assumed, however, that (although we have no express affirmative statutory provisions on the subject) when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it. But it is evident that we must look to general principles of law applicable to the subject when it is to be determined in what instances a court has the power to compel a witness to give up his books and papers, and disclose his private business to the world. And the question raised here is one of power in the court, and may be inquired into on habeas corpus. Indeed, there is no other way in which a party deprived of his liberty as petitioner was could recover his freedom. The same principle applies as when a witness has been imprisoned for contempt for not answering a question not legal or pertinent, and it has been held by this court that in such a case he will be discharged. In Ex parte Brown, 97 Cal. 83, 31 Pac. 840, the petitioner had been ordered to produce a package of tickets, and had been sent to jail for refusing to do so, and this court discharged him on habeas corpus, and said that "it is the settled law of this state that no court or judge has power to punish as a contempt the violation or disregard of an unlawful order." In Ex parte Zeehandelaar, 71 Cal. 238, 12 Pac. 259, the petitioner had been imprisoned for contempt for not answering as a witness a question not legal or pertinent to the issue, and he was discharged on habeas corpus. Several concurring opinions were delivered in the case, and it was held not only that the petitioner could not be punished for refusing to answer the question, but that the commitment must show affirmatively that the question was legal, and pertinent to the issue. See, also, Ex parte Rowe, 7 Cal. 181. And a witness can no more be lawfully imprisoned for refusing to produce papers and books which he cannot be legally required to produce than he can be for refusing to answer questions not proper to be asked.

In the case at bar we are satisfied that the order in question was unauthorized. There was no showing, by affidavit or otherwise, that the books in question contained any evidence material to plaintiff's cause. The only evidence on the point was the testimony of petitioner when on the witness stand as plaintiff's own witness, and that showed that they did not contain such evidence. In Morrison v. Sturges, 26 How. Prac. 179, the court say: "It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support such belief." Moreover, it was, in effect, a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized; for, while it named certain books, yet those constituted all of defendant's books, as appears from plaintiff's examination of petitioner as to what books the defendant had. Again, the order was in the nature of what Lord Chancellor Hardwicke, over a century ago, called "a mere fishing bill," and such bills have been universally condemned. It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them, or any part of them, in evidence, unless he found something in the part offered that was relevant and material in support of his side of the case; and, indeed, they would not have been otherwise admissible. He merely intended to draw his dragnet of inspection through all these books under the ostensible motive of trying to catch something which his witness had testified was not there. In the meantime all the private business of the defendant—all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition, and other matters vitally important to its welfare—would have been exposed. There is no warrant in the law for such a forcible wholesale violation of a person's privacy upon such a showing as was made in this case. A man does not lose all his civil rights because he is brought into court as a party to a suit. As was said by Lord Hatherby: "A court is bound to protect the defendant against undue inquisition into its affairs" (7 Ch. App. 97, and notes); and it would be difficult to imagine a more striking instance of such "undue inquisition" than an order compelling a defendant to produce for inspection all his books upon the mere suspicion—against positive evidence to the contrary—that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of all these books over which this suspicion was supposed to hover.

The authorities on the subject are innumerable. Many of them arose out of discussions of the old "bill of discovery," and many out of later statutory provisions; but the principles which they declare are clearly to the point that such an order as is here under review is unauthorized. Originally, an order for the production of a paper, document, or book was made only when the document was one declared on in the bill, or set up as a defense; or where the party asking for it had an interest in the document itself, —as where it was a contract between the parties, and there was only one copy of it, which was in the hands of the opposite party; or where the instrument was, in the very nature of things, material evidence,—as where it was alleged to have been forged or altered, and that it would, on its face, show the fact alleged; or where books belonged to both parties, and would necessarily contain evidence of the issues pending,—as in case of a suit between partners, or generally between principal and agent, or trustee and beneficiary. See 2 Phil. Ev. (Cow. & H. and Edwards' Notes) c. 4, *p. 321, and notes. Afterwards such orders were undoubtedly extended so as to include other grounds for production of papers, and were in many states, as hereinbefore noticed, regulated by statutes and rules of court; but the principles applicable generally to the forced production of papers are declared in the authorities as above stated, and we have been referred to no case warranting such an order as the one now under review. The subject, in all its bearings, both at common law and under recent statutes, is fully discussed in 2 Wait, Prac., commencing at page 522, where a very large number of authorities touching the question are cited. Many cases are there cited to the point that there must be a substantial showing that the document or book sought for contains material evidence in support of the cause of action or defense of the party asking for it, and that such a mere suspicion as appeared in the case at bar will not warrant an order for the production. But the principle which is determinative of the invalidity of the order involved in the case at bar is stated on page 533, where the author says: "The right given by statute to discover books, papers, and documents relating to the merits of a pending action does not entitle a party to enter into a mere fishing examination of all the books, papers, and documents of his adversary. An inquisitorial examination was not contemplated by the framers of the statute,"—citing authorities. In Hoyt v. Bank, 8 How. Prac. 93, the court said: "He has no right to have a general inquisitorial examination of all the books, papers, and documents of his adversary, with a view to ascertain if, perchance, something cannot be found which will probably aid him." There are numerous other authorities to the same point. In the case at bar, if we were to confine ourselves entirely to the commitment itself, the conclusion above stated would be the same. It was recited there that the plaintiff moved for the books for the purpose of proving by them "the general course of business of said defendant corporation," and this is as complete an expression of an intent to go upon a general fishing expedition as could possibly be imagined. Another recital is that the books were wanted for the "purpose of proving" that Mrs. Rickert had "full power and authority to make contracts for and on behalf of said defendant corporation as its agent," but there is no evidence that the books sought for would have afforded any evidence of that kind, and plaintiff had already introduced from the minute book a resolution of the board of directors to that effect; and, moreover, the averment of the complaint was that the defendant in the case held out Mrs. Rickert as their "ostensible agent." The other recital was that plaintiff wanted the books for the purpose of proving "who were the stockholders of said defendant corporation at all times since its organization, and more particularly on the 5th day of March, 1898," but the suit was against the corporation, and not against the stockholders, and it was immaterial who the stockholders were, and it was unimportant to plaintiff to know who the stockholders were, unless it desired the information for the purpose of a future suit, which is in no case allowable. Moreover, the order is not confined to the stock book.

For the reasons above stated, we are of the opinion that the order for the violation of which the petitioner was imprisoned was void, and that, therefore, he should be discharged from custody. This conclusion is based entirely upon the order here reviewed. Under what circumstances a proper and authorized order could be made for the inspection, or for the production at the trial, of a paper, document, or book, is a question not now before us. The petitioner is discharged.

We concur. VAN DYKE, J.; TEMPLE, J.; HENSHAW, J.; HARRISON, J.

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126 Cal. 244

Ex parte RICKERT. (Cr. 571.)

(Supreme Court of California. Sept. 29, 1899.)

CONTEMPT—WARRANT OF COMMITMENT—SUFFICIENCY.

Where a warrant of commitment for a contempt, not committed in the court's presence, is not in compliance with Code Civ. Proc. §§ 1211, 1212, requiring the warrant in such cases to be preceded by affidavit showing the facts constituting the contempt, or by a citation or notice to show cause, the prisoner will be discharged.

In bank. Appeal from superior court, city and county of San Francisco.

Petition by Annie Kline Rickert for habeas corpus. Granted.

J. J. Burt and Jas. A. Louttit, for petitioner. E. B. Young, for respondent.

PER CURIAM. This proceeding is akin to Ex parte Clarke (this day decided) 58 Pac. 546; but the alleged contempt of this petitioner, Mrs. Rickert, consisted in instructing Clarke not to produce in court certain books which he had been ordered to produce, and in doing certain other acts to prevent the production of said books. These acts were not done by the petitioner "in the immediate view and presence of the court or judge at chambers," and the warrant of commitment was not preceded by an affidavit showing the facts constituting the contempt, or by a citation or notice to show cause, as required by sections 1211 and 1212 of the Code of Civil Procedure. For this reason the petitioner must be discharged from custody, independent of the views upon which Clarke himself was discharged. The petitioner is discharged from the custody of the sheriff.

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126 Cal. 248

In re MITCHELL'S ESTATE. (Sac. 629.)

(Supreme Court of California. Sept. 30, 1899.)

EXECUTORS — DISTRIBUTION — ORDER — VACATION—REVERSAL—REVIEW—PRESUMPTION OF FACT.

1. Where an order for partial distribution vacating a prior order denying a petition therefor is reversed on an appeal from the entire order, the vacated order comes into full force and effect.

2. An order denying a petition for partial distribution is not vacated merely by a subsequent order granting the petition, since it is final so far as the hearing on the petition is concerned, and is appealable.

3. Where the bill of exceptions purports to present all the facts, a fact not contained therein will not be presumed.

4. That an order denying a petition for partial distribution denied it "without prejudice to making another application" did not make the order in any way less effective, and it was unnecessary to preserve a right to another application.

5. Unless notice of an application for an order for partial distribution to a part of the legatees is given by posting, as required by Code Civ. Proc. § 1633, the order is unauthorized.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county.

In the matter of the estate of John W. Mitchell, deceased. From an order for partial distribution to legatees the executors appeal. Reversed.

Jas. F. Peck, for appellants. Earl H. Webb and C. A. Stonesifer, for respondents.

CHIPMAN, C. Appeal by the executors of the testator's estate from an order making partial distribution to certain legatees, and directing a certain sum to be paid to the county treasurer of Stanislaus county as collateral inheritance tax. The cause was here on a former appeal, and the facts are quite fully stated in the opinion on that appeal, and need not be repeated at this time. In re Mitchell's Estate, 121 Cal. 395, 53 Pac. 810. Briefly, the court below had, by an order dated September 11, 1896, denied the petition of certain legatees for a partial distribution, the hearing of which was duly noticed. Subsequently the legatees served personal notice upon the executors, but upon no others, of a motion to vacate the order denying the petition and to grant the petition. The executors objected to the hearing on the ground that no notice had been served upon other interested parties, and on the ground that the court had no jurisdiction. The court granted the motion, and made an order vacating the first order denying the petition, and also ordered the distribution prayed for. This order was made February 27, 1897. The executors appealed from this last order, and it was reversed here, and "the cause remanded for further proceedings." The reversal was ordered on account of two errors, specifically pointed out, to wit: (1) That the order relieved the legatees from the necessity of giving any bond; and (2) it ordered "the whole of the legacies paid, as shown by the will, without deducting therefrom the sum of $1,166.66⅔, paid to each of the legatees after the original hearing and before the final hearing." The point raised as to the sufficiency of the notice of the motion to confer jurisdiction to make the order was remarked upon by Mr. Commissioner Searls, who wrote the opinion, but in promulgating the decision the question as to the sufficiency of the notice was not decided. One of the judges especially disclaimed expressing any opinion upon it, and another judge concurred in the judgment simply. The question was, we think, left open. Remittitur went down August 8, 1898. On August 10, 1898, the attorneys for the legatees served notice on the executors (which was filed August 11, 1898) that they would, on August 23, 1898, move the court for an order of partial distribution, "in conformity with the decision of the supreme court * * * made and filed on the 7th day of July, 1898. Said motion will be made upon the said decision now on file herein, and the papers, records, and folios herein." No notice of this motion was served otherwise than upon the executors personally. It was stipulated that the motion might be heard August 29, 1898, the executors "reserving all rights to said executors to make objection to the jurisdiction of the court to hear the motion, and to such other objection as goes to the right of the petitioners to have distribution made to them in the present proceedings." The motion was heard August 29th, the executors making objection to the jurisdiction. The petitioners introduced the remittitur, and the opinion filed by this court July 7, 1898, whereupon the motion was submitted, and the court made an order of the date of the hearing granting the petition and ordering the distribution prayed for. The two errors pointed out in the opinion of this court on the former appeal were corrected, but otherwise the order was, in effect, about the same as the order of February 27, 1897. It is from this last order the executors now appeal.

When the order of February 27, 1897, was reversed, it no longer had any vitality or force, and the result was to leave the proceeding where it stood before that order was made. 2 Freem. Judgm. § 481. The order of September 11, 1896, denying the petition, thereupon came into full force and effect, and it has never been vacated or set aside. The subsequent order granting the petition did not operate to vacate the order of September 11, 1896, denying the petition. 1 Freem. Judgm. § 104a. As was said in Nuckolls v. Irwin, 2 Neb. 60: "When a judgment is once entered of record, it must stand as the judgment until it is vacated, modified, or disposed of by some means provided by law. Entering additional judgment entries is not one of them." We do not think the situation was such as to justify the rule sometimes applied by which the subsequent judgment by implication is held to vacate the former judgment. A judgment, when pronounced, must stand until set aside or reversed on appeal. Stearns v. Aguirre, 7 Cal. 443. We do not think the cases of Paige v. Roeding, 96 Cal. 389, 31 Pac. 264, and Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878, can aid respondents, for the bill of exceptions presents all the facts, and we cannot presume that the court vacated the first order before proceeding to hear the last motion. Assuming that the court had jurisdiction to make an order vacating this first order, we do not see under what rule or by what authority the court afterwards, while this original order remained in force, and without taking any steps to vacate it, proceeded, by motion merely, and upon no notice other than to the executors, to hear the original petition a second time, and make an order granting it. When the first order was made, it was final so far as the hearing upon the petition at that time was concerned, and it was an appealable order. That part of the order vacating the first order may not have been appealable if that had been its only purpose. In re Hickey's Estate (Cal.) 53 Pac. 818. But it also ordered distribution, which was an appealable order. The appeal was taken from the entire order, and when reversed the reversal operated to reverse that part of the order vacating the first order. As the record now appears, the court heard and determined the petition a second time, reversing its former judgment while that judgment stood unappealed from, and after it had withstood the only attack made upon it by the motion to vacate it. It is true the first order denied the petition "without prejudice to making another application," but this saving clause did not make the order less effective in determining the issues as then presented; and, as to preserving any right in the legatees to make another application, it was unnecessary. While the order was final and appealable so long as it stood unassailed in that proceeding, there was nothing in it to prevent another petition being filed and heard whenever the legatees might believe a more favorable showing for them could be made, or it was by them thought probable that the court might take a different view of the matter, or the condition of the estate had changed so as to make the distribution proper.

2. But, aside from this view of the matter, the objection to the order of February 27, 1897, as well as to the order of August 29, 1898, from which this appeal is taken, already briefly referred to, stands in the way of affirming the latter order. The notice of the motion to vacate the order of September 11, 1896, and the notice of the second motion to hear the petition, were served only upon the executors. No notice was given by posting as prescribed by section 1633, Code Civ. Proc. After the order of September 11, 1896, denying the petition, was made, and the legatees, by their motion to vacate that order, had failed, and the order was left in force, there was no way open to them to have their petition heard except by pursuing the statutory method requiring notice to be posted. Service of the notice of the motion upon the executors alone was not sufficient. There were other legatees and there were creditors. The first order, denying the petition, was favorable to them; but the subsequent order, granting the petition, was adverse to their interests. They should have had an opportunity to be heard, and we do not think that notice to the executors gave them such opportunity, for the executors did not represent them. Section 1633 requires notice to be given by posting, presupposing that others than the executors might have an interest adverse to the petition. It is true that they did not appear in response to the first notice of the hearing, which was duly served, and they would be and are bound by the order then entered. But, after the legatees had failed to appeal from that order, and had also failed in their attack upon it by motion, we think the court lost jurisdiction to further act, except after new notices had been given as required by the statute. The legacies bequeathed to other legatees amounted to about $300,000; there were unsecured creditors of considerable amount; and, although apparently the estate was solvent, these other legatees and the creditors had an interest adverse to the petitioners, who asked for payment at a time when all could not be paid, and were thus to be preferred in point of priority of payment. We advise that the order be reversed.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(126 Cal. 283)

BYRNE v. HOAG et al. (L. A. 555.)[1]

(Supreme Court of California. Oct. 6, 1899.)

APPEAL AND ERROR—ORDERS AFTER JUDGMENT—MORTGAGE FORECLOSURE.

Where, under Code Civ. Proc. § 728, providing that when, in a mortgage foreclosure suit, the debt is not all due, only sufficient property to satisfy the amount due must be sold, and, as often as more becomes due, the court may, on motion, order more to be sold, plaintiff in a foreclosure suit obtains a judgment for interest due, and an order of sale, and subsequently moves for a sale to satisfy interest accruing since the decree, which is granted, such action is an "order," and not a judgment, from which an appeal, to be available, must be taken within 60 days.

Department 1. Appeal from superior court, Riverside county.

Action by Olive A. Byrne against Abram Hoag and others for the foreclosure of a mortgage. A judgment was entered for accrued interest, and sale directed to satisfy it, and from a subsequent order directing a sale to satisfy interest accruing after the former judgment the defendants appeal. Dismissed.

Chas. R. Gray, for appellants. Purrington & Adair, for respondent.

HARRISON, J. The appellants executed to the respondent their promissory note for $2,000 April 27, 1892, payable three years after date, with interest payable semiannually, and as security for its payment executed at the same time a mortgage upon certain real property, with a provision therein for its foreclosure in case of default in the payment of the note, or of any installment of interest when due thereon. There was no provision that the note should be deemed to have matured in case of any default in the payment of interest. October 6, 1893, the first installment of interest not having been paid, the respondent commenced an action for the foreclosure of the mortgage; alleging in her complaint that the entire amount of the sum named in the note, both of principal and for interest, was due. The defendants in their answer denied that any part thereof was due thereon, except for the interest then accrued upon the principal sum. Judgment was entered November 27, 1893, for the amount of the interest then due, and directing the sale of the mortgaged premises, or so much thereof as should be necessary to satisfy said amount. No provision was made in the judgment in reference to the amounts subsequently to fall due upon the note. No sale was made under this provision of the judgment, nor was the amount thereof paid. In April, 1897, the plaintiff served upon the defendants, and presented to the court, her affidavit of these facts, and also that since the entry of the judgment the principal sum named in the note, with interest thereon that had accrued since the entry of the judgment, had become due, and had not been paid, and moved the court for an order and decree directing a sale of the property described in the decree of November 27, 1893, to satisfy the amount which had become due on the note since the rendering of said decree. The court granted her motion, and on October 12, 1897, caused to be entered an order entitled "Decree of Foreclosure and Order of Sale," by which it determined the amount that had become due upon the promissory note since the entry of the decree of November 27, 1893, and directed a sale of so much of the mortgaged premises as should be necessary to satisfy the same. The defendants have appealed therefrom.

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[1] Rehearing denied November 4, 1899.

The respondent contends that this court cannot consider the appeal, and that it must be dismissed, for the reason that it was not taken within 60 days after the entry of the order appealed from. This involves a determination of the character of the direction of the superior court from which the appeal is taken,—whether it is to be regarded as an order or as a judgment. If it is to be considered as a judgment, the appeal therefrom could have been taken within 6 months from its entry, whereas, if it is an order, it should have been taken within 60 days after its entry.

Section 726, Code Civ. Proc., declares, "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter." In the present case there has been only one action brought for the foreclosure of the plaintiff's mortgage, and in that action the court by its judgment in 1893 established the validity of the note and mortgage, and directed a sale of so much of the mortgaged premises as should be necessary to satisfy the amount then found to be due. This action was brought to foreclose the mortgage for the entire amount for which it was given, but the note and mortgage were set forth at length in the complaint, from which it appeared that only the interest that had accrued prior to the commencement of the action was due, and the judgment that was rendered therein was limited to directing a sale of enough property to satisfy this amount. Bank v. Godfrey, 77 Cal. 616, 20 Pac. 143, was similar to the present case, and the court there said: "The real issues in the case, as presented by the pleadings, were whether or not the plaintiff was entitled to recover upon the note, and to a foreclosure of the mortgage, according to their terms. The fact that plaintiff treated the whole amount of the note as being due did not make it so, as against the terms of the note, set out in, and made a part of, the pleading; nor could the issues be thereby confined to the mere question whether the note was then due or not." The omission to provide in the judgment for a subsequent sale of any portion of the mortgaged premises in the case of default in the payment of the note or interest thereon as it matured is supplied by section 728, Code Civ. Proc., which provides that, in such case, "as often as more becomes due for principal or interest, the court may on motion order more to be sold." This was the course pursued by the plaintiff herein. After the maturity of the note she presented a "motion" to the court for an order directing the sale of the mortgaged premises to satisfy the amount that had fallen due on the note "since the rendering of the decree," and the court made an "order" accordingly. This action of the court was in accordance with the provisions of section 728, Id., and was also in sequence of its judgment previously given, and was substantially in accordance with the procedure sanctioned in Bank v. Godfrey. It was taken upon a motion of the plaintiff, and after notice to the defendants, in a case in which a judgment had been entered which was still in force, and was based upon an affidavit setting forth matters that had occurred subsequent to the entry of the judgment. Such action of the court is denominated an "order." Section 1003, Code Civ. Proc. It was an order after judgment, and the appeal therefrom should have been taken within 60 days after its entry.

We are the less reluctant to dispose of the appeal upon this question of practice, for the reason that, if we were at liberty to consider it upon the merits, we should be compelled to affirm the action of the superior court. The grounds chiefly urged in support of the appeal are that the failure to reserve in the judgment of 1893 the right to direct any further sale of the premises deprived the court of such power, that this judgment was a final determination of the rights of the parties to the action, and that the court could render no further judgment therein. As seen above, section 728, Code Civ. Proc., supplies this alleged omission in the judgment, and the action of the court was not a further judgment in the case, but was an order subsequent to judgment, which it had authority to make until the entire mortgaged premises had been sold in satisfaction of the debt. The character of the court's action or direction is to be determined by the nature of the action itself, considered in the light of the authority of the court in the premises, rather than by what it has been designated by the court. The defendants had an opportunity to controvert the facts set forth in the plaintiff's affidavit, but offered no evidence therefor, and these facts must be considered as admitted by them. As they chose to rely for their defense upon technical rules of procedure, they cannot complain that similar rules are invoked against them. The proceedings on the part of the plaintiff may not have been conducted with the most strict regard to the provisions of the statute, but, as was said in Bank v. Godfrey, supra, "it is evident to our minds that the appellant is seeking the aid of this court to avoid the payment of a just obligation, and we hold that the statute has been substantially complied with and the proper result has been reached." The appeal is dismissed.

We concur: BEATTY, C. J.; VAN DYKE, J.

126 Cal. 291

FREEMAN v. SEITZ. (Sac. 509.)

(Supreme Court of California. Oct. 12, 1899.)

SET-OFF AND COUNTERCLAIM—CLAIMS ARISING OUT OF CONTRACT—JURISDICTION.

Under Code Civ. Proc. § 437, providing that defendant's answer may contain a statement of any new matter constituting a counterclaim, and section 438, providing that such counterclaim may be set up in actions arising on contract, where plaintiff sues in the superior court on a demand arising on contract defendant may set up as a counterclaim a demand also arising on contract with plaintiff, though his demand is insufficient in amount to give the court jurisdiction in an independent action.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county.

Action by J. E. Freeman against F. J. Seitz. From a judgment for plaintiff, defendant appeals. Reversed.

F. D. Soward, for appellant. Frank R. Wehe, for respondent.

COOPER, C. The plaintiff brought this action against defendant to recover $1,560.36 for beef furnished by plaintiff to defendant at his request. The defendant answered, and, without denying any of the allegations of the complaint, alleged as a counterclaim that at the time of the commencement of the action the plaintiff was indebted to defendant in the sum of $110.89 for beef furnished by defendant to plaintiff at his request. The plaintiff filed a demurrer to the defendant's answer upon the ground that the court had no jurisdiction of the subject-matter, for the reason that the counterclaim amounts to less than $300. The court sustained the demurrer, and defendant declined to amend. Judgment was thereupon entered in favor of plaintiff for the amount claimed in his complaint. This appeal is by defendant from the judgment.

The sole question here is as to the order sustaining the demurrer. We think the order was erroneous. Our Code (Code Civ. Proc. § 437) provides that the answer of the defendant shall contain a statement of any new matter constituting a defense or counterclaim, including (Id. § 438) "in an action arising upon contract, any other cause of action also arising upon contract and existing at the commencement of the action"; that (Id. § 440) "when cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim could have been set up, the two demands shall be deemed compensated, as far as they equal each other." This action is one arising upon contract, and the counterclaim is also one arising upon contract, and existing at the commencement of the action, and is clearly within the provision of the Code above quoted. The law abhors a multiplicity of actions, and the evident intent of the legislature in passing the Code provision was that all matters that may be the subject of litigation between the parties within the limitations prescribed shall be settled in one action. If the ruling of the court below is correct, the defendant would have to bring suit in a justice court upon the cause of action set forth in his counterclaim, and, if he obtains judgment, take the chances of collecting it from the plaintiff. He might apply to have it set off against the plaintiff's judgment, provided the plaintiff's judgment has not been paid or assigned by plaintiff to some third party. The law does not require such circuity of action in a plain case, where all matters may in the same action between the same parties by the one judgment be at once finally settled and determined. Pomeroy (Rem. & Rem. Rights, § 730), in speaking of our Code provisions, says: "It is clear that if the plaintiff's action was on a contract and for a debt,—for the more extended language of the statute describes only a debt,—and the defendant held another debt due from the plaintiff personally, and existing in his own favor, and which did so exist at the commencement of the action, he could plead such demand as a set-off." And in section 795 the same author, in speaking of the counterclaim mentioned in subdivision 2 of section 438, Code Civ. Proc., says: "This is substantially the definition of 'set-off' given in the codes of the second group. The language of this clause plainly includes all cases of counterclaim based on contracts when the plaintiff's cause of action is also on contract." In Bank v. Gay, 101 Cal. 289, 35 Pac. 877, this court said: "'Counterclaim,' as used in our Code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. It may be used by defendant to plead as against the plaintiff (1) a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the cause of action; (2) in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action." In the case of Hart v. Cooper, 47 Cal. 77, plaintiff brought suit upon a promissory note for $365.55. The defendants, in their answer, were allowed to plead as a set-off an indebtedness of $235.30 due them upon account. It appeared at the trial that the true amount due defendants on the account was $35.80, which was credited by the court below on the amount due plaintiff on the note, and this court affirmed the judgment. Counsel for plaintiff point out that the defendant in his answer prays for judgment against plaintiff for the amount named in the answer, and argues from this that the answer was seeking to obtain an affirmative judgment for less than $300. Taking the answer as it reads, it is quite plain that such was not intended to be its effect. It admitted the amount of plaintiff's claim as pleaded, but, by way of counterclaim, sought to have the claim of plaintiff reduced $110.89. The prayer is not a very material part of the answer. Counsel for plaintiff in his brief has stated the rule which we think very properly may be applied here: "Perhaps the just rule would be to treat the pleading as a defense, or a counterclaim, according to its nature, considering the facts alleged." The case apparently relied upon by plaintiff (Griswold v. Pieratt, 110 Cal. 260, 42 Pac. 820), is not in conflict with what has been here said. That was an action brought by plaintiff to recover of defendant the sum of $858, as damages for the negligent performance of a contract by defendant to bud a quantity of fruit trees. Defendant denied the negligence and damages. Then, for a counterclaim, he pleaded a balance due him upon settlement amounting to $192, and asked judgment for the amount. The lower court found in favor of defendant, and awarded him an affirmative judgment for the amount claimed by him. It was properly held by this court that the facts stated in the answer were not the subject of a counterclaim, that they did not arise out of the transaction set forth in the complaint, and that the amount of the defendant's demand against the plaintiff was not within the jurisdiction of the superior court, so as to justify affirmative relief to the defendant. In the opinion the correct rule is laid down which applies to this case. It is said: "Of course, what is here said on the subject of jurisdiction has no application to the counterclaims provided for in the first subdivision of section 438 of the Code of Civil Procedure. The amount of the cross demand under that subdivision is of no moment for jurisdictional purposes. Our remarks are to be understood as confined to the unconnected causes of action mentioned in the second subdivision of that section, and limited also to cases presenting the substantial features of the present. If the set-off, less than three hundred dollars in amount, exclusive of interest, held by a defendant, is pleaded by him as purely defensive matter in reduction or extinguishment of the claim of the plaintiff in an action triable by the superior court, it may well be that the court can properly entertain the same. Such was the case in Hart v. Cooper, 47 Cal. 77. It is, under the statute (Code Civ. Proc. § 440), perhaps as much a matter of defense merely as would be a plea of payment of a like sum." We advise that the judgment and order be reversed, and the cause remanded to the court below, with directions to overrule the demurrer to the answer.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded to the court below, with directions to overrule the demurrer to the answer.

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126 Cal. 288

TROXLER v. BUCKNER. (Sac. 551.)

(Supreme Court of California. Oct. 11, 1899.)

TROVER—PLEADING.

1. In an action of trover, an allegation in the complaint of the amount due on a certain chattel mortgage covering the goods, and a claim for that amount, is sufficient to support a judgment for the value of the goods, when it is less than the mortgage debt.

2. Where it is alleged that defendant released the "mare named 'Mollie' and the mare named 'Pat,'" the property is sufficiently described by the finding that "those two certain horses named 'Molly' and 'Pat' were released."

Commissioners' decision. Department 1. Appeal from superior court, Kings county.

Action by W. L. Troxler against W. V. Buckner. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dixon L. Phillips, for appellant. Cosmer B. Clark, for respondent.

CHIPMAN, C. Trover. Plaintiff had judgment for the sum of $220, from which defendant appeals on the judgment roll alone. The pleadings are verified. The court found as facts that defendant was sheriff of Kings county during all the times mentioned in the complaint; that plaintiff was the owner and holder of a certain chattel mortgage executed by one M. P. Troxler on certain horses therein described, to secure the indebtedness of the latter to plaintiff, and that said mortgage had been duly recorded in the records of said county; that afterwards, to wit, on May 20, 1897, defendant, as sheriff, "without paying or tendering to plaintiff the amount of plaintiff's said mortgage debt and the interest due thereon, and without depositing said amount thereof with the county clerk or treasurer, as required by the provisions of section 2969 of the Civil Code of the State of California, as such sheriff and acting in that capacity, levied upon, seized, and took and carried away the whole of said mortgaged property," except a horse called "Medium," and said taking was by virtue of a writ of attachment in a certain suit wherein the Bank of Oroville was plaintiff, and M. P. Troxler and Sarah A. Troxler were defendants; that on May 24, 1897, plaintiff served a written notice upon defendant, duly verified, of the existence of said mortgage, and demanded that defendant pay to plaintiff the amount of said mortgage debt due plaintiff, or that he release said property from said attachment; that defendant refused to do the one or the other, and still refuses, or to deposit the sum due with the county clerk or treasurer, or to tender plaintiff said amount, or to release said property so taken, "excepting those two certain horses named 'Molly' and 'Pat,' which were released"; that the amount of the mortgage debt was $732.94, and interest thereon $4.06; "that the value of said personal property so taken by defendant was at the time of the taking and is of the value of $220." As conclusion of law, the court found that plaintiff was entitled to judgment for $220, and judgment for that sum was accordingly entered.

1. Appellant contends that the complaint is fatally defective in failing to allege the property to be of any value; citing Irwin v. McDowell, 91 Cal. 122, 27 Pac. 603. It was held in that case, upon the question of the measure of damages, that plaintiff's recovery should be "the full amount of the mortgage debt, if the property is worth enough to pay it; if not, then such amount only as it is worth." No question of pleading arose in the case or was decided by it. Plaintiff here alleged in his complaint the amount due upon the mortgage, and claimed damage for that amount. We think this was sufficient to support the judgment for the value, which was much less than the mortgage debt. If the property in fact was of less value, it was matter of defense. Civ. Code, §§ 2969, 3338; Irwin v. McDowell, supra. Defendant alleged the value of the property to be no more than $100. This allegation was deemed to be controverted, and the issue of the value of the property was thus presented.

2. There is nothing in appellant's point that the court failed to find upon the issue raised by the allegation of the answer that defendant did release the "mare named 'Mollie' and the mare named 'Pat' immediately after they were attached." The finding is that "those two certain horses named 'Molly' and 'Pat' were released." There were no other horses or mares thus designated in the chattel mortgage. We think it sufficiently clear that the court intended by the finding to refer to the identical animals described in the answer and the complaint. The term "horse" is generic, and includes, ordinarily, the different species of the animal, however diversified by age, sex, or artificial means. And. Dict. I advise that the judgment be affirmed.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(126 Cal. 262)

HARVEY et al. v. BARKER et al. (L. A. 490.)[1]

(Supreme Court of California. Oct. 4, 1899.)

PUBLIC LANDS—MEXICAN GRANTS—RIGHTS OF INDIANS.

1. Under Act Cong. March 3, 1851, a claim of title or right to property derived from the Mexican government must be presented for confirmation to the board of land commissioners there provided for; and a failure to present a claim shall be regarded as an abandonment thereof, and the lands covered by it shall become public lands.

2. The decision of land commissioners appointed under Act Cong. March 3, 1851, that certain land derived from the Mexican government was, at the time it was granted, vacant and subject to alienation, is final and conclusive.

3. Defendants, mission Indians, claimed a prescriptive title to certain lands included within the boundaries of a Mexican grant, which grant was confirmed by the United States and a patent thereto issued to plaintiff's grantor. Defendants did not present their claim to the land commissioners for confirmation. *Held*, that said grant was not subject to any right or interest in the defendants, but was hostile thereto, and no trust relation existed between the grantee and said defendants.

4. Where a grant of land from the Mexican government is confirmed by the United States, and a patent issued thereto, such patent is conclusive evidence of title, as against Indians claiming a prescriptive title to the same land.

Beatty, C. J., and McFarland and Temple, JJ., dissenting.

In bank. Appeal from superior court, San Diego county.

Action by J. Downey Harvey and others against Allejandro Barker and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Shirley C. Ward and Frank D. Lewis, for appellants. White & Monroe, for respondents.

VAN DYKE, J. Plaintiffs claim title to the property in controversy through a patent of the United States issued to J. J. Warner, January 16, 1880, pursuant to the provisions of the act of congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California." Defendants claim a possessory right as mission or pueblo Indians, and by their answers form three groups, describing severally the tracts of land alleged to be occupied by them; the first consisting of 1,907 acres; the second, 266.43; and the third, 120 acres. They base their right of possession to such tracts of land upon the claim that their ancestors were mission Indians, and that they have been in continuous occupancy, use, and possession of said premises from time immemorial, and were in such possession at the time the rights of the plaintiffs' grantor accrued under the Mexican government. At the trial the plaintiffs introduced in evidence the United States patent to Warner, and it was thereupon stipulated that the lands described in said patent included the premises in controversy, and that plaintiffs had succeeded to all the rights of the patentee, and had paid all taxes levied or assessed upon said premises since the patent issued. Thereupon, in support of the claim on behalf of the defendants, there was offered in evidence the expediente of two grants of the Mexican government; the first being made June 8, 1840, to José Antonio Pico by Juan B. Alvarado, governor of California, and the second made November 28, 1844, to Juan José Warner by Manuel Micheltorena, governor general of California. The grant to Pico was of the "land known by the name of 'Agua Caliente,' bounded by the ranch of San José Valle, * * * subjecting himself to pay for the place of worship and other improvements that be there belonging to the San Luis Rey Mission, and not molest [prejudicor] the Indians that thereon may be established, and with the approbation of the most excellent assembly of the department, and the conditions following: First. He is allowed to fence it in, without interfering with the roads, cross roads, and other usages [servidumbres]. He will possess it fully and exclusively, turning it to agricultural or any other use he may see fit, but within a year he shall construct a house thereon and live in it. Second. When the property shall have been confirmed to him, he shall petition the respective judge to give him possession thereof by virtue of this order, and shall mark out the boundaries on whose limits he shall fix the landmarks,—some fruit and wild trees that may be of some utility. Third. The land of which donation is hereby made is of the extent mentioned in the plan which goes with the expediente. The judge who should give possession thereof shall have it surveyed according to law, leaving the residue that may result to the nation for their purposes. Fourth. If he should fail to comply with these conditions, he shall forfeit his title to the land, and it will be denounced by another."

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[1] Rehearing denied November 3, 1899.

Accompanying the grant to Warner of 1844, offered on behalf of the defendants, are the following papers:

The petition of Warner for the place known by the name of "Valle San José," which he alleges is vacant and situated east of the pueblo of San Diego, distant about 20 leagues, and surrounded by mountains:

"To the most R. P. Vincent Olivas: With the object of soliciting in property the place known by the name 'Valle de San José,' formerly occupied by the mission under your charge, I beg of you to be so kind as to inform me if at the present day the mission of San Diego does occupy the said land, and, if not, how long since it has been abandoned. Juan J. Warner."

"The Valley of San José can be granted to the party who petitions for it, inasmuch as the mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the mission. Fr. Vincent P. Olivas. Mission of San Diego, August 5, 1844."

"Office of the First Justice of the Peace, San Diego. In view of the petition which the party interested remits to this office, I beg to state that the said Valle San José is, and has for the past two years been, vacant and abandoned, without any goods nor cultivation on the part of San Diego; but said place belongs at the present time to the said mission, and at petitioner's request I sign this, in San Diego. Juan Ma Marron. August 6, 1844."

The secretary forwarded the papers to the governor, as follows:

"Governor: The land which is petitioned for, it seems that there is no objection to its being granted, according to the information which I inclose from the Rev. P. F. Vincent Olivas, and from the judge of San Diego, Juan Marron. The petitioner is a naturalized citizen, and is a person of good qualities, so that, if your excellency does not dispose otherwise, you can accede to his petition. Manuel Jimeno. Monterey, September 2, 1844."

(Same date.) "Extend to him the title, and I order that he be obliged to procure the plan thereof within four months from this date, and should he fail to comply with such obligation within said term this title will be null and of no value. So it ordered and decreed. Micheltorena."

The deseño or sketch accompanying the petition describing the property includes the entire San José valley. The grant of Gov. Micheltorena recites that whereas one José Warner had petitioned for the land known by the name of "Valle de San José," giving the boundaries thereof, and "having previously complied with the notices and investigations on such matters, as prescribed by the laws and regulations, exercising the powers conferred on me, in the name of the Mexican nation, I have resolved to grant him the said land, declaring it by these presents his property, subject to the approbation of the most excellent assembly of the department, and to the conditions following, to wit." The conditions are similar to those contained in the grant to Pico, with the exception that it omits entirely the clause "not to molest [prejudicor] the Indians that thereon may be established." Thereupon Warner addressed the governor, stating that he would proceed under the grant, and subsequently commissioners were appointed to make an examination and report. In their report they say: "And, it appearing from the said examination that the said concession in favor of Juan J. Warner was made in perfect conformity with what the laws prescribe in this particular, * * * the concession is hereby approved in favor of Juan J. Warner, of the place named 'Valle de San José,' adjudicated in property by the government of this department." This report was subsequently approved by the departmental assembly.

There was also offered on behalf of the defendants the petition of Warner to the land commission, under the act of congress, asking confirmation of his title to the lands in controversy, which it is claimed was based on the two grants referred to. But Warner in the petition says that he claims, by virtue of grants from the Mexican nation, a tract of land in the county of San Diego known as the "Valle de San José and Agua Caliente"; that so much as is known by the name of Agua Caliente was granted in 1840 to José Antonio Pico; that the same had become vested in the petitioner; that the remainder of the tract was subsequently granted to the petitioner in 1844 by Micheltorena;

"that said second-named grant was approved and confirmed to the claimant by an act of the departmental assembly of California passed on the 17th day of June, 1845. The claimant has no knowledge whether such first-named grant has or has not been so confirmed." By the decree of confirmation recited in the patent it is adjudged that "the land described in the grant" is a good and valid claim, and that said land is "known as the 'Valley of San José,' and is bounded and described in the original grant and map to which it refers, copies of which grant and map are on file with the papers in this case as follows, to wit: On the east by the entrance from San Felipe and the mountains; on the west by the mountains and defile of Aguando; on the north by the mountains; the southern limits being the canisal and the mountains to the extent of six square leagues, provided said quantity of six square leagues be contained within the boundaries." The patent contained the usual recitals that the said decree had become final, and a survey of the premises thereafter made and approved, and closing with the usual granting clause.

There were offered also on behalf of the defendants certain depositions and oral testimony to the effect that the defendants and their ancestors were mission Indians, and they had formerly been under the charge of the San Luis Rey Mission, and had been in the exclusive use, occupancy, and possession of the premises in controversy continuously since a time prior to the inception of the plaintiffs' title from Mexico, and had always claimed and exercised the right to so use said property.

To these several offers made on behalf of the defendants, plaintiffs interposed objections on the ground that the evidence offered was incompetent, irrelevant, and immaterial, and that the patent was conclusive as to the title of the patentee. The court reserved its ruling upon such objections, and thereafter sustained the objections and excluded the testimony, to which ruling the defendants excepted. Judgment went for the plaintiffs, and the defendants subsequently moved for a new trial, which motion was denied. The appeal is from the judgment and from the order denying a new trial.

The position of counsel on behalf of the appellants may be summarized as follows: (1) That the patent under which plaintiffs claim specified that it "shall not affect the interest of third persons," and it is claimed defendants are third persons, and are not thereby concluded. (2) That the object of the act of congress of March 3, 1851, was accomplished by presenting, confirming, and patenting Warner's claim to the land in question so as to relieve these defendants of the necessity of presenting their claim to the board of land commissioners. (3) That the decision of the board of land commissioners was not conclusive, except against the claimant and the United States government and parties claiming under the United States government by title subsequent, as it was not the province of such tribunals to pass upon conflicting titles as between individuals; that they were left just as they existed at the time of the change of sovereignty. (4) That under the Mexican law Warner held the legal title subject to the easement of the Indians' possessory rights, and that the confirmation of the legal title and issuance of the patent in no way changed the character of such title, nor freed it from the easement in favor of the defendants. (5) That in order to constitute one a "third person" under the act of March 3, 1851, it is not essential that he should deraign his title through the same specific grant as the party whose title was presented and confirmed; that it is only essential that the party claiming to be a "third person" should have a superior and anterior title to that confirmed, and the fact that his claim is hostile to the claim confirmed does not preclude the existence of a trust in his favor created by operation of law. (6) That it was not required that the title of the Indians should rest upon a specific grant, but their rights were protected by the general law of the land. (7) That the United States assumed both by its treaty and by the law of nations to protect and preserve all existing private property rights within the ceded territory, which it is claimed includes the rights of these defendants.

To sustain such claims the appellants rely upon Byrne v. Alas, 74 Cal. 628, 16 Pac. 523. It was stipulated in that case that the defendants were mission or pueblo Indians; that their ancestors and predecessors had been in the continuous, open and notorious, peaceable and exclusive, possession, occupancy, and use of the premises in controversy, claiming adversely to all the world, ever since and for a long time prior to the establishment of the Mexican republic, and that their claim had not been presented for confirmation under the act of 1851; and that the premises were included within the exterior boundaries of the Mexican grant of the San Jacinto rancho, and patented to Estudillo, from whom plaintiff derives title, and it was expressly provided in that grant that "he [Estudillo] shall in no way disturb or molest the Indians who are established or living thereon at the present time." In the opinion of the court in that case it is said: "The patentee and his grantee under the law and the terms of the grant took the fee, subject at least to the right of occupancy by the Indians; and those rights are still preserved unless the Indians forfeited them by failure to present their claims to the board of land commissioners appointed by the act of March 3, 1851." After reviewing the history of the Indians under the Spanish and Mexican governments, and their treatment by such governments, particularly mission or pueblo Indians, the opinion proceeds: "It becomes necessary to inquire to what extent, if at all, the confirmation of the Estudillo grant and the United States patent affected the claim of these defendants. The fifteenth section of the act of March 3, 1851, provides that the decree or any patent issued under the act shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons. Under this clause the rights of the Indians were preserved without presenting their claims. * * * The patent therefore passed the legal title to the patentee, burdened with whatever equities existed at the time of the cession of California in favor of third persons. Under the treaty the government of the United States stood in the place of the Mexican government. Its patent confirmed the grant, proclaimed it to be good, neither added to nor detracted from it in any way. It left the title of Estudillo just as it was at the time of the treaty, so far as the Indians were concerned, and it remained thereafter as to them just as it would have remained if the treaty had not been made. If the Indians were entitled to possession before the date of the patent, they were entitled to it afterwards, so long as any of the community remained in actual possession. So far as we have been able to learn, nothing remained for them to do, under the laws of Spain or Mexico, to complete their rights of possession. Neither was there any act or writing required on the part of the government. Their right was therefore complete." Referring to section 16 of the act of March 3, 1851, which reads "that it shall be the duty of the commissioners herein provided for to ascertain and report to the secretary of the interior the tenure by which the mission lands are held, and those held by civilized Indians and those who are engaged in agriculture or labor of any kind, also those which are occupied and cultivated by pueblo or rancheros Indians," the court adds: "This language indicates that congress did not intend that the rights of the Indians should be cut off by a failure on their part to present their claims, but that it should be the duty of the commissioners to ascertain and report the tenure by which they held their lands."

The case under consideration, it will be seen, differs materially from that of Byrne v. Alas. Here it is shown that by the investigation of the Mexican officials and their reports, together with the grant to Warner, the land, some portions of which had formerly been occupied, was vacant and unoccupied at the date of the grant, and in the grant the clause in reference to the rights of the Indians is omitted entirely. At the time of the Pico grant, four years before, there may have been some mission or pueblo Indians at the Agua Caliente, covered by that grant. The later grant, as already stated, embraced the whole valley; and this was the grant which was confirmed and patented, as clearly appears from the papers offered in evidence on the part of the defendants. This is also shown by the case of Pico v. Warner, 73 Cal. 17, 14 Pac. 377. In the opinion in that case it is said: "The findings are in substance as follows: On the 8th day of June, 1840, the governor of California granted to José Antonio Pico a tract of land known as the 'Agua Caliente,' to the extent of four square leagues; the same being a part of the Valle de San José, which contains about ten square leagues, and is now situated in San Diego county. On the 28th day of November, 1844, the governor of California granted to the defendant J. J. Warner the tract of land known as the 'Valle de San José' to the extent of six square leagues." The court further say that the Pico grant was rejected, and the Warner grant confirmed, and add: "In pursuance of the confirmation of the Warner grant the United States on the 20th day of February, 1880, issued to Warner its patent for the premises described in the complaint, including the Agua Caliente tract and other lands not embraced in the Pico grant."

It is useless for counsel on behalf of appellants to contend that the Warner grant is the same as the Pico grant in reference to the rights of the Indians. Not to interfere with roads and other usages (servidumbres), under the circumstances, cannot be tortured into the equivalent of a reservation in the grant to "not molest [prejudicor] the Indians that thereon may be established." The grant to Warner neither reserved nor preserved any possessory or other right or supposed right in the Indians; and the reason of the difference between the two grants in this regard is obvious. The record shows that before the Warner grant was issued an investigation was had by the proper Mexican officers, who reported "that the said 'Valle San José' is, and has for the past two years been, vacant and abandoned," and could be granted, "inasmuch as the Mission of San Diego, to whom it belonged, had no means sufficient to cultivate and occupy it, and it is not so necessary for the mission." Any arguments based upon the asserted rights of the mission or pueblo Indians under the Spanish or Mexican régime—and much of the argument on the part of the appellants is on this line—is entirely irrelevant in this case, as the grant under consideration did not interfere with any such alleged rights. Therefore, if it were permitted to go behind the patent to the grant itself, there was no defense on the part of the appellants to the plaintiffs' action. But we are not permitted to go behind the patent in a case like this, and in the light of more recent decisions, both by this court and by the United States courts, Byrne v. Alas can no longer be considered as authority, more especially as to the consequences resulting from the nonpresentation of claims of title to land arising under the laws of Spain or Mexico, and the scope and effect of patents based upon such claims of title. In Minturn v. Brower, 24 Cal. 644, it was held that claims founded on perfect titles—that is, such titles as require nothing further to be done at the date of the change of sovereignty—need not be presented for confirmation, under the act of congress of 1851. And this seems to have been the theory up to the time of Byrne v. Alas. In consequence it is there held that an Indian title, such as this is claimed to be, namely, the right for themselves and descendants perpetually to possess, use, and occupy the land,—without, however, the right of alienation,—was a right or title prior and superior to any grant, and could be asserted successfully against such grant, or the patent issued thereon. The court say: "Under the treaty the government of the United States stood in the place of the Mexican government. Its patent confirmed the grant, proclaimed it to be good, neither added to nor detracted from it in any way." At the time of, or just prior to, the decision in Byrne v. Alas, Phelan v. Poyoreno, 74 Cal. 448, 13 Pac. 681, and 16 Pac. 241, was also decided. In that case the plaintiff claimed under a patent issued upon a confirmed Mexican grant, and the defendants under a grant which was alleged to have conveyed a perfect title, but it had not been presented for confirmation. The judgment below went for the plaintiff, but this court held the unconfirmed grant to be superior in right to the patent, and reversed the judgment. The court there say: "Holders of titles to lands in the ceded territory which were perfect at the date of the treaty could, if they so elected, present them to the commission for confirmation, but were not bound to do so." At the same term Dominguez v. Botiller, 74 Cal. 457, 16 Pac. 241, was decided "upon the doctrine enunciated, and for the reasons given, in Phelan v. Poyoreno, 74 Cal. 448, 13 Pac. 681, and 16 Pac. 241. This latter case, by a writ of error, went to the supreme court of the United States; the error assigned being that this court erred "in holding that under the said act of congress of March 3, 1851, it was not necessary for each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present such claim to the board of land commissioners under said act." After a full and thorough discussion of the questions involved, the judgment of this court was reversed. Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. 525.

In Beard v. Federy, 3 Wall. 478, the contention was similar to that of the appellants, and the court there say: "The position of the defendants is that, as against them, the patent is not evidence for any purpose; that, as between them and the plaintiff, the whole subject of title is open, precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of the patent issued upon the confirmation of a claim to land under the laws of Spain and Mexico. In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when the proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection under them, to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they had declared the manner and terms on which they will discharge this obligation. They have there established a special tribunal before which all claims to lands are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court, and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunal and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. It is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie." The court further defines the meaning of "third persons," mentioned in the fifteenth section of the act of 1851, whose rights are reserved in all patents issued under such act, as follows: "The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimant, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." The opinion in this case has been frequently quoted and approved in subsequent cases by the same court. In Knight v. Association, 142 U. S. 201, 12 Sup. Ct. 271, "property" is defined: "And by the term 'property,' as applied to land, all titles are included, legal or equitable, perfect or imperfect."

In Houston v. City and County of San Francisco, 47 Fed. 337, Justice Field, in rendering the opinion of the court, said: "The alleged grant, if one ever existed, was not presented for examination and confirmation to the board of land commissioners for the settlement of private land claims in California, under the act of congress of March 3, 1851. The land embraced within the alleged grant thus became, by the express declaration of congress in that act, which was passed to carry out our treaty obligations with Mexico, and by the decisions of the supreme court of the United States thereon, public land, no longer subject to any private ownership by virtue of the grant."

In More v. Steinbach, 127 U. S. 80, 8 Sup. Ct. 1070, after referring to the act of congress, and quoting former decisions in reference to Mexican grants, the court say: "The doctrine invoked by the defendants, that the laws of the conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until change be made, does not aid their defense. That doctrine is not applicable to laws concerning the alienation of any portion of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken, except in pursuance of his authority on the subject."

In this case, therefore, if any rights whatever can be conceded to the appellants, under the former Mexican government, such rights were in the nature of private property, or a right dependent upon the will and pleasure of the state or nation. If, as claimed, it were a right to possess, occupy, and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican government, under the act of congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former government to occupy the land, such right would not prevent that government from granting the land unincumbered with such right. This was the case in reference to pueblos under the former régime. The pueblos held title in trust for the use of the inhabitants, not conferred by special grant, but under the laws and regulations of Spain and Mexico; and there were many cases where such governments made specific grants within the territorial limits of the pueblos which were, after the change of government, confirmed and patented by the United States under the act of congress of 1851. The United States, succeeding to all the rights and sovereignty of Mexico, had such power to grant all public lands,—that is, all lands not claimed by private parties; and if owned or claimed by private parties, and not presented for confirmation, the claims were waived or forfeited, and such lands thereafter became public lands. "The ascertainment of existing claims was a matter of vital importance to the government in the execution of its policy respecting the public lands; and congress might well declare that a failure to present a claim should be deemed an abandonment of it, and that the lands covered by it should be considered a part of the public domain." Again: "The power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government, as matter of original jurisdiction is by the act of 3d of March, 1851, exclusively conferred upon the commissioners appointed under the first section of that act." Further: "The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable to the claimant, the land 'shall be held and considered as a part of the public domain of the United States'; but, if favorable, the decrees rendered by the commissioners or the courts 'shall be conclusive between the United States and the claimants.' These acts of congress do not create a voluntary jurisdiction, that the claimant may seek or decline. All claims to lands that are withheld from the board of commissioners during the legal term for their presentations are treated as nonexistent, and the land as belonging to the public domain." And: "Claims, whether grounded upon an inchoate or a perfect title, were to be ascertained and adequately protected." U. S. v. Castillero, 2 Black, 17; Newhall v. Sanger, 92 U. S. 761; More v. Steinbach, supra; Botiller v. Dominguez, supra. Appellants' counsel, to ward off the effect of these decisions,—particularly the Botiller Case,—characterize much of the language used in such opinions as pure dictum. But the opinion in this latter case, as well as the others quoted, have been referred to and adopted by the same court in subsequent cases. In Knight v. Association, supra, the court say: "The patent, being thus conclusive, can only be resisted by those who hold paramount title to the premises from Mexico and antedating the title confirmed." De Guyer v. Banning, 167 U. S. 723, 17 Sup. Ct. 937. When unable to meet and answer opinions of the court, it is a custom of counsel, which would be "more honored in the breach than the observance," to characterize the language used as mere dictum. The answer to such criticism is well stated in the Botiller Case itself: "We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, dicta; for we feel bound to say that they were observations pertinent to the matter under consideration, and seem to have met the entire approbation of the court in whose behalf they were uttered, and, as they embrace a very considerable period of time, during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered."

Many of the questions raised here were presented in the case of Milling Co. v. Thompson, 117 Cal. 594, 49 Pac. 714. The plaintiffs there relied upon a patent issued on the confirmed grant of the Ex-Mission San Fernando. The defense offered to show that the grant was void for the reason that it was an attempted grant of mission lands reserved from, and not subject to, grant under the laws and regulations of the Mexican government, and that the board of land commissioners had no jurisdiction over the subject-matter, and that the decree of confirmation was therefore void. Upon the objection of the plaintiff the evidence was excluded, and this ruling of the court was the principal error assigned. This court, in affirming the judgment in favor of the plaintiff, reviews to some extent the cases already referred to, and says: "The board of land commissioners was authorized to adjudicate upon the validity of every claim for land in California which purported to be derived from the Spanish or Mexican government. The validity of the claim included the authority of the governor to make the grant, as well as the existence or effect of the laws of Mexico concerning the same, and the jurisdiction of the board extended to the determination of each of these questions as fully as to determining whether there had been a compliance with the forms of law in making the grant, and its judgment thereon cannot be collaterally assailed on account of any error it may have committed in reference thereto." This case, aside from the cases from the United States courts already referred to, affords a complete answer to the contention that the land, being occupied by the Indians, could not be granted under the laws of Mexico. But it is claimed that Warner took his title subject to the trust or right of the Indians. Neither the grant nor the patent contains anything to support this contention, and there is no privity between them and the grantee, or anything from which a trust could arise in their favor as against his grant or the patent issued thereon. They are not third persons, within the meaning of the fifteenth section of the act of 1851, as already shown, but are mere strangers to the record. But it is contended that, if the Indians are not third "persons," within the meaning of section 15 of the act of 1851, they are protected by section 16 of that act. By that section it is simply made the duty of the commissioners to report the status of the mission Indians to congress, so that that body might be able to provide for their future government, and to treat them equitably and in accordance with the general policy of the United States. It would appear from that section that the Indians were treated as dependent upon the care and generosity of the government, and were not classed as Mexican citizens who held rights to property. The presumption is that the proper inquiry or investigation was had and reported by the proper officers, as required by law, prior to the confirmation of the Warner grant.

From the foregoing it follows (1) that the decision of the land commissioners, and other appropriate officers of the government of the United States, holding to the effect that the land in question was, at the time it was granted, vacant and subject to absolute alienation, is conclusive on the defendants and all others; (2) that the grant to Warner of the Valle de San José was not subject to any right or interest in the defendants, but that he claimed and held the land granted in hostility to the defendants' pretensions, and there is no trust relation existing between Warner and the said Indians; (3) that the patent issued to Warner upon the confirmed grant to the premises in controversy is conclusive against the defendants. The judgment and order denying a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

BEATTY, C. J. I dissent. The case presented by this record cannot, in my opinion, be distinguished in any material respect from Byrne v. Alas, 74 Cal. 628, 16 Pac. 523. It is true, the grant to Warner, under which the appellant claims, did not contain the provision quoted from the Estudillo grant (74 Cal. 635, 16 Pac. 526), that "he shall in no way disturb nor molest the Indians who are established or living thereon at the present time"; but it was an express condition of the Warner grant that he should not interfere with the roads or other "servidumbres," and it appears from the authorities cited by appellant that the word "servidumbres" had a meaning in Spanish law broad enough to include the servitude corresponding to the right of occupancy claimed by these defendants as successors of the Christianized mission Indians, who, according to the evidence excluded by the superior court, were established and living upon some, at least, of the lands in controversy, long before the date of the Warner grant. The claim that our decision in Byrne v. Alas has been overturned by subsequent decisions of the supreme court of the United States is, I think, unsupported by the cases cited by counsel; and, in the absence of controlling authority, I am unwilling to depart from the doctrine established here upon mature consideration.

McFARLAND, J. I dissent. In addition to what is said in the dissenting opinion of the Chief Justice, I think that the privileges of the Indians would have been preserved even if in the grant to Warner there had been no express words of reservation which could be construed as including them,—if there had been no express reservation whatever. I think that under the general law applicable to the subject,—written and unwritten,—running back through Mexican and Spanish dominion to the sixteenth century, the legal title to the lands like those in question here always passed subject to the right of the Indians to occupy them as they had been accustomed to, "in such manner as that they shall not stand in need of the necessaries of life." See Byrne v. Alas, 74 Cal. 628, 16 Pac. 523, and the authorities there cited. I do not think that they were required to present their claims to the land commission, or that they are even to be charged with knowing that there was such a commission, or with a knowledge of the law generally. They are mere wards of the nation, and it is to be presumed that the nation has always recognized and protected their customary rights, and that all its grants are made with the understanding that the grantees know those rights, and take subject to them.

I concur: TEMPLE, J.

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126 Cal. 279

CITY OF SAN LUIS OBISPO et al. v. FITZGERALD, City Treasurer. (S. F. 2,000.)

(Supreme Court of California. Oct. 6, 1899.)

MUNICIPAL CORPORATIONS—ORDINANCES—ELECTION—CHANGE IN BALLOT.

1. An ordinance passed under St. 1889, p. 399, which provides that a city may fix by ordinance the time and manner for holding certain elections, has the same power and effect, and is to be interpreted as a part of, the statute itself.

2. Although it was not required of the clerk of a city that he send the voters a sample ballot before election, where he does so the voters have the right to assume that the ballots furnished them at the voting booth correspond to the sample.

3. Where a city ordinance calls for a special election, setting forth the propositions to be voted upon, stating that "each voter shall indicate his wish by writing 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote," and the ballots used at the election had the word "Yes" printed in the right-hand margin opposite each proposition, such change is a material departure from the provisions of the ordinance, and renders the election void.

In bank. Petition by the city of San Luis Obispo and another for a writ of mandate against A. F. Fitzgerald, as treasurer of the city of San Luis Obispo. Writ denied.

S. M. Swinnerton, for petitioners.

VAN DYKE, J. This is an original application to this court for a writ of mandate to compel the treasurer of the city of San Luis Obispo to accept from the said D. J. Harris the purchase money for certain bonds of said city, and to issue to said Harris said bonds. The defendant's refusal is based upon the ground that the election held for the issuance of said bonds was illegal and void. Any city, town, or municipal corporation is authorized to incur indebtedness to pay the cost of any municipal improvement requiring an expenditure greater than allowed by the annual tax levy, whenever the legislative authorities of said city or town, by a two-thirds vote of the members thereof, shall determine that the public interest or necessity requires the same. Act March 19, 1889 (St. 1889, p. 399). The act in question prescribes that an ordinance be passed by said city or town as therein specified, calling a special election to submit to the qualified voters thereof the proposition of incurring the debt for the purpose set forth in the ordinance, and provides that no question other than such proposition shall be submitted at that election; and it further requires that the votes of two-thirds of all the voters voting at such special election shall be necessary to authorize the issuance of the bonds provided for. The city of San Luis Obispo, March 20, 1899, passed an ordinance, numbered 107, set forth in the petition herein, requiring a special election under the act referred to, submitting to the voters of said city the proposition of incurring a debt and bonding the city for certain municipal improvements, namely, waterworks and sewers. Section 6 of the ordinance reads as follows:

"The manner of holding said election shall be as follows: (1) As provided by law for holding elections in said city; (2) as provided by the general election laws of this state, except where such general laws may conflict with the state law for elections of the kind hereby called, or with this or any ordinance of this city; and (3) as provided for in this ordinance. The voting for and against said indebtedness shall be as follows: Tickets must be of ordinary election ticket paper, 6x12 inches (variations in size permitted as in said general election law). The heading of such tickets must be, 'Bond Election, City of San Luis Obispo.' Each proposition set forth in section 2 of this ordinance shall be voted on separately, and must be printed on such tickets as follows:

"(1) Bonding for City Water Works, $80,000.00.

"(2) Bonding for Sewer Improvement, $36,000.00.

"Each voter shall indicate his wish by writing, or causing to be written or printed, 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote."

The statute delegates to the city the power to fix by its ordinance the time of holding the election, and the duty of prescribing the time and mode of voting for and against the proposition submitted. Such ordinance, passed in pursuance of the statute, has the force and effect of a law of the state, and is to be construed as if its terms had been incorporated in the statute itself. Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085. The ordinance in question was published as required therein, and, as shown by the petition, the clerk issued a notice for such election, and mailed to the registered voters of said city sample ballots. These sample ballots were in accordance with the ordinance, and were as follows: "Each voter shall indicate his wish by writing, or causing to be written or printed, 'Yes,' or 'No' on the right-hand margin of the ticket, opposite the proposition on which he desires to vote.

BOND ELECTION.

CITY OF SAN LUIS OBISPO.

1. Bonding for City Water Works $80,000.00		
2. Bonding for Sewer Improvement $36,000.00		

The ballots, however, furnished to the voters to be used, and which were used, at the said election, were as follows:

BOND ELECTION.

CITY OF SAN LUIS OBISPO.

1. Bonding for City Water Works $80,000.00	Yes	
2. Bonding for Sewer Improvement $36,000.00	Yes	

It will be seen the ticket to be voted has added the affirmative of the proposition to be voted upon. But it is claimed on behalf of petitioner that the sample ballot is not required in an election of the character in question, and it was, therefore, immaterial whether the ballot furnished corresponded with the sample ballot or not. Still the voter had a right to assume that the ballot which was furnished him as he passed into the voting booth conformed to the sample ballot. The very purpose of a sample ballot, when required or furnished to the voter, is to instruct him as to the matter and form of the ballot he is about to cast. In this case the sample ballot, instead of being a guide to the voter, would have a tendency to deceive him. The ordinance plainly indicated, aside from the sample ballot, that the proposition submitted to the voter was whether he would insert "Yes" or "No" after each of the propositions, and left him entirely at liberty to exercise his preference, without being influenced or handicapped by any preference being indicated on the ticket one way or the other. It is said the voter might, while in the booth, erase the "Yes" and insert "No." In Murphy v. City of San Luis Obispo, supra, the ordinance, as in this case, directed that the voter should indicate his wish by writing, or causing to be written or printed, "Yes" or "No" on the right-hand margin of his ticket, but the ticket as furnished provided for a stamp or cross in the square of the right hand. It was held in that case that such departure from the directions of the ordinance rendered the election invalid, the court saying, "Whatever the statute requires the form to be is mandatory." See, also, Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454. Under the statute, and the ordinance in this case, passed in pursuance thereof, it was the right and privilege of the voter to express his choice by inserting the word "Yes" or "No" at the right hand of the proposition placed on his ticket, entirely free and untrammeled from outside interference by writing or printing thereon any direction or suggestion as to how he should vote. It was, therefore, not only highly improper and irregular to have the tickets printed and furnished the voters as they were in this case, but it was a substantial departure from the provisions of the ordinance in a material matter, and hence rendered the election void. Writ denied.

We concur: BEATTY, C. J.; HARRISON, J.; HENSHAW, J.; GAROUTTE, J.

I concur in the judgment: TEMPLE, J.

HIGGINS et al. v. CITY OF SAN DIEGO et al. (L. A. 577.)

(Supreme Court of California. Oct. 13, 1899.)

CHANGE OF VENUE—INTEREST OF JUDGE—PREJUDICE—AFFIDAVIT—INFORMATION AND BELIEF—APPEAL.

1. A water company had a claim against a city for the use of its plant, contingent on there having been funds in the treasury from which it could have been paid as it accrued. *Held*, that under Code Civ. Proc. § 170, disqualifying a judge having an interest in the litigation, a judge was not disqualified merely by reason of being a taxpayer, though the judgment might become the foundation of a special tax to meet it, or by some other means payment might be enforced, the judge's interest in any event being too remote.

2. The interest of a judge as taxpayer, being made a special ground of disqualification, cannot be considered in support of the ground of bias.

3. The fact of a continuous controversy between a city and a water company, engendering much feeling between the company and its consumers, including the judges, does not show ill feeling on the part of the judges indicating prejudice sufficient to disqualify them from trying an action between the company and the city.

4. A controversy between a water company and one afterwards a judge, in which both aired their grievances in the papers, and the company shut off the judge's water, and he threatened to proceed to forfeit the company's charter, does not show prejudice of the judge disqualifying him from trying an action in which the company was a party.

5. The fact that, in a former application for change of venue, applicant's attorney made an insufficient affidavit, and that the judge became offended, and censured the attorney, and intimated that he might be guilty of contempt, does not show prejudice of the judge disqualifying him to adjudicate the client's case.

6. The fact that in another litigation the attorney incorporated in his brief matter reflecting on the judge, which the latter resented, does not disqualify the judge.

7. Where counsel made no objection at the time to the court's examination (on motion for change of venue) of a witness as to prejudice, and submitted their motion on the evidence as

it went in, they cannot on appeal urge the invalidity of such action.

8. Affidavit on information and belief as to bias is not sufficient to authorize a change of venue, where the sources of information, though readily obtainable, were not brought forward.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Action by T. J. Higgins and others against the city of San Diego and the San Diego Water Company. Appeal from an order refusing a change of venue. Affirmed.

Works & Works, for appellant. H. E. Doolittle and T. L. Lewis, for respondents.

CHIPMAN, C. Plaintiffs bring the action for themselves and all other taxpayers of the city of San Diego. Certain defendants answered the complaint, and the defendant the water company filed a cross complaint. Upon the filing of the answer the plaintiffs dismissed their action, "leaving the contest to be waged between the water company on one side and the city and its officers on the other." The issues are fully stated in the opinion of the Chief Justice on the first appeal (118 Cal. 524, 45 Pac. 824, and 50 Pac. 670), from which it will be seen that the cause was tried upon the issues presented by the cross complaint of the water company. The court held that the water company could not recover, except for the reasonable value of the use of its plant during the time it had been used and held by the city. The demand of the water company is for a money judgment, the amount of which is the only question to be determined. This amount will depend upon whether the claims of the water company accrued at a time when there were unappropriated revenues to meet them, and the answer to the question, when did the claims of the water company equal the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant? In the opinion filed by the court on rehearing, the principle that no indebtedness or liability incurred in any one year shall be paid out of the ordinary income and revenue of any future year, as held in McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, and other cases, was reaffirmed; but it was suggested that "future provision might be made for the payment of a debt, although there might be no revenues of the fiscal year in which the debt was incurred out of which it could be satisfied, —as, for instance, by the adoption by the people of a proposal to pay it, or by other methods that might possibly be suggested." The opinion first rendered was also modified in this: that it was held that the court could not order judgment upon the findings for the reasonable value to the city of the water company's plant and of the water supplied, "because it does not appear that the claims of the water company all accrued at a time when there were unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant." The plaintiffs having dismissed their action, and this court having decided that the portion only of the cross complaint of the water company counting on quantum valebat presented any ground for relief, the cause came on for hearing before the Honorables J. W. Hughes and E. S. Torrance, judges of the superior court, sitting in bank, upon the motion of the water company for an order that the judges of this court secure the services of some other judge of another county to preside at the trial of said cause, or that the judges of this court change the place of trial of the said action to some other county. The motion was heard upon the affidavit of J. M. Howells, president of the defendant water company, in its support, and upon the counter affidavit of H. E. Doolittle, Esq., one of the attorneys for the city, and upon the oral examination of affiant Howells, called as a witness by the city. The court made an order denying the motion, from which the water company appeals. The grounds of the motion were: (1) The judges were disqualified by reason of pecuniary interest in the result of the action; and (2) that they were disqualified by reason of bias and prejudice entertained towards appellant.

1. Upon the question of interest, the undisputed statement in Howells' affidavit is that there are but two judges of the superior court in San Diego county, and that they "are, and each of them is, and was at the times mentioned in the pleadings in this action, resident property owners and taxpayers in said city of San Diego, and their, and each of their, property in said city will be liable to taxation for any amount that may be found due the water company, if it shall be held that a tax shall be levied therefor," and said judges are therefore disqualified to try the action. The inquiry to be made is whether there were unappropriated revenues to meet the water company's claim, and to ascertain, "as the basis of its judgment against the city, just when the claims of the water company * * * equaled the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant." The question as to the liability of the city has already been determined on the first appeal, contingent upon the fact that when the claim accrued there were funds in the treasury applicable to its payment. The water company will be entitled to a general judgment, and it was so ordered by this court, should the facts show the legal basis, whether or not the funds are still available to pay it. The amount of the judgment—that is, the reasonable value of the use of the water company's plant—must be determined by the trial court, and the further fact as to the basis of the liability. In such state of the case, is the judge disqualified because he is a taxpayer?

The rule was thus stated in Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434: "Where, in any litigation, there is any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered, in every such case, without exception, so far as an exhaustive examination of the authorities goes, the disqualification of the judge is held to exist." In City of Oakland v. Oakland Water-Front Co., 118 Cal. 249, 50 Pac. 268, the court said: "In our opinion, the word 'interested,' as used in the section of the Code relied on [section 170, Code Civ. Proc.], embraces only an interest that is direct, proximate, substantial, and certain. * * * We cannot conceive that the legislature meant to declare that the mere contingent possibility that some future supposable financial condition of a municipality might in a slight degree affect a judge as a taxpayer would strip him of all his personal judicial qualities." In Mining Co. v. Keyser, 58 Cal. 315, it was said that the Code provision "should not receive a technical or strict construction, but, rather, one that is broad and liberal"; and the meaning of the court was shown by its adoption of what was said in Stockwell v. Board, 22 Mich. 350, namely, "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application." In further statement of the rule the court said in the Keyser Case: "Undoubtedly the prohibition does not extend to cases where the interest is simply in some question or questions of law involved in the controversy, or when it is indirect and remote." These expressions fairly state the rule, and the spirit in which it must be applied.

Appellant relies on Meyer v. City of San Diego, supra, as decisive of the question. In that case the plaintiff sought to set aside as void a contract between the city and the water company, defendant, involving an expenditure of $1,500,000 of the city's moneys, to be obtained by the sale of bonds which had been voted at a special election, and to enjoin their issuance. The law under which the bonds were to be issued enjoined on the municipality the duty of levying and collecting a special annual tax sufficient to pay interest and provide a sinking fund for the ultimate redemption of the bonds. The court said: "The disqualification does not spring from the fact that the judge is a citizen, inhabitant, and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of forty years, as he shall decide. * * * The judgment which he renders in the case will be binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct, measurable, pecuniary interest." The Oakland Water-Front Case, supra, was distinguished from the Meyer Case by the broad fact that in the Oakland Case, even if the city had succeeded, it was doubtful whether the control of the lands involved would result in profit or loss to its finances, and it was still more doubtful whether the management of the lands would affect the tax rate of the city in any degree; and it was held that under such circumstances the interest was remote, contingent, and speculative, and did not work the disqualification of the judge. We are to apply the foregoing principles, as illustrated by the cases cited, to the facts in the present case. That the water company has a claim for some amount seems to be reasonably certain, contingent only upon there having been funds in the treasury from which it could have been paid from time to time as it accrued. This is not a contingency which applies to the interest of the judge, but is, rather, one of the facts upon which the liability depends. With this contingency supplied by the facts, the water company will be entitled to a judgment, whether or not the funds once applicable have since been used properly or improperly for other purposes, or, if not used at the time, have been carried over to other years, and have been used, or are now beyond the reach of the judgment. If the funds for the fiscal years which might have been applied to the payment of the claim are still on hand, they must be applied to the payment of the judgment; and to that extent, it is urged, the treasury will be depleted, and must be replenished by taxation on the property of the city, including that of the judges. It is also contended that, if there is no money applicable to the payment of the judgment which may be rendered, there will rest a liability upon the city, nevertheless, which may become the foundation for the imposition of a special tax to meet it, or by some other means payment may be enforced, as was suggested in the former appeal of this case; and, in any view of the probable outcome of this litigation, there will result a liability of the city, which, if ever met, must be met by either taxing the property of the inhabitants, or by appropriating funds already raised from taxation.

Conceding all this to be true, still it seems to us that the interest of the judge is too remotely involved to come within the rule. If there are funds now available to meet the judgment, it does not follow by any means that a tax levy would be necessary, or would ever be levied, to replenish the fund so appropriated. It has often been held that judges, as taxpayers, are not disqualified to try damage suits against a municipality, where the judgment is to be paid out of the treasury of such municipality. If in this case it should turn out that there are no available funds with which to pay the judgment, the question remains, how or when will it ever be paid? To say that the people may vote a special tax for that purpose is to look far into the future, and to a very remote and uncertain contingency; and besides it would then be the act of the people, and not of the judge. It is true that his judgment would be the foundation for such possibility, but we cannot believe that the rule goes so far as to preclude a judge from hearing a cause where the enforcement of his judgment is so remote, uncertain, and problematical, and, if ever enforced, must be through some agency independent of the court. Besides, the judgment does not necessarily involve a tax levy at all. It goes no further than to determine that an indebtedness exists, but the contingency remains that it may never be paid. The decision in the Meyer Case was supported in part by City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960, which was in most respects similar to the case here. But that case has since been distinguished in City of Dallas v. Peacock, 89 Tex. 58, 33 S. W. 220, and in Thornburg v. City of Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054. The ground of the distinction, as stated in the latter of these cases, was that "the Nalle Case directly involved the levy of a tax, and the legality of bonds supported by a tax levy already levied, and was to prevent the issuance of bonds for the payment of which it would be necessary to levy a tax before they could have been issued"; and the court said, "In that case tax levies were directly involved, while in this case the suit is a simple suit for the recovery of a money judgment upon the obligation of the city." The court repeated what was said in Peacock's Case, supra,—"that there is no disposition to extend the disqualification of a judge beyond the rule announced in City of Austin v. Nalle." The Thornburg Case was an action to recover of the city of Tyler upon 250 bonds, of the value of $100 each, issued in aid of a railroad. Plaintiff objected to a trial before Judge McCord, who was a taxpayer in the city of Tyler, and he was held qualified. The Peacock Case was an action against the city for personal injuries caused by a broken and defective sewer negligently left open by defendant. In that case the judges raised the question of their qualification on their own motion, two of whom owned residences in the city of Dallas, and all three of them were taxpayers therein. It was held that a judge, as a taxpayer, has no interest in a suit against a city which does not involve a tax. The court said: "There exists a possibility that, where a judgment is given against a city, it may result in an increased levy of taxes, and so the recovery of a judgment by a city may in some cases bring about a reduction of taxation. In the case of State v. Intoxicating Liquors, 54 Me. 564, it is said, 'The interest of the judges is not only extremely minute, but is contingent, and dependent entirely upon the decision of another tribunal.' So in the present case a judgment against the city cannot in any way affect primarily any one of the judges of the court of civil appeals, except upon two contingencies: (1) That the city council have not already levied taxes beyond the limit of their power; and (2) that they may order an increased levy in order to pay the judgment. This seems to us a remote contingency." In the Meyer Case, supra, the validity of the bonds was involved. By that judgment the judge was to place upon his property, or to refuse to do so, a certain, direct, definable, pecuniary burden, capable of mathematical ascertainment; and it was for this reason the judge was held to be disqualified. But such is not the case here, and we do not think the rule should be extended beyond the boundaries defined in the Meyer Case. The action here is on an implied contract for the reasonable value of the use of the water company's plant, and may be tried by a jury. We can see no difference between this case and ordinary cases involving liabilities upon contract generally, where judgments may be entered against cities, counties, or the state. To hold that no taxpaying judge could sit in such cases would render the administration of justice in the courts nearly impossible.

2. The matters relating to the alleged bias and prejudice of the judges are mostly stated on information and belief. The facts claimed to have been stated positively on which appellant relies are (1) that both judges are property holders and taxpayers in the city; (2) that there has been long and continued controversy between the city and water company, which has engendered much feeling between the water company and its consumers, including said judges; (3) that there was a personal controversy between the company and Judge Hughes, both parties resorting to the newspapers to air their grievances, and the company shut off the water from the judge's premises, whereupon he threatened to resort to proceedings to forfeit the company's charter, and that his threats found their way into the newspapers; (4) that shortly before this application was made a similar one was made upon an affidavit held insufficient, and that the judges became offended, and censured the attorney of the company for presenting the same, and said that, unless the affidavit was made through inadvertence, its presentation would be a contempt of court; and (5) that in certain other litigation an application had been made for a change of venue from Judge Torrance's court, which he refused, and that on the appeal the attorneys of the company filed a brief in which it was claimed that said judge was disqualified, and that the circumstances were such that the said judge should, on his own motion, have called in another judge without an affidavit having been filed. As to specification 1, it is sufficient to say that interest is made a special ground of disqualification, and we do not think it should be considered in support of the ground of bias, which is made a distinct and separate ground. The facts under specification 2 do not, we think, show such ill feeling on the part of the judges towards the company as to indicate prejudice

sufficient to warrant us in saying that they are disqualified to try the case. The personal controversy referred to in specification 3 would not disqualify Judge Torrance, even if it could be said to have that effect as to Judge Hughes. But it appeared that the controversy arose before the latter became superior judge, and was not of such nature as would justify us in holding that he carried this old grudge, if he had any, with him on the bench; and, besides, it appeared that the basis of these charges was largely hearsay, and they were stated on information and belief. We can see nothing to justify appellant's conclusion that disqualifying bias exists in the minds of these judges from the episode as to the insufficient affidavit. The judges might without just provocation have thought the attorneys guilty of contempt, and might have said so; but we cannot say that for this reason they would be disposed to bear down upon the attorneys' client, or unduly favor the city. Nor can we so far impeach the sense of fairness and justice which it is presumed rests in the conscience of every judge as to say that, because the attorney has incorporated distasteful and even scandalous matter in a brief reflecting upon the judge, therefore the judge would punish the offense by mulcting the innocent client. If we must presume bias and prejudice towards the client because of ill feeling towards the attorney, it would establish a dangerous rule, by which the attorney through his own fault could have his case transferred to another judge by quarreling with the court. We prefer to believe that a judge may, with or without cause, cordially dislike and even distrust an attorney, and yet be capable of doing exact justice towards his client. The matters conceded to have been stated on information and belief fail to convince us that there exists in the minds of either one of these judges such animosity towards the company as would disqualify him from meting out evenhanded justice in the case. Appellant complains that the affiant, Howells, was put upon the witness stand, and was made to undergo a rigid examination by the judges as to the hearsay statements in the affidavit affecting their feeling towards the water company; and it is claimed that this examination was unauthorized, and his evidence should be disregarded. Counsel made no objection at the time, but submitted their motion on the evidence as it went in. We do not think they can now be heard to object. Upon information and belief it is stated that Judge Torrance became offended because of the brief filed in the supreme court by the attorneys in this case in another action, and complained to that court of the same; that a certain newspaper owned by opponents of the water company was the especial champion of Judge Torrance, and defended him, and "attacked the company and its attorneys in a violent and virulent way"; that there was a strong feeling of friendship between said judge and the opponents of the company; and that said judge entertained feelings of personal animosity towards the company, its managers and officers. We do not think the evidence warrants the conclusion (for it is but a conclusion, and cannot be received as a fact because so stated by affiant) "that the judge entertained feelings of personal animosity towards the company, its officers and managers." The facts, as drawn out, fail to justify the conclusion. It should be added that affidavits based upon information and belief, especially where the sources of the information are readily obtainable, as was the case here, but were not brought forward, have but weak probative force as ground for change of place of trial. The court has in many cases so held, and in some of them it has been held that a statement upon information and belief, standing alone, is not sufficient to authorize the change to be ordered. People v. McCauley, 1 Cal. 379; People v. Williams, 24 Cal. 31; People v. Shuler, 28 Cal. 490. We have given the proofs submitted careful scrutiny, for the reason that appellant's counsel are at some disadvantage because of the strained personal relations between them and the judge before whom the case is pending. But we cannot bring ourselves to believe from the evidence that this judge is legally disqualified to go forward with the hearing. The order should be affirmed.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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126 Cal. 296

PEOPLE ex rel. STONE v. JEFFERDS et al.
(Sac. 427.)

(Supreme Court of California. Oct. 12, 1899.)

ACTION—FAILURE TO PROSECUTE—DISMISSAL —LACHES.

1. Code Civ. Proc. § 581, subds. 3, 4, prescribing the circumstances under which an action may be dismissed, is not the sole source of power to dismiss an action for failure to prosecute, but such power exists independent of the Code.

2. In an action by the state, on the relation of an individual, against an irrigation district, formed under the statutes of the state, to have such district declared to have no legal existence, laches may be imputed to plaintiff for failure to prosecute with due diligence, so as to authorize dismissal.

Commissioners' decision. Department 1. Appeal from superior court, Yuba county.

Action by the people, on the relation of C. E. Stone, against William M. Jefferds and seven others, claiming to be directors of the Brown's Valley irrigation district, and said district, to have said district declared to have no legal existence. From an order dismissing the action, plaintiff appeals. Affirmed.

Atty. Gen. Ford and C. W. Cross, for appellant. Forbes & Dunsmore, W. H. Catlin, and M. E. Sanborn, for respondents.

CHIPMAN, C. Motion to dismiss the action for want of prosecution. The suit was brought in the county of Yuba to have the Brown's Valley irrigation district declared to have no legal existence. The original complaint was filed January 3, 1891, and was signed by Atty. Gen. Johnson. The defendants, except the defendant corporation, filed demurrers January 16, 1891, which were amended March 28, 1891, and as amended were, on June 16, 1891, sustained, on the ground that said defendant corporation should be made a party to the action. On September 2, 1892, plaintiff filed an amended complaint, signed by Atty. Gen. Hart, to which all the defendants, including the defendant corporation, demurred on September 23, 1892. Nothing further was done in the case, so far as the court minutes show, until December 7, 1896, when W. G. Murphy, Esq., of counsel for plaintiff, served upon defendants a notice that plaintiff would move the court on December 26, 1896, at 2 o'clock p. m., "to have a day set for the hearing of the demurrers of defendants to the plaintiff's amended complaint." The minutes of the court show that on December 26, 1896, said motion last above set forth "was, on motion, continued until called up," but upon whose motion does not appear by the minutes. On March 30, 1897, a notice of motion, and an affidavit in support thereof, to dismiss said action for want of prosecution, were served and filed by defendants' then attorneys. This motion came on to be heard April 9, 1897, all parties being represented by counsel; whereupon the attorneys for plaintiff objected to the consideration of the motion on the ground that plaintiff's motion to have a day set for hearing the demurrers should be first heard and determined, which objection was overruled. Plaintiff's attorneys thereupon moved that the demurrers be taken up and heard or a day fixed to hear the same. The court sustained defendants' objection to an immediate hearing of the demurrer, and reserved its ruling as to the other branch of the motion until after it had determined the motion to dismiss the action. Affidavits on behalf of plaintiff and counter affidavits on behalf of defendants were then presented, the motion to dismiss was heard, and on April 13, 1897, was granted. The appeal is from the order dismissing the case.

Appellants make the following objections: (1) That the court had no authority to dismiss the action; (2) that laches are not imputable to the state; (3) the case cannot be dismissed unless it be shown that those in whose behalf the action is prosecuted have themselves been negligent; and (4) that the court abused its discretion.

1. It is contended that section 581 of the Code of Civil Procedure provides the only authority for the court to dismiss an action, and that this case does not fall within the terms or meaning of that section, and therefore the order was unauthorized. That section prescribes the circumstances under which an action may be dismissed. The subdivisions applicable, if any, are as follows: "(3) By the court, when the plaintiff fails to appear at the trial and the defendant appears and asks for a dismissal. (4) By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it." The contention is that under these provisions the plaintiff must either fail to appear at the "trial," or he must abandon the case upon the "trial" and before the final submission.

The learned attorney general and his associate in the brief of appellant say: "In support of this point, we are compelled to attack a number of decisions of this court, which, we respectfully submit, were inadvertently made." Grigsby v. Napa Co., 36 Cal. 585, and Chipman v. Hibberd, 47 Cal. 638, are given as examples. It is suggested that these decisions do not refer to any statute authority, and that they must have been decided upon the theory "that the plaintiff had practically abandoned his cause of action." It is further suggested that "the later cases simply follow the earlier cases, without going into the reason upon which the earlier cases were based." Counsel then proceed to argue that the Code has laid down the only grounds for dismissal, and the circumstances under which alone the court can exercise the power, invoking the maxim, "expressio unius, exclusio alterius est." In a nutshell, the contention is that the plaintiff "must either fail to appear at the 'trial,' or he must abandon the case upon the 'trial,' and before its final submission." It is hence argued that, as the case never came to trial, the plaintiff did not "fail to appear on the trial," nor did he "upon the trial, and before the final submission of the case, abandon it," and therefore there was no authority to dismiss the case. We have re-examined the cases, in view of this challenge of their correctness.

In Hassey v. Association, 102 Cal. 611, 36 Pac. 945, it was said: "The power of the court to dismiss an action under section 581, Code Civ. Proc., or independent of that section, has been too often exercised and upheld by this court to leave the question an open one." See, also, McLaughlin v. Clausen, 116 Cal. 487, 48 Pac. 487; Bank v. Nason, 115 Cal. 626, 47 Pac. 595.

Section 148, subds. 3, 4, Prac. Act, read as do the same subdivisions of section 581, Code Civ. Proc., and section 149, Prac. Act, provided as does section 582, Code Civ. Proc., to wit: "In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits." It was said in Grigsby v. Napa Co., 36 Cal. 585, that, on an appeal from an order dismissing the action for want of prosecution, "it has not been the practice of this court to interfere, except where the district court has abused the discretion which it necessarily exercises in this class of cases, and in invoking the aid of this court it is incumbent on the appellant to establish affirmatively that there has been such abuse of discretion. Until the contrary appears, the presumption is the discretion of the district court was rightfully exercised."

In Dupuy v. Shear, 29 Cal. 238, upon motion, the complaint was stricken from the files for want of prosecution. The court said: "We do not think such a case is provided for in sections 148 and 149 of the practice act; but the court, having got possession of the case by the commencement of the suit, must have some power to dispose of it when the plaintiff declines or neglects to proceed." Here was an express recognition of the power to dismiss notwithstanding the statutory provisions. See, also, Carpentier v. Minturn, 39 Cal. 450, where sections 148 and 149 of the practice act were cited in the briefs.

In Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530, it was decided that "the court had power to dismiss the action for want of prosecution (see Code Civ. Proc. § 581), and, there being no showing to the contrary, we must presume that the court below exercised its power properly and within the rules prescribed by law." The circumstances were not shown in the report of the case, and possibly it is not in point.

Saville v. Frisbie, 70 Cal. 87, 11 Pac. 502, was a case where the power was exercised, but no reference was made to the Code section in the opinion. And so in Kornahrens v. His Creditors, 64 Cal. 492, 3 Pac. 126. In Simmons v. Keller, 50 Cal. 38, the cause was at issue of fact by answer filed December 21, 1870. In March, 1873, defendant gave notice of a motion to dismiss the action for want of prosecution. Plaintiff resisted the motion on a showing that the defendant had pleaded the statute of limitations, and that there was another case pending in the supreme court in which the statute was pleaded, and which was like the case at bar, and that plaintiff had desired to wait until such case was decided, in order to know whether the statute was a valid defense,—a situation similar to that found in this case. In plaintiff's brief, sections 581, 582, Code Civ. Proc., were cited, and the point was made, as it is now made, that the maxim, "Expressio unius," etc., applies. The court said: "A similar question was presented in Chipman v. Hibberd, 47 Cal. 638, where we affirmed the order of the district court dismissing a pending action for the failure of the plaintiff to prosecute within a reasonable time. We think there was no abuse of the discretion of the court in this case." See, also, Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57.

Conceding that appellant's reading of section 581 is correct, it does not follow that the power to dismiss an action for lack of prosecution does not reside in the court except upon a showing in conformity with the provisions of that section. It was pointed out in People v. Latham, 53 Cal. 386, that the power to dismiss an action was first exercised by equity courts. For a long period, however, courts of law have exercised the authority as part of their inherent powers, and the same rules now apply to a dismissal at law or equity, under code procedure. 6 Am. & Eng. Enc. Pl. & Prac. p. 910, and cases cited.

The cases are numerous where this court has been called upon to decide as to the correctness of orders made upon motions to dismiss for failure to prosecute. I do not find any case where the power was distinctly referred to subdivision 3 or 4 of section 581, or to the same provisions in the practice act. Dupuy v. Shear, supra, however, is direct authority for dismissing an action where the plaintiff has neglected to proceed, and where he had not failed to appear at any trial (subdivision 3), and where he had not at any trial, before final submission of the case, abandoned it (subdivision 4). As late as Hassey v. Association, supra, this court said that the power existed "independent of that section." We are unwilling to believe that the rule was founded in error, and that its frequent reaffirmance has been by inadvertence. The court has, rightly we think, refused to regard the Code provisions as the sole source of the power to dismiss for failure to prosecute the action.

2. It is urged that Brown's Valley irrigation district is a quasi public corporation, and, representing, as it does, the interests of the people of the state, that laches cannot be imputed to the corporation. We are cited to People v. Holden, 28 Cal. 124, where, in an action to try the right to an office, it was suggested as doubtful (but not decided) whether counsel for the relator could bind the state by a stipulation. Also to Weber v. Commissioners, 18 Wall. 57–71, where the presumption arising under the statute of limitations as applicable to the state was held not to arise in the case of the wharves and other rights of the state in the harbor of San Francisco, which the legislature had directed the board of state harbor commissioners to take into their possession. It is a rule that statutes are construed as not including the sovereign except the construction is compelled by express terms or by necessary implication, as, for example, statutes of limitations; but it was held in Re Royer's Estate, 123 Cal. 614, 56 Pac. 461, that the University of California, though a public corporation and a state instrumentality, is not clothed with the sovereignty of the state, but is included in the statute (Civil Code, § 1313), which limits the amount of any bequest in its nature charitable. We do not think an irrigation district, formed under the statutes of the state, is clothed with the sovereignty of the state or is the sovereign. If appellant's contention be sound, we can see no way by which an action brought in the name of the people could ever be brought to trial unless the plaintiff was disposed to allow it to be done. There is no reason why, in a case like this, the plaintiff should have immunity from the operation of rules of practice and rules of law applicable to other litigants. No permanent injury can come to the state by the dismissal; for, if the defendant corporation is illegally exercising a franchise, the order is not a bar

to another action. The continued exercise of a franchise without right is a continuously renewed usurpation, on which a new cause of action arises each day. People v. Stanford, 77 Cal. 360, 18 Pac. 85, and 19 Pac. 693. The state was in this case also protected against costs by an undertaking.

3. Appellant's point, that those in whose behalf the action was brought must be shown to have themselves been negligent, rests upon the reasons advanced in support of the point just considered, and need not be further noticed.

4. Appellant suggests that there was an abuse of discretion, but the point is not argued nor insisted upon. Reliance seems to have been placed wholly upon the objections already considered. We will therefore not undertake to present the evidence upon which the court acted. In the judgment the learned judge who heard the motion has stated quite fully the facts and the reasons impelling his decision. We are not shown wherein these facts were not supported by the evidence, nor can we say that his conclusions indicate an abuse of the discretion with which he was clothed. I advise that the order be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(126 Cal. 213)

DOEG v. COOK et al. (L. A. 549.)[1]

(Supreme Court of California. Sept. 28, 1899.)

MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTS IN STREETS—NEGLIGENCE—ACTION—JOINDER OF PARTIES.

1. An action for damages for injury caused by a defective highway will lie against a town marshal acting ex officio as street commissioner, whose duty it is to keep the highway in repair, and the board of town trustees, where the duty of maintaining the safety of highways is correlative with the right accorded them by charter, of opening, lighting, and keeping in good repair the highways of the municipality.

2. It is proper to join as defendants in an action for damages for injury resulting from a defective highway the town marshal, his bondsmen, and the board of town trustees, when the injury resulted from the separate, but concurrent, negligence of the marshal and trustees.

Department 2. Appeal from superior court, Ventura county.

Action by A. Hope Doeg against F. S. Cook and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

B. F. Thomas, for appellant. Shepherd & Eastin and Blackstock & Ewing, for respondents.

HENSHAW, J. This action was brought to recover damages for personal injuries sustained by plaintiff by falling into a culvert on a public highway of the town of San Buenaventura. The defendants are the town marshal, who is also ex officio street commissioner, his bondsmen, and the individuals composing the board of town trustees. The charge in the complaint is that the marshal and the trustees, whose duty it was to maintain the highway in good repair, negligently suffered and permitted the culvert to remain in an open and dangerous condition, without railing or protection, and they permitted a railing, which had been erected to guard against the dangers of the culvert, to be removed, and failed, negligently, to replace it. The plaintiff upon a dark night fell into the culvert and sustained injuries, in compensation for which he brings this action. By the charter of the town it is declared that "the trustees have the power to provide for the opening, lighting and keeping in good repair streets and alleys," etc. St. 1875–76, p. 535, § 17. By section 10 of the same act, the marshal "shall perform the duties of street commissioner, and be governed by the provisions of this act, and such regulations or ordinances as the board of trustees may adopt relative thereto." Plaintiff further pleaded an ordinance of the town by which the street in question was declared to be a regularly graded, open, and accepted public street, "and it is hereby declared to be the duty of the street commissioner to keep the same open and in good repair as such." This complaint was demurred to upon grounds both general and special. The demurrer was sustained, and from the judgment entered thereon plaintiff appealed.

It is first insisted in support of the demurrer—and this may be said to be the principal question in the case—that the complaint states no cause of action, because an action will not lie against public officers such as these for injuries resulting from their mere negligent omission. It is well settled in this state that generally an action will not lie against a municipal corporation for the misfeasance, malfeasance, or nonfeasance of its officers (Huffman v. San Joaquin Co., 21 Cal. 426; Winbigler v. Mayor, etc., 45 Cal. 36; Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364; Arnold v. City of San José, 81 Cal. 618, 22 Pac. 877); and, if the position of respondents is sound upon this contention, it must result that an injured party under circumstances such as these has no redress whatsoever. Upon the question thus presented it must at once be conceded that there is a conflict in authority, but the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when its performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby. Shear. & R. Neg. (3d Ed.) § 156, thus states the rule: "The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task,—in other words, is simply ministerial,—he is liable in damages to any one specially injured either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority." In Robinson v. Chamberlain, 34 N. Y. 389, the question is considered at length, and many cases reviewed. It is there said: "In Adsit v. Brady, 4 Hill, 630, the broad rule is laid down that 'when an individual sustains an injury by the misfeasance or nonfeasance of a public officer, who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case.' This is a healthful rule, sound entirely in public policy, if as a rule of law it can be questioned. As a rule of law, as there applied, it has stood for nearly a quarter of a century, and I think should continue." Without further quotation of authorities upon the question, it will be sufficient to refer to the instructive note to Commissioners v. Duckett, 83 Am. Dec. 557, where the liability of road officials for negligence in repairing and maintaining public highways is elaborately considered, and to Whart. Neg. §§ 285, 286; Elliott, Roads & S. p. 506. We conclude, therefore, that in proper cases—and this assuredly is one—such liability upon the part of a public officer exists. Further, we think that the circumstances under which such liability will attach are sufficiently shown by this pleading. The duty upon the part of the trustees to keep the highways in repair is correlative with the right accorded them by the charter to provide for the opening, lighting, and keeping in good repair the streets of the municipality. Upon the part of the marshal, it appears that he was ex officio street commissioner, charged with the duty of street commissioner under the law, and with such duties as might be imposed upon him by the board of trustees of the town, and that by the ordinance the special duty was imposed upon him of keeping this particular street in good repair.

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[1] Rehearing denied October 27, 1899.

Further grounds of demurrer were improper joinder of parties defendant, and the misjoinder of causes of action. Herein it is urged that the trustees' negligence, if negligence could be imputed to them, was not joint with the negligence of the marshal; that the marshal and the trustees were in no sense fellow delinquents or joint tort feasors, and the causes of action were separate. Still further it is urged that, while it was permissible to join the marshal's bondsmen in an action against him for official negligence, the trustees were improperly joined as defendants with those bondsmen. It is unquestionably the rule that an action cannot be maintained against several defendants jointly for damages when there has been no concert of action or unity of design among them. But, upon the other hand, where direct personal injury is occasioned by the separate but concurrent negligence of two parties at one and the same time, an action will lie against one and all of them, and it is such an action as is here being prosecuted. Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165; Colegrove v. Railroad Co., 20 N. Y. 492; Klauder v. McGrath, 35 Pa. St. 128; 17 Am. & Eng. Enc. Law, 602, 603. It has been settled in this state since the case of Van Pelt v. Littler, 14 Cal. 194, that a plaintiff need not first recover judgment against an official before proceeding against the sureties upon his official bond, but that the official and his sureties may be joined in the same action. Since in this case it was proper for plaintiff to unite the marshal with the trustees, and since, also, it was proper to unite the sureties with the marshal, it is not perceived that either the trustees or the sureties have any just cause of complaint because they are both impleaded. If the result of the litigation should be to exonerate the trustees, the presence of the sureties as defendants would not affect them. If, upon the other hand, the result of the litigation should be to hold the trustees liable and exonerate the marshal, the sureties would go out of the case with their principal, and this could not affect the trustees. If, again, judgment should be rendered finding both the marshal and the trustees liable, there could be but one satisfaction, and, so far as the sureties are concerned, the recovery would be limited to the amount of their official bond, but it could not be injurious to the trustees to have the judgment to the extent of the bondsmen's liability satisfied by them.

It is unnecessary to discuss the question of the validity or invalidity of section 23 of the Vrooman act (St. 1885, p. 161), since, as has been said, the duty of the defendants, as trustees and as street commissioner, is clearly established by the charter. The judgment appealed from is reversed, and the cause remanded, with directions to the court to overrule the demurrers.

I concur: TEMPLE, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice HENSHAW. It is to be said, however, that this is a case of marked negligence on the part of respondents, and that a street commissioner or road overseer could be held to the exercise of only a reasonable degree of care, and would not be liable for accidents caused by slight imperfections in a highway.

126 Cal. 351

PEOPLE v. HURLEY. (Cr. 547.)

(Supreme Court of California. Oct. 20, 1899.)

BRIBERY — OFFER TO RECEIVE — DELEGATE-ELECT—MEMBER OF A POLITICAL CONVENTION—EVIDENCE.

1. Under Pen. Code, § 57, which provides that every person who gives or offers a bribe to any member of a political convention, and every member of such a body who receives or offers to receive any such bribe, is punishable with imprisonment in the state prison, one who offers to receive a bribe, with intent to influence his vote, is guilty, though no offer of bribery is made to him.

2. One elected as a delegate to a political convention not yet organized is a member thereof, within the meaning of Pen. Code, § 57, which provides that every person, a member of such a convention, who receives or offers to receive a bribe, is punishable by imprisonment in the state prison.

3. In a prosecution for offering to accept a bribe, evidence that defendant offered to accept a bribe from a candidate other than the one referred to and charged in the indictment is not admissible, where there is no connection between the two offers.

Commissioners' decision. Department 2. Appeal from superior court, Napa county.

Patrick Henry Hurley was convicted of offering to accept a bribe, and appeals. Reversed.

E. L. Webber, Webber & Rutherford, and Geo. E. Caldwell, for appellant. Atty. Gen. Ford, for the People.

HAYNES, C. The defendant was indicted by the grand jury of Napa county for offering to accept a bribe, was tried, convicted, and sentenced to imprisonment in the state prison for the term of one year, and appeals from the judgment and an order denying a new trial. The defendant demurred to the indictment, and his demurrer was overruled. After conviction, and before sentence, he moved in arrest of judgment; and, that motion having been denied, he moved for a new trial, and that motion was also denied.

The defendant was indicted under section 57 of the Penal Code, which is as follows: "Every person who gives or offers a bribe to any officer or member of any legislative caucus, political convention, committee, primary election, or political gathering of any kind, held for the purpose of nominating candidates for offices of honor, trust or profit, in this state, with intent to influence the person to whom such bribe is given or offered to be more favorable to one candidate than another, and every person, member of either of the bodies in this section mentioned, who receives or offers to receive any such bribe, is punishable by imprisonment in the state's prison not less than one nor more than fourteen years." The indictment charged, in substance, that at a primary election held in the Veterans' Home precinct on September 14, 1898, the defendant was elected a delegate to the regular Republican county convention to be held on September 22d for the purpose of nominating candidates for the various county offices of said county, among which was the office of superintendent of schools; that John A. Imrie was a candidate for the nomination to said office by said convention; that on the 21st day of September, 1898, the defendant, as such delegate and member of such convention, did unlawfully and feloniously offer to receive from said John A. Imrie, as such candidate for said office, a bribe of $10, with the willful, unlawful, and felonious intent that it should influence him, said Hurley, to be more favorable, as such delegate, to said Imrie, as such candidate, than to any other person seeking said nomination. Appellant contends "that, before he could have been guilty of any crime, Imrie, the candidate, must have offered appellant a bribe, and appellant must have received or offered to receive such bribe." This construction cannot be sustained. It is, in effect, that a delegate to a nominating convention may, without violating this statute, offer to receive money in consideration of his vote or influence in favor of a candidate, if the candidate has not offered to bribe him, and that he violates it only when a candidate offers him a bribe for his vote or influence, and the delegate offers to accept the offered bribe. It may be assumed as a general rule that, when the transaction arrives at the stage of mutual offers to give and receive, it does not halt long enough to permit a prosecution for the offense of offering to give or receive a bribe. Counsel seem to think the words "such bribe," in the last clause of the section, refer to the bribe offered or given to any officer or member of a political convention, and that the offense described in the last clause consists in offering to accept it. If Imrie, the candidate, had approached the defendant and offered to give him $10 for his vote, or for his influence as a member of the convention, he (Imrie) would have been guilty of offering a bribe, under the first clause of the section; whereas, if the defendant offered his vote or influence in favor of Imrie if Imrie would pay him $10, the defendant would be guilty under the last clause,—the words "such bribe" referring to the intent in the first case to secure the influence or vote of the delegate in favor of the candidate, and in the second case to an offer by the delegate to receive a bribe for such or the like vote or influence.

The nominating convention was to be held on the 22d day of September, and the offer to receive the bribe charged in the indictment was on the day before the convention met; and it is argued on behalf of appellant that he was not, at the time the alleged offer was made, a member or officer of any convention, and was therefore not guilty of any offense under said statute. This construction would leave the delegates to a nominating convention free to indulge in bribery with perfect security up to the moment of the organization of the convention, and in many cases permit coin to dictate nominations that otherwise would never be made. It cannot be assumed that the legislature intended to shut the door against corruption only during the sitting of the convention, and to leave it conveniently open until the moment of its organization. Such construction of the statute cannot be indulged unless its language requires it. Its language is, "and every person, member of either of the bodies in this section mentioned, who receives or offers to receive any such bribe." The primaries for the election of delegates to the convention were held on the 14th of September, and the defendant was elected that day; and the question is whether he then became a member of the convention, within the meaning and for the purposes of the statute. No oath of office or bond or other formality is required to complete his qualification as a member. The fact of his election is all that is required. He is then the representative of his constituents, and his obligation to them to honestly and faithfully represent them commences at that time. The power of the convention only extends to the ascertainment of the fact of his election as a representative of his precinct, and adds nothing to his qualification as an officer or delegate. His offense was primarily and principally against his constituents, though affecting injuriously the people of the whole county. In speaking of the rule in regard to the strict construction of penal statutes, Judge Sutherland, in his work on Statutory Construction (page 441), says: "Nor does it preclude the application of common sense to the terms made use of in the statute to avoid an absurdity which the legislature ought not to be presumed to have intended. Though a statute may be of a class which must be construed strictly, it is nevertheless to be so construed as to effect the intention of the legislature. Effect is to be given to the plain meaning of the language, and strict construction is to be applied only where the effect is reasonably open to question. The rule that penal statutes are to be construed strictly is not violated by allowing their words to have their full meaning, or even the more extended of two meanings, where such construction better harmonizes with the context." One of the definitions of the word "member" given by the Century Dictionary is: "A person considered in relation to any aggregate of individuals to which he belongs,—particularly one who has united with or has been formally chosen as a corporate part of an association or public body of any kind." So we often speak of members of the legislature or members of congress, though the body of which the person is such member is not organized or in session. This contention of appellant is not sustained.

The points already discussed dispose of the two requests made by the defendant to instruct the jury, and they need not be specially considered. They were each properly refused.

A witness called by the prosecution testified that she was a candidate for the office of county superintendent of schools, and had a conversation with the defendant, after he was elected a delegate, in regard to her candidacy, and was asked to state what that conversation was. The defendant objected that it was immaterial, irrelevant, and incompetent, unless the prosecution connected Imrie with it. The district attorney stated that defendant made certain statements to the witness to the effect that he wanted money for his vote, and that the evidence would tend to show whether or not he approached Imrie. The court said: "If it tends to prove another crime, it perhaps would not be admissible; but, if it simply tends to show that he was announcing a proposition to make a demand for money from candidates, it perhaps would be,—if it is with a view of tending to show whether he may have approached Imrie, who he says approached him." The objection was overruled, and the witness testified, in substance, that she called on the defendant the day after the primaries, and informed him that she was a candidate for county superintendent of schools; that defendant took a paper out of his pocket, and showed her a list of the names of the men whom he had on his ticket at the primary, and talked some time, and finally said: "Well, don't you understand what I mean?" Witness said, "No;" and he said: "Well, if you get the office, you will live on beefsteak; and what am I going to live on,—hash?"—that she could not repeat all his words, but that his vote would be had for some equivalent. The court erred in receiving this testimony. There was no connection between the interview with Miss Thomas and that with Mr. Imrie. Its only effect would be merely to show that he was likely to ask other candidates for a consideration for his vote or influence, or, as said by the district attorney, "it will tend to show whether or not he approached this other candidate"; but, if it had that tendency, it was only because he had shown himself capable of perpetrating such offenses. There was no necessary or logical connection between the two cases. "That evidence of a distinct and substantive offense cannot be admitted in support of a charge of the commission of another offense is a general rule laid down by all the authorities." People v. Lane, 100 Cal. 385, 34 Pac. 856. See, also, Whart. Cr. Ev. § 29.

The demurrer to the indictment and the motion in arrest of judgment were properly overruled, but for the error in overruling the defendant's objection to the evidence of Miss Thomas the judgment and order appealed from should be reversed and a new trial granted.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

126 Cal. 327

HAZEN v. NICHOLLS et al. (Sac. 517.)

(Supreme Court of California. Oct. 19, 1899.)

MORTGAGES — REDEMPTION — TITLE — PLEADING—UNCERTAINTY.

1. One who alleges that he is the owner of land, but does not show that he derived his title through the mortgagor, has no interest that will support an action to enjoin a foreclosure sale, or to compel an accounting to ascertain the amount of the mortgage debt, so as to permit him to redeem.

2. A complaint in an action to enjoin a mortgage foreclosure sale, and for an accounting between plaintiff and the mortgagee, which alleged that the trust deed was given "to secure the payment of $10,370 and interest, and matters incidental to said trust," and then alleged "that no other or different sum than said $10,370 is, or ever has been, due or payable, or chargeable against said land," without disclosing any fact to show why, if the principal sum is due, the interest and matters incidental are not, is demurrable for uncertainty.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county.

Action by P. J. Hazen against W. & P. Nicholls and another to enjoin a foreclosure sale, and to compel an accounting. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

P. J. Hazen, in pro. per. C. W. Eastin, for respondents.

BRITT, C. It is in substance alleged in the complaint in this action, which was filed January 30, 1897, that plaintiff is the owner of several tracts of land described; that on July 1, 1893, one Vivian, who was then the owner of said land, executed to certain of the defendants, as trustees, a deed and conveyance thereof as security for the payment by Vivian to the defendants W. & P. Nicholls "of the sum of ten thousand three hundred and seventy dollars and interest, and matters incidental to said trust; * * * that no other or different sum than said ten thousand three hundred and seventy dollars is or ever has been due or payable, or chargeable against said land, under the terms of said instrument or otherwise"; that defendants claim that there is due and unpaid on said security the sum of $13,613.74, with interest thereon from December 24, 1896, and have advertised the land for sale under the terms of said trust deed, and intend to sell it to raise that amount; that plaintiff has demanded of defendants an account and statement of their claim, which they have refused; that the land is of the value of $20,000; that plaintiff is ready and willing to pay any sum which is legally or equitably a lien on the land, but by reason of said unfounded claim of defendants he is prevented from redeeming it by such payment. The prayer is that defendants be enjoined from further proceeding under such trust deed, that the sum payable thereunder be ascertained, and that plaintiff may redeem the land on payment thereof. Defendants demurred to the complaint on the ground that it states no cause of action, and for uncertainty in several particulars. The court sustained the demurrer, and judgment passed for defendants.

The plaintiff does not show himself to be entitled to redeem the land from the alleged lien, or to demand an account of the debt of Vivian to W. & P. Nicholls. Although he avers that he is now the owner of the land, yet he in no way connects himself with the title formerly held by Vivian. For anything stated in the pleading, the alleged title of plaintiff may have accrued to him as purchaser at a tax sale, or by other means in hostility to Vivian. A stranger to the title of a mortgagor—one who claims no subsisting interest under him, and who does not act by his authority—has no right to make a tender of the debt, or otherwise intermeddle in the relations created by the mortgage. "Nothing is plainer," said Judge Cooley, "than that such a person has no right of redemption." Sinclair v. Learned, 51 Mich. 339, 16 N. W. 672. And so are all the cases. See Jones, Mortg. §§ 1055, 1055a, 1059. The rule must be the same in cases like the present, and for reasons perhaps yet stronger; for the trustee himself holds for security not merely a lien, but the legal title of the debtor. Bateman v. Burr, 57 Cal. 480. Plaintiff having failed to connect himself by his allegations with the rights of Vivian, those rights certainly can afford him no cause of action. The case of More v. Calkins, 85 Cal. 177, 24

Pac. 729, relied on by plaintiff, affords no support to the pleading here.

The complaint is also uncertain. It is first charged that the deed was made to secure payment of the sum of $10,370 "and interest, and matters incidental to said trust"; but further it is alleged that "no other or different sum than said ten thousand three hundred and seventy dollars is or ever has been due or payable, or chargeable against said land," without disclosing any fact to show why, if the alleged principal sum is due, the said "interest and matters incidental" are not also due. The demurrer was rightly sustained, and the judgment should be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

126 Cal. 315

EAST RIVERSIDE IRR. DIST. v. HOLCOMB, Sheriff, et al. (L. A. 537.)

(Supreme Court of California. Oct. 18, 1899.)

JUDGMENT—ACTION TO ENJOIN EXECUTION—PARTIES DEFENDANT—CROSS COMPLAINT—SETTING UP NEW MATTER.

1. Code Civ. Proc. § 442, providing that when defendant seeks affirmative relief relating to the contract on which the action is brought, or affecting the property to which it relates, he may file a cross complaint, is primarily applicable to the person whom plaintiff had originally made defendant; and, before any other person can take advantage of the statute, he must have been made a defendant, and his cross complaint must be such as will warrant the court to order him brought in for the purpose of filing it.

2. In an action to enjoin a sheriff from executing a judgment in an action in which plaintiff was not a party, the persons in whose favor the judgment was rendered may be made defendants, under Code Civ. Proc. § 389, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in.

3. In an action to enjoin a sheriff from executing a judgment in an action in which plaintiff was not a party, the person in whose favor the judgment was rendered cannot file a cross complaint, setting up a new cause of action against plaintiff, independent of the judgment on which execution is issued, and which the original defendant has no interest in, and which cannot be affected by a judgment against the sheriff.

Department 2. Appeal from superior court, San Bernardino county.

Action by East Riverside Irrigation District against F. L. Holcomb, sheriff, and others, to enjoin the execution of a judgment. From a judgment in favor of defendants and an order denying a motion for new trial, plaintiff appeals. Reversed.

Chas. R. Gray, for appellant. Jas. A. Gibson, for respondents.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendants, and from an order denying his motion for a new trial. The cross complaint of certain persons, who may be designated as Fox and others, and who were brought in as defendants, against the objection of plaintiff, by order of court, and the findings of the court, are very voluminous, and deal with a great many matters which would be difficult to briefly state; but these matters need not be noticed with any great detail, because, in our opinion, the court erred in allowing the cross complaint to be filed, and in dealing with the issues which it sought to raise. The purpose of the action, as stated in plaintiff's complaint, is merely to enjoin the defendant Holcomb, as sheriff, from forcibly cutting a hole in a large water pipe of plaintiff's, and placing or causing to flow in said pipe certain water. The complaint merely states facts sufficient to entitle the plaintiff to the relief sought. It is averred that the sheriff was about to cut the pipe as aforesaid, at a point considerably below its head, and at an elevation 60 feet lower than said head, and that said threatened act of the sheriff would utterly ruin plaintiff's water system, and prevent the water from flowing by gravity through the pipe to points below, where the water was supplied to customers. It was averred that the sheriff was about to do this thing by virtue of a writ of execution issued upon a judgment in a certain action brought by one Lewis against the said Fox and others, defendants, wherein, after various answers and cross complaints and the bringing in of new defendants, a judgment was entered in favor of said Fox and others against Mary W. Armstrong, P. A. Raynor, and others, decreeing that, as against said last-named defendants, Fox and others had the right to have 30 inches of water put into and carried through said pipe; that in the case at bar the sheriff threatens to do the acts complained of under the execution issued upon said judgment; that the present plaintiff was not a party to that action, and is in no way bound thereby; and that the threatened acts of the defendant Holcomb, sheriff, would be, as against plaintiff, a willful and unlawful trespass. Therefore the only issue tendered by the complaint is the right of the sheriff to proceed under said writ of execution to do the threatened acts. The defendant Holcomb asked to have Fox and others brought in and made defendants. To this the plaintiff objected, but the court ordered them to be brought in, and plaintiff excepted to the order. Fox and others filed an answer in which some of the averments of the complaint were denied, and which may be construed, perhaps, as asserting the right of the sheriff to proceed under the execution. But, in addition, they filed a cross complaint in which, leaving out of view the right of the sheriff to proceed under the execution, they set out an entirely new cause of action against the plaintiff, averring that, by a certain written contract with another party called the "Vivienda Water Company," and by various other facts set up, they had acquired a right to run 30 inches of water through the plaintiff's pipe, and also an additional 10 inches of water, and prayed for a decree declaring their right, as against the plaintiff, to run 40 inches of water through said pipe. This cause of action is entirely separate from and independent of the judgment in the said case of Lewis against Fox and others. It constitutes, indeed, a new action, in the shape of a suit to quiet title, and leaves entirely out of sight the right of the sheriff to execute the writ, to prevent which was the only purpose of plaintiff's complaint. The plaintiff moved to strike out the cross complaint, but his motion was denied, and the court entered into a full examination and determination of all the issues made by the cross complaint, and entered judgment quieting the title of Fox and others to 40 inches of water to be run into and through said pipe. Plaintiff excepted to the order of the court compelling Fox and others to be brought in as defendants, and to the order refusing to strike out the cross complaint.

The questions here presented involve, not only section 442 of the Code of Civil Procedure, which refers to cross complaints, but also section 389, which deals with the matter of bringing in new parties, and section 387, which deals with the matter of intervention. Section 442 provides that when "the defendant" seeks affirmative relief "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates," he may file a cross complaint. In the case at bar the cross complaint certainly did not relate to, or depend upon, the transaction upon which the action was brought, namely, the execution under said judgment, and it is doubtful whether it could be considered as "affecting the property to which the action relates." But it is primarily applicable only to the defendant; that is, the person whom the plaintiff had originally made defendant. Before any other person could take advantage of the section, he must have been made a defendant for the purpose of filing a cross complaint, and his cross complaint must have been of such a character as would warrant the court to order him brought in for the purpose of filing it.

The first questions presented, therefore, are: (1) Could Fox and others, against plaintiff's will, be brought in as defendants at all, for any purpose? and (2) could they be brought in for the purpose of allowing them to file their cross complaint, and thus inaugurate practically a new action?

1. While it can hardly be said that, for any purpose, they were necessary parties, under section 389, still, as the writ which the sheriff was about to execute was in their favor, and they were interested in resisting the attempt of the plaintiff to enjoin its execution, it was not improper to allow them to appear and assist the sheriff in defending the suit, upon the same principle that a landlord may be allowed to defend for a tenant, or one who has indemnified a defendant against damages for an act for which he has been sued may come in as a defendant to assist in the defense. Moreover, the plaintiff could not have been injured by such a course. Fox and others could, perhaps, have thus assisted the sheriff as effectually if they had not been made nominal defendants; and, as long as they made no defense other than that which the original defendant could have made, plaintiff was not prejudiced.

2. But allowing Fox and others, by a cross complaint, to set up new matters and causes of action not involved in the original suit,—not defenses to the action, and not available at all to the original defendant,—raises entirely different questions from the one first noticed. Decisions dealing directly with modern statutory cross complaints, and declaring what parties may use them, and for what purpose they may be used, are quite meager, and we have been referred to none which bear directly upon the question arising in the case at bar. The principles which govern are, however, to a great extent those which apply to interventions and counterclaims and the bringing in of new parties, and those which would apply to cross bills under the old equity practice. The general rule is that a plaintiff may select those whom he desires to make defendants, and that new parties brought in against his will cannot be allowed to set up against him defenses and affirmative causes of action which the original defendant could not have set up; and this is specifically so where the granting of the relief sought by the original complaint would not have prejudiced the other causes of action which the new parties seek to have adjudicated. Peculiar circumstances may make exceptions to the rule, but the general principle is as above stated. Fagan v. Barnes, 14 Fla. 56; Andrews v. Hobson's Adm'r, 23 Ala. 239; Daniel v. Morrison's Ex'r, 6 Dana, 182; Insurance Co. v. McKay, 21 N. Y. 191; Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3. In Daniel v. Morrison's Ex'r, supra, it is said, "A cross bill can be sustained only upon matters growing out of the original bill;" in Andrews v. Hobson, supra, that "it is well established that a cross bill is a mode of defense to the original bill, and must be pertinent to that suit"; and in Fagan v. Barnes, that "the general rule is that the court will not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action." The case, however, of Curran v. Car Co., decided by Thayer, J., in the United States circuit court, and reported in 32 Fed. 835, is more nearly in point than any other which we have found. There the plaintiffs sued the defendant, the car company, to restrain an alleged infringement of certain letters pat-

ent, the alleged infringement consisting of using a certain apparatus for drying lumber. The Boston Blower Company asked to be made a party defendant, upon the ground that it was the manufacturer of and had sold to the original defendant the alleged infringing apparatus,—that is, the one single machine which it was using,—and was under obligations to protect it from suits for infringement; and the blower company was allowed, upon this ground, to come in as a defendant, and assist in making the defense. But it also asked to file a cross bill in which it was alleged, in substance, that the plaintiffs were sending out circulars wherein they charged that the apparatus manufactured by the blower company was an infringement of their patents, and threatened suits against all persons buying or using the same; and it was prayed that plaintiffs be enjoined from sending such circulars, bringing suits, etc. But the court refused to allow the cross complaint, and said: "In this case it will be observed that the corporation originally made a defendant could not maintain a cross bill of this nature, because it is only a vendee of one machine, and not entitled to the relief prayed for in the cross bill. In my judgment, waiving any decision of the question whether the cross bill presents grounds for equitable relief, the court ought not to permit a third party to come in as a defendant, and then file a cross bill which the original defendant could not maintain, even if it desired to do so. For that reason I shall deny the application of the Boston Blower Company for leave to file the cross bill in question. I will permit it, however, to come in, and be made a party defendant, and to defend the claim that is preferred by Curran & Co. against the St. Charles Car Company. To that extent I think their motion should be granted, and they will have leave to be made a party defendant for that purpose."

In view of the foregoing principles and authorities, the court erred in the case at bar in refusing to strike out the cross complaint. For the purposes of the cross complaint, Fox and others were neither necessary nor proper parties to the action. The original defendant had no interest in any of the matters which they sought to set up, and could not have availed himself of them as a defense or for any purpose. The judgment against him, restraining him as sheriff from executing the writ, would not have prejudiced any right or title of the cross complainants which was independent of the judgment in Lewis against Fox and others; and to allow them, against the plaintiff's desire, to be brought in as new parties, for the purpose of interjecting their new causes of action, with all the questions which they involved, into a simple suit to restrain the sheriff from executing a writ on one certain judgment, would be not only to violate plaintiff's rights, but to tolerate a confusion of pleading and practice not sanctioned by any authority to which our attention has been called. If the cross complainants have any cause of action against the plaintiff not based on the Lewis judgment and execution, they can properly assert it in an independent action. For these reasons the judgment and order denying a new trial must be reversed, and when the case goes down the court should strike out the cross complaint, and, if the judgment in Lewis against Fox and others be still in existence, the court should try and determine the single question whether the writ of execution issued on that judgment is enforceable against plaintiff; and, in determining that question, the rights of the parties which grow out of, and are based on, that judgment and execution should alone be considered. The judgment and order appealed from are reversed, with directions to the court below to take further proceedings as indicated in this opinion.

We concur: TEMPLE, J.; HENSHAW, J.

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126 Cal. 357

GEORGE v. LOS ANGELES RY. CO.

(L. A. 574.)

(Supreme Court of California. Oct. 20, 1899.)

NEGLIGENCE—STREET RAILROADS — LEAVING CARS IN STREET—INJURY TO CHILD—CONTRIBUTORY NEGLIGENCE — CAPACITY OF CHILD TO COMPREHEND DANGER—OBVIOUS DANGER — INSTRUCTIONS — SPECIAL INTERROGATORIES.

1. In an action against a street railroad to recover for injuries to a boy, sustained by him while playing on certain cars left by defendant in the street at the end of its line, an instruction "that plaintiff was not a passenger, nor entitled to the rights of a passenger, at the time of the injury," where the jury were not told what defendant's liability was to passengers, is not erroneous, unless it tended to mislead the jury.

2. In an action against a street-railroad company to recover for injuries sustained by a boy in being run over by a car left in the street at the end of defendant's line, and which the boy's companions had released, and set in motion, while he was trying to run in front of it, an instruction "that there is no presumption of law that plaintiff did not have capacity to understand that it was dangerous for him to go in front of the car, and, unless the evidence shows that he did not have such capacity, contributory negligence on his part, if shown by the evidence, is a good defense," is not erroneous.

3. In an action for injuries sustained by an infant in being run over by one of defendant's street cars, which it had left in the street at the end of its line, and on which plaintiff and his companions were playing, an instruction that whether the cars should have been permitted to stand on the track in the street when they were not needed for carrying passengers was a question to be determined by the city authorities, and was wholly irrelevant, is not misleading, in connection with another instruction that the manner of leaving the cars and the place where they were left were to be considered by the jury in determining whether defendant was negligent.

4. In an action to recover for personal injuries sustained by an infant in being run over by one of defendant's street cars, which it had left in the street at the end of its line, and which was set in motion by children while playing thereon, plaintiff cannot complain that an instruction was inconsistent with another, given at his request, if it properly states the law, though not as favorable to plaintiff as the former.

5. In an action to recover for personal injuries sustained by a boy in being run over by a street car, which defendant had left in the street at the end of its line, and which was set in motion by children playing thereon, the plaintiff cannot recover if the element of danger was not a hidden one, but was open to observation, and could have been comprehended by a boy of plaintiff's age, with average intelligence, and the cars were held by brakes of the ordinary kind, which were set so as to hold the car where it was left unless some one loosened them.

6. The submission of special interrogatories to the jury to be answered, in addition to the general verdict, lies in the discretion of the trial court.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Otis George, a minor, by his father, against the Los Angeles Railway Company. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

T. E. Gibbon and J. H. Krimminger, for appellant. Bicknell & Trask, for respondent.

CHIPMAN, C. Action for personal injuries. The jury found a general verdict for defendant. Against plaintiff's objection, the court submitted certain questions to the jury, the answers to which were favorable to defendant. The appeal is from an order denying plaintiff's motion for new trial.

The evidence disclosed the following facts: The defendant was, at the time of the accident, engaged in operating a street railway on Pasadena avenue, in East Los Angeles. For two days preceding the accident the defendant had left seven or eight small cars, commonly known as "trailers," at the end of said line at the junction of Pasadena avenue and Daly street. It was the custom of the company to use these cars during the hours of time when there was the heaviest travel, and during the interval were left, for convenience, at said point. Pasadena avenue was the most generally used public thoroughfare in East Los Angeles. One of the public schools of the city was within one block of this point, and another within three blocks, and fully one-half of the pupils at these schools passed this place in going to and from these schools. These trailer cars were left at the point in question by the employés of the defendant after being used by them in the morning, and were pushed up to the end of the line, beyond the point where the cars turned back; and the brakes were properly set to hold them, and were the only means taken to hold the cars in place. The brake was operated by turning a crank with a short arm and handle, to be turned by one hand, and was held by a "dog" that caught in a ratchet wheel on the top of the floor of the platform of the car. A kick with the foot against the "dog" would easily loosen the brake. The persons engaged in operating the regular cars came to this point about every 15 minutes during the day. On the day of the injury a number of boys, including the plaintiff, left one of the public schools a few minutes after 3 o'clock p. m., and, on arriving at the cars, began to play with them by pushing them a short distance up the track, starting them down the grade, and jumping on and riding back. After they had been playing about half an hour, they started down, as usual, with two cars, the plaintiff standing on the step running along lengthwise on the side of the front car. He rode down part of the distance in this way, when he jumped from the step of the car to the ground, and ran from 10 to 20 feet ahead of the car, and started to cross the track in front of it, when his foot was caught by a splinter of wood projecting above the ground from one of the cross-ties, which caught in his shoe, throwing him to the ground, and before he could extricate himself he was caught and run over by the forward car. Plaintiff had not been on the cars in question before the afternoon on which the injury occurred, and one of the boys testified that he warned plaintiff to keep off the cars. The grade at the point in question was very slight, and the cars, when started back, came very slowly, and he would have had ample time to get across the track before the car overtook him if he had not been thrown down by the splinter catching in his shoe. Plaintiff was of the age of 9 years and 9 months. About 2:45 or 3 o'clock p. m., and before the accident, the employé of defendant in charge of the trailer cars was at the cars, and found two boys playing with them, and that the brake of one of the cars was unloosened, but all the other brakes were set. He made the boys leave the cars, and he set the loose brake.

Appellant confines his argument exclusively to alleged erroneous instructions. The court gave six instructions as asked by plaintiff, with some modifications as to two of them, not now objected to. These instructions were quite favorable to plaintiff, and we do not understand that plaintiff questions their correctness. His contention is that the court gave certain instructions at request of defendant, two of which (11 and 12) are contradictory of and inconsistent with the instructions given for plaintiff, and do not correctly state the law; that instructions 1 and 2 are outside the issues; that instruction 10 is misleading, and that instruction 8 does not state the law correctly.

Defendant's instructions 1 and 2 were that "street-railway companies are not required to use the same care to avoid injuring persons who are not passengers as they are to avoid injury to persons who are passengers"; and that "the plaintiff was not a passenger, nor entitled to the rights of a passenger, when the injuries of which he complains were received." We suppose these instructions were given because there was evidence that plaintiff was riding on the trailer cars. The jury were not told what the defendant's liability was to passengers, and to inform the jury that plaintiff was not entitled to the rights of passengers left the instruction incomplete.

It was apparently outside the issues. Still we cannot see how it could have misled the jury, especially as they were fully instructed as to the law applicable to the facts in the case. The rule invoked by plaintiff does not go so far as to make all irrelevant instructions error. It must appear that they at least tended to mislead.

Instruction 8 was as follows: "There is no presumption of law that plaintiff did not have capacity to understand that it was dangerous for him to go in front of a moving car; and, unless the evidence shows that he did not have such capacity, contributory negligence on his part, if shown by the evidence, is a good defense to the action." We are asked to hold to the rule of the common law that minors under the age of 14 years are presumably without discretion and judgment, and that evidence is necessary to remove the presumption. It was proper to leave the question of contributory negligence to the jury, free from any presumption as to plaintiff's incapacity. The only testimony as to the fact was given by the plaintiff's mother, who said that he "was not a particularly bright or intelligent child." The law upon the point is stated in Studer v. Southern Pac. Co., 121 Cal. 400, 53 Pac. 942.

Instruction 10 was as follows: "Whether the defendant's trailer cars should have been permitted to stand on the track in the street during the hours of the day when they were not needed for carrying passengers was a question to be determined by the city authorities, and is a wholly irrelevant and immaterial question in this case." It is objected that this instruction was confusing and misleading to the jury, because they had been previously told that the questions of the manner of leaving the cars, the place where they were left, etc., were to be considered by them in determining whether defendant was negligent or not. It seems to us that this particular instruction was intended to show simply that the city authorities alone could determine whether the cars should be permitted to be left on the street for the convenience of defendant. It is true that the right to so use the street must come from the city, and in so saying to the jury the court did not weaken the force of the other instructions as to the care defendant should exercise in so occupying the street.

Instruction 11 was as follows: "If the jury believe from the evidence that any element of danger connected with the defendant's trailer by which plaintiff was injured was not a hidden or concealed danger, but was open to the observation and could be comprehended by a boy of average intelligence, of the age of plaintiff; and if you further believe that the trailer, when left on the track by defendant's employés the day of the accident, was held by brakes of the ordinary kind, and that the brakes were set in a manner to hold the cars where they were unless some one should loosen the brakes,—the plaintiff cannot recover." The jury had been told "that the fact, as shown by the evidence, that the brakes of the car in question were set when the cars were left on the track in the way in which such brakes were usually set or fastened, or according to the usual custom of defendant, is a matter to be considered by the jury in passing upon the question as to whether the defendant exercised ordinary care in the way it placed and maintained said cars at the place in question; * * * and they should consider the danger, if any there was, attending the leaving of the cars at the place in question, whether said cars were of a dangerous nature, likely to cause an injury of the kind complained of, and were likely to attract children thereon for amusement and play; the manner in which they were fastened; the publicity of the place; whether defendant, in the exercise of reasonable care and diligence, should have securely fastened them, or, if that was impracticable, whether in the exercise of such diligence it was its duty to leave them in charge of an attendant," etc. It is claimed that these instructions are contradictory of instruction 11, supra, and irreconcilable with it. If the last instruction is a correct statement of the law,—as we think it is,—plaintiff cannot complain, even if it was inconsistent with the instructions which were manifestly more favorable to plaintiff. If the jury had given their verdict for plaintiff, the defendant might have complained. Plaintiff contends, however, that instruction 11 was not a correct statement of the law because it violates the principles laid down in the "turntable cases," which, it is claimed, apply here. The rule in these cases as held by this court will be found in Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666. In a later case—Peters v. Bowman, 115 Cal. 345, 47 Pac. 114, 598—it was said: "The rule of the turntable cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land has erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds." The cases illustrating the principles of the turntable cases are quite fully set forth in the opinion, and need not be restated. The recent case of Kaumeier v. Railway Co., 116 Mich. —, 74 N. W. 481, is very similar to this one, the principal difference in its facts being that in the Michigan case the car had no brakes. It was testified by the conductor in charge of the cars in that case that, when the flat car was left at the point where the accident happened, "he blocked the wheels with a stone and a stick, which could be removed by the kick of a small boy, if he hit it hard, and that he always blocked this car every time he left it." The court, in its decision, gave the question very careful consideration, reviewing the turntable cases from the first one,—Railroad Co. v. Stout, 17 Wall. 657,—and reached the conclusion that they do not furnish the rule by which such a case as this is to be determined. It was held, upon the undisputed facts, that the court should have instructed the jury to find a verdict for the defendant. Speaking of Railroad Co. v. Stout, the court said: "It is difficult to see how that case can be likened to the present. In that case a dangerous piece of machinery was left open, exposed, and unguarded, to the knowledge of defendant. The turntable itself was dangerous. The car in question in the present case was not dangerous in its construction. It was a plain car, with four wheels, with no machinery about it. It had no brake, but was a small platform car. It is true that it stood upon a track where it might be removed by several children applying their united strength. Several children might, in the same way, move a wagon or carriage left beside the highway. We apprehend that no claim of negligence could be sustained against the owner of such a vehicle if one of the children climbing on it should fall off, and be run over, even if the wheels were left without blocking."

It is not contended that these trailer cars were objects dangerous to children, and it has been held that cars are not "dangerous machines," within the meaning of the rule, in some of the turntable cases (Elliott, R. R. § 1260); but it is urged, as it was urged in the Michigan case, that, because the cars were left in a condition which made it possible for children to loosen the brakes and push the cars along the track, the cars became dangerous, and, being attractive objects to children, they were likely to move them, and thus be put in danger. It will be observed that the court instructed the jury that if they believed, from the evidence, that the element of danger connected with these trailers was not a hidden or concealed danger, but was open to the observation, and could be comprehended by a boy of plaintiff's age with average intelligence, then, in such case, if defendant's cars were held by brakes of the ordinary kind, and the brakes were set in a manner to hold the cars where they were left, unless some one loosened them, the plaintiff cannot recover. We think such an instruction takes the case out of the class to which the turntable cases belong and like cases, such as Branson v. Labrot, 81 Ky. 638, where lumber was negligently piled, and analogous cases, and stated the law correctly as applicable to the undisputed facts in this case.

Appellant alleges error in submitting certain special interrogatories to the jury for answer. It is said that they were of a character calculated to lead up to a general verdict for defendant, and did not embrace all the issues involved. The court was authorized, by section 625, Code Civ. Proc., to instruct the jury "to find upon particular questions of fact, to be stated in writing," if the jury render a general verdict. It is a matter resting in the discretion of the court (Smith v. Steamship Co., 99 Cal. 462, 34 Pac. 84), and the court was not required to thus submit all the issues. The order should be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

127 Cal. 400

PEOPLE v. UNION BUILDING & LOAN ASS'N OF SACRAMENTO et al.

(two cases. Sac. 610, 611).

(Supreme Court of California. Oct. 20, 1899.)

BUILDING AND LOAN ASSOCIATIONS — APPOINTMENT OF RECEIVER.

Section 9 of the act creating the board of commissioners of building and loan associations (St. 1893, p. 231), and providing for proceedings to restrain the prosecution of business by such associations in certain cases, does not imperatively require the appointment of a receiver, but simply permits it, in the discretion of the court; and where the cause of probable future insolvency of such an association is depreciation of real estate owned by it, and no fraud or mismanagement by its officers, or lack of competency on their part to liquidate and settle up its affairs economically, and in the interest of creditors and stockholders, is shown, the appointment of a receiver at the instance of the state, when the state is neither a creditor nor stockholder, is not justified.

Commissioners' decision. Department 2. Appeals from superior court, Sacramento county.

Action by the people of the state of California, by W. F. Fitzgerald, attorney general, against the Union Building & Loan Association (a corporation), and others as directors. From a judgment enjoining the defendant corporation, its directors, etc., from further prosecution of its business, and appointing a receiver therefor, defendant corporation and one of its directors bring separate appeals. Modified and affirmed.

Devlin & Devlin and L. T. Hatfield, for appellants. W. F. Fitzgerald, A. M. Johnson, Grove L. Johnson, and J. B. Devine, for the People.

HAYNES, C. These are separate appeals taken upon the same record from the same judgment upon the judgment roll. The appellants, however, are represented by different counsel, who have also presented separate briefs. The first is taken by the corporation, and the second by a director. They present the same question for decision, and may therefore be disposed of together.

As the title of the case indicates, the defendant corporation is a building and loan association. In December, 1897, the commissioners of the building and loan associations of the state of California made an examination of the business and affairs of said corporation, and reported to the attorney general that it was "conducting its business in an unsafe manner, such as to render its further proceeding hazardous to the public and to those having funds in its custody"; and thereupon this action was brought by the attorney general, under and in pursuance of the provisions of section 9 of the act creating said board of commissioners (St. 1893, p. 231). The defendants answered, and upon the hearing findings were made and judgment entered enjoining said corporation, and its directors, servants, etc., "from the further prosecution of the business of the defendant corporation until the further order of the court," and appointing a receiver to take possession of its property and effects of every description, and, subject to the order of the court, liquidate and settle up the business of the corporation.

The only question presented is whether the averments of the complaint and the findings authorized the court to appoint a receiver to take charge of the corporate affairs and settle and liquidate the business of the corporation. The only allegations of the complaint tending to justify the relief granted are the following: "That since the organization of said corporation the said corporation has loaned out large sums of money upon real-estate security, and, in default of payment of said loan, has been compelled to take said property in payment of the moneys so loaned and interest thereon; that the cost of said real estate so obtained and now owned by said corporation exceeds the sum of $112,215.52; that there are now outstanding loans on real estate to the amount of $90,118.24; that since making said loans upon said real estate, and acquiring the title to the real estate, as aforesaid, the value of the said real estate has greatly depreciated, and is now depreciating, which has reduced, and will continue to reduce, the assets of said corporation to such an extent as to render the further proceeding and conduct of the business hazardous to the public and to those having funds in its custody; that plaintiff is informed and believes, and upon such information and belief alleges, that, unless the said defendants are enjoined and prohibited by this court from the transaction of any further business, the said defendants will continue to prosecute and transact such business, to the irreparable injury of the people of the state of California." The prayer is for an injunction, and, "if the court shall deem it expedient," that a receiver be appointed.

The only finding touching the existing condition of the corporation is the following: "That actions have been commenced against the defendant corporation on promissory notes aggregating three thousand five hundred dollars, and property of the said corporation is now, and for more than twenty-nine days has been, under attachments levied thereon in said actions, and there are no funds available with which to discharge said attachments and indebtedness; that the necessary disbursements exceed the income of the defendant corporation, and. the said corporation continue its business, its necessary disbursements will continue to exceed its income; that the said corporation has been compelled to take in satisfaction of loans a large amount of real estate, which since taking has greatly depreciated in value, and there is no assurance or probability of any increase in its value; that there is a large amount of indebtedness of said corporation now due, and there are not sufficient assets on hand that can be realized upon whereby said corporation will be able to pay said indebtedness in any reasonable time; that to continue the business of said corporation, under such circumstances, would require that a considerable portion of the monthly dues of the members and stockholders be used for the purpose of discharging the deficit in current expenses and interest, after applying the income of the corporation to the same; that said corporation can no longer continue business without a continued impairment of the assets of said corporation and dues to be paid in by members; that the assets of said corporation, if converted into money at this time, are insufficient to pay the existing indebtedness of said corporation, and reimburse the stockholders of said corporation for moneys paid by them as dues; that the further proceeding with its business by said corporation would be unsafe and hazardous to the public, and to those having funds in its custody, and to its stockholders." The court, it is true, further found "that it is necessary and a proper case for the appointment of a receiver to settle and liquidate the business of the said defendant corporation"; but this is essentially a conclusion of law, which must find its justification in the allegations of the complaint and the findings of fact, if it be sustained.

Section 9 of said act authorizes the attorney general, upon receiving the report hereinbefore stated from said commissioners, to apply to the judge of the court to issue an injunction restraining the corporation from further proceeding with its business until a hearing can be had, and further provides: "Such judge may on such application issue such injunction, and, after a full hearing, may dissolve or modify it, or make it perpetual, and may make such orders and decrees, according to the course of proceedings in equity, to restrain or prohibit the further prosecution of the business of the corporation, as may be needful in the premises; and may appoint one or more receivers to take possession of its property and effects, subject to such directions as may from time to time be prescribed by the court." It will be observed that this statute does not imperatively require the appointment of a receiver, but permits it in the discretion of the court, or, in other words, in proper cases. In Havemeyer v. Superior Court, 84 Cal. 327, 365, 24 Pac. 121, 129, Mr. Chief Justice Beatty, speaking for the court, said: "Under our Codes, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of the dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that, for the protection of his rights, the appointment of a receiver, and the administration of the assets under the control and superintendence of a court of equity, is necessary." Conceding that, under the provisions of the building and loan commissioners act, above quoted, a receiver may be appointed, it does not follow that the appointment was authorized under the facts of this case. The state is neither a creditor nor stockholder, and has no pecuniary interest in the association. It is neither alleged nor found that there was any fraud or mismanagement on the part of the directors or officers of the corporation, or any want of competency on their part to liquidate and settle up its business and affairs economically and in the interest of its creditors and stockholders, so that, if this application had been made by a creditor or stockholder, the facts alleged and found would not have justified the appointment of a receiver; and, unless such facts are alleged and found as would justify the appointment at the instance of a creditor or stockholder, it cannot be made at the instance of the state, under said statute. The notice of appeal is to the effect that it is taken from the whole of the judgment, but appellants say that no point is made against the judgment enjoining the association from the further prosecution of its business. I therefore advise that the judgment be modified by eliminating therefrom the order appointing a receiver, and all the provisions thereof relating to such receivership, and, as so modified, that the judgment be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is hereby modified by eliminating therefrom the order appointing a receiver, and all the provisions thereof relating to such receivership, and, as so modified, the judgment is affirmed.

SAN JOSE RANCH CO. et al. v. SAN JOSE LAND & WATER CO. (L. A. 491.)

(Supreme Court of California. Oct. 19, 1899.)

DISMISSAL AND NONSUIT—NEGLECT IN DEMANDING JUDGMENT — STATUTES — VALIDITY.

1. Code Civ. Proc. § 581, subd. 6, providing that an action may be dismissed when, after verdict or final submission, the party entitled to judgment neglects to have it entered for more than six months, does not warrant the dismissal, before judgment is rendered, of a case which the court has taken under advisement, after determining that defendant was entitled to a nonsuit, and had failed to demand a judgment for more than six months, since defendant could not demand that a judgment be entered until one was rendered.

2. A contention, on appeal, that plaintiff was not injured by an erroneous dismissal of his complaint, because defendant was entitled to judgment, and a dismissal was no worse than an adverse judgment, is untenable; for the plaintiff's purpose in bringing the action was to have his rights determined, and it would not advance his interest to have the suit disposed of without such determination.

3. On appeal from an erroneous judgment dismissing plaintiff's complaint for neglect in entering judgment, a contention that plaintiff was not injured, because the judgment may be set aside, if on the appeal it is found that there was evidence to support his demands, is unavailing; for it assumes that on the appeal from the order of dismissal the court may consider the case as though a judgment of nonsuit had been entered.

Department 2. Appeal from superior court, Los Angeles county.

Action by the San Jose Ranch Company and others against the San Jose Land & Water Company. From a judgment of dismissal, plaintiffs appeal. Reversed.

J. S. Chapman, for appellants. R. Dunnigan and Anderson & Anderson, for respondent.

TEMPLE, J. The plaintiffs claim certain water rights by appropriation. They charge that the defendant has wrongfully diverted water to which they are entitled, greatly to their damage, and threatens to continue to do so. They ask for an injunction during the pendency of the action, and that it be made perpetual, and for $5,000 damages. An answer was put in, which took issue with the allegations of the complaint, and asserted adverse rights in defendant. Upon these issues the action was tried without a jury, evidence put in on both sides, and the case argued by counsel and submitted for decision. Some seven months or more after the submission the court made an order dismissing the case. The judgment dismissing the case recites that the case was finally submitted to the court for its decision more than six months before, and that the court, after due consideration, has determined that the defendant is entitled to a nonsuit, and that defendant has failed to demand a nonsuit for more than six months; it was therefore ordered and adjudged that a nonsuit be granted, "and that the action be dismissed."

It is contended that this action was warranted by subdivision 6, § 581, Code Civ. Proc., which reads, "by the court, when after verdict or final submission the party entitled to judgment neglects to demand and have the same entered for more than six months." The ready answer to this is that no one was entitled to have the judgment entered until it had been rendered. If findings were not waived, it was incumbent upon the court to make findings, and upon them it was the duty of the clerk to enter judgment at once. Section 664, Code Civ. Proc. The defendant who fails to demand a nonsuit is in no default. It is his privilege and right, although he can obtain a nonsuit, to demand instead a regular judgment on the merits. In this case both parties demanded a judgment on the merits by a final submission. It is said that plaintiff is not injured, although the action of the court was erroneous. The court found that judgment must be for the defendant, and a dismissal, it is contended, is no worse for the plaintiffs than an adverse judgment. In fact, respondent argues, it is better, for it leaves them at liberty to sue again, and is not an estoppel. But the one purpose of plaintiffs in bringing the suit was to have their rights determined. It would not advance their interests to have the suit disposed of without determining the disputed claims of the parties. They certainly cannot appeal as easily, or as conveniently present their view of the controversy, as they might have done if findings had been filed. It is said that plaintiffs may now have the judgment of dismissal set aside if upon appeal it should be found that there was any evidence to support their contentions. This assumes that, upon an appeal from the order dismissing the case, this court could consider the case as though a judgment of nonsuit had been granted. I do not see how this could be on an appeal from an order dismissing an action because of neglect in entering the judgment. The dismissal is because of neglect, and whether the neglect was such as to warrant and justify the dismissal would be the subject of review on such appeal; or, perhaps, whether it was a case for dismissal for neglect.

It may be said that injury cannot be presumed from error; that the court must be able to see from the record that the appellant has been aggrieved, or no relief can be granted. Section 475, Code Civ. Proc., is cited to that point. Among other matters contained in the section it is said: "No judgment, decision or decree shall be reversed or affected by reason of any error, ruling, instruction or defect, unless it shall appear from the record that such error, ruling, instruction or defect was prejudicial, and also that by such error, ruling, instruction or defect that said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction or defect had not occurred or existed. There is no presumption that error is prejudicial." In this particular case I think we can see that a different result would have been reached but for the error complained of. The plaintiffs would have had their action tried, and the issues disposed of by a judgment which could have been reviewed here, and the rights and liabilities of the parties finally disposed of. But, unless some very restricted meaning can be given to the amendment to section 475, it is plainly unconstitutional and void. The "substantial injury" and "different result" mentioned must have reference to the final judgment. Ordinarily we cannot ascertain or determine "from the record" whether the appellant has suffered substantial injury, or whether a different final result would have been reached, had not some particular error been committed. If the court were erroneously to refuse to receive any evidence for a party, and should arbitrarily determine all issues against him, this court could not determine from the record whether he would have fared better if the evidence had been admitted. So if, in an ordinary action at law, a court were to erroneously deny a jury trial, the record could not disclose that a different result would have been probable if the error had not been committed, although it would plainly enough show that a party had been denied a trial according to the law of the land. A person against whom such a ruling has been made, and who has lost his case, has been deprived of life, liberty, or property without due process of law. And this amendment, if valid, would prevent a reversal of the cause upon that ground. That it might result in preventing the appellate courts from enforcing the fundamental right to a jury trial is not really of greater moment, perhaps not so much, as the fact that it may prevent this court from enforcing uniformity in the administration of the law. Under this rule, any and all trial courts may refuse to be governed by the law of procedure and evidence solemnly enacted by the legislature; and unless we can determine from the record, both that the party complaining has suffered substantial injury, and that a different result would have been probable if the law of procedure had been followed, there could be no reversal.

It is the right of every person, before he can be deprived of his property, to have a trial according to law,—to have the same character of trial, governed by the same established rules of evidence and procedure, as are applied in other cases under similar conditions. "Due process of law" "is law in its regular administration through courts of justice." 2 Kent, Comm. 10. Judge Field says of the words, "due process of law," when applied to judicial proceedings: "They then mean a course of legal proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." Pennoyer v. Neff, 95 U. S. 714. Webster, in his well-known definition of the phrase, "the law of the land," said: "The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." And in Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, the court said: "In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established usages and customs of the courts." See numerous decisions cited in 10 Am. & Eng. Enc. Law (2d Ed.) p. 293, note 4.

Uniformity in the administration of justice is a fundamental right, and every litigant may demand that his case shall be tried, so far as practicable, by the same established rules of procedure and evidence, as well as upon the same principles, which are applied to other like controversies. To secure this uniformity is an important function of an appellate court, and, the jurisdiction being derived from the constitution, a co-ordinate branch of the government cannot say that it shall not perform its function or control its use of the power and discretion vested in it. A litigant who has been denied a trial according to the law of the land has, in a legal sense, been aggrieved; but courts are not created for the redress of ideal wrongs, and therefore, when from the record we can see that the injury is not substantial, it is not such a grievance as courts will redress. We therefore say in such case that the party complaining has not been injured. He is not an aggrieved party in such sense that he needs or can obtain a correction of the error. Further than this the courts should not go, even if authorized by the legislature. How serious the departure from established rules must be to require a reversal is generally a judicial question. The judgment is reversed.

We concur: HENSHAW, J.; McFARLAND, J.

(126 Cal. 330)

MOCK v. CITY OF SANTA ROSA et al.

(S. F. 1,597, 1,599.)[1]

(Supreme Court of California. Oct. 19, 1899.)

MUNICIPAL CORPORATIONS — CONSTRUCTION OF WATERWORKS—RIGHT OF TAXPAYER TO SUE CITY—RETURN OF BONDS IMPROPERLY ISSUED — MISJOINDER — APPEAL ON JUDGMENT ROLL.

1. Where an appeal is taken upon a judgment roll without any bill of exceptions, appellant admits that no errors were committed in the admission or rejection of evidence, and that the evidence sustains the findings.

2. In an action to compel the return to a city of bonds issued by it to defendants for the construction of a waterworks costing less than the value of the bonds, a judgment that the bonds should not be affected, but that the defendants be charged with their value, and credited with the value of the waterworks, is warranted, under a prayer for general relief.

3. In an action by a taxpayer to set aside a contract made by a city, and to have returned to it certain bonds, where the complaint shows that a demand upon the city to bring suit or demand the return of the bonds would have been useless, the omission to make such demands is not ground for reversal of judgment for plaintiff.

4. Where several defendants are officers of a municipality, and the acts complained of were done under color and in excess of their authority, whereby the municipality as well as the plaintiff suffered loss, the recovery may be against them both as individuals and in their official capacity, though they were sued only as officers.

5. Where a plaintiff, in a suit against a municipal corporation, is a taxpayer, and has a direct and substantial interest in the controversy, the fact that he may also have ulterior motives in bringing the suit does not disqualify him.

6. In an action to have returned to a municipality certain bonds issued by it, holders of such bonds residing beyond the jurisdiction of the court are not indispensable parties, and, where no fact is alleged which would affect their title to the bonds, their omission as parties is not ground for reversal.

7. The fact that the answer of one of several defendants was stricken out, and no judgment can be rendered against him outside of the prayer of the complaint, does not necessarily affect the judgment against his co-defendants, whose answer was not stricken out.

8. A motion and ruling thereon made at trial, and which does not form any part of the judgment roll, cannot be reviewed on appeal from the judgment, in the absence of a bill of exceptions.

9. In a suit on behalf of a municipal corporation for the improper construction of waterworks, it is not stating different causes of action or misjoinder of defendants to include prayers for annulment of the contract for such construction, and the return of bonds issued therefor, and to include as defendants those interested in only a part of the relief sought.

10. Since section 21 of the charter of Santa Rosa (St. 1875–76, p. 262), prescribing the duties of the city attorney, and stating when he may commence actions on his own motion, does not authorize him to bring suit against the city to set aside a contract for the construction of waterworks, it is not necessary for a taxpayer before bringing such a suit to obtain the city attorney's consent.

In bank. Appeal from superior court, Sonoma county.

Action by Wesley Mock against the city of Santa Rosa and others. From a judgment in favor of plaintiff, the city of Santa Rosa, and one other defendant, separate appeals are taken by the city and certain other defendants from certain portions of the judgment. Modified and affirmed.

Russell & Campbell, for appellants. Edward Lynch, for appellee Mock. J. W. Goodwin, for appellee Perkins. O. O. Webber and Thos. Rutledge, for other appellees.

PER CURIAM. The plaintiff, a resident taxpayer of the city of Santa Rosa, brought this action against the following named defendants: "The city of Santa Rosa, as a municipal corporation; E. F. Woodward, as mayor of said city; the common council of said city, as the legislative body thereof; F. Berka, C. N. Collins, E. D. Harris, Thos. P. Keegan, George A. Tupper, and J. S. Wilson, as members of and composing said common council and the legislative body of said city of Santa Rosa; C. L. Mobley, as city clerk and auditor of said city; M. V. Vanderhoof, as treasurer of said city of Santa Rosa; Robert Effey; and Paul B. Perkins." Judgment was entered in favor of the plaintiff and the city of Santa Rosa, in whose behalf he sued, and defendant C. L. Mobley, and this appeal is taken therefrom by defendants Woodward, Keegan, Collins, Berka, Wilson, and Vanderhoof from the whole of said judgment, except that portion thereof in favor of defendant Mobley. Mobley, Effey, and Perkins do not appeal. A separate appeal (No. 1,599) is taken upon the same judgment roll by "the city of Santa Rosa, a municipal corporation, and the common council of said city, as the legislative body thereof," from the whole of said judgment, except that part in favor of Mobley. Both appeals are upon the same record, and may be disposed of in one opinion.

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[1] Rehearing denied November 18, 1899.

The record, though consisting of the judgment roll alone, without any bill of exceptions, is very long. The amended complaint covers 53 pages, the demurrer to it 12 pages, the answer 50 pages, and the findings and conclusions of law 69 pages. The facts involved are numerous, and dependent, and cover a period of time extending from the spring of 1893 to the time of the trial in December, 1896, so that the utmost condensation will necessarily require much space. The controversy has grown out of the issuance and disposal of bonds of the municipality for the purpose of constructing waterworks to furnish water for the use of the city and its inhabitants, the letting of a contract for the construction thereof, changes of plans, and other acts of the defendants connected with and forming part thereof, whereby the city, as the court finds, has sustained serious loss.

The judgment from which this appeal is taken is as follows: "(1) It is hereby ordered, adjudged, and decreed that the contract dated September 28, 1895, made by and between defendant the city of Santa Rosa, a municipal corporation, party of the first part, and defendant Effey, of the city of Santa Cruz, party of the second part, for the construction of a system of waterworks according to the plans and specifications of C. Monjeau, is hereby declared null and void and of no effect; and defendant the city of Santa Rosa is hereby absolved of and from any and all obligations whatsoever to any one under or by virtue of said contract. (2) It is further ordered, adjudged, and decreed that the bonds provided for in ordinance No. 163 of the ordinances of defendant the city of Santa Rosa, except the first series of said bonds, to wit, bonds numbers 1 to 5, inclusive, were unlawfully disposed of by defendants E. F. Woodward, individually and as mayor of said city, F. Berka, C. N. Collins, E. D. Harris, Thos. P. Keegan, George A. Tupper, and J. S. Wilson, individually and as members of and composing the common council and legislative body of defendant the city of Santa Rosa, and M. V. Vanderhoof, individually and as treasurer of said city of Santa Rosa, and Robert Effey, and contrary to the provisions of law regulating the mode and conditions for the disposal of such bonds, and in violation of the trust reposed in defendants Woodward, Berka, Collins, Harris, Keegan, Tupper, Wilson, Vanderhoof, Effey, and Paul B. Perkins, willfully, unlawfully, and fraudulently disposed of the proceeds of said bonds, and that said defendants last named are adjudged to be liable for the payment to defendant the city of Santa Rosa of the value of said bonds at the time of their disposal, to wit, $165,701.25. (3) It is further ordered, adjudged, and decreed that the system of waterworks constructed by Paul B. Perkins in the city of Santa Rosa, consisting of pipe lines, reservoirs, pumping plants, and all other appliances connected therewith, be, and they are hereby, decreed to be the direct results of the disposal of said water bonds issued by the city of Santa Rosa under and by virtue of ordinance No. 163, and that, as such direct result, said waterworks constructed by said Paul B. Perkins should be, and they are hereby, decreed to be held and possessed by the defendants the mayor and common council of the city of Santa Rosa in trust for said city of Santa Rosa, and the inhabitants and taxpayers thereof, as if said works were a part of said water bonds, and that said defendants Robert Effey and Paul B. Perkins never had any lawful right, title, or interest in or to said waterworks, or any part or parcel thereof. (4) That an accounting shall be had by this court of the actual value of said system of waterworks, pipe lines, reservoirs, pumping station, etc., constructed by said Paul B. Perkins in said city of Santa Rosa, and that after said actual value of said waterworks is ascertained as herein provided, that a judgment shall be entered, to take effect as of the entry of this judgment, against defendants E. F. Woodward, F. Berka, C. N. Collins, E. D. Harris, Thos. P. Keegan, George A. Tupper, J. S. Wilson, M. V. Vanderhoof, individually and as treasurer of said city of Santa Rosa, Robert Effey, and Paul B. Perkins, jointly and severally, for the amount of money which shall be found to be the difference between the value of said bonds at the time of their disposal, to wit, $165,701.25, and the ascertained value of said system of waterworks constructed by defendant Perkins. (5) That said city of Santa Rosa shall have the option to take and retain, as the property of said city, said system of waterworks constructed by said Paul B. Perkins, at the value thus ascertained, provided that the defendants hereby made liable for the deficiency aforesaid consent thereto; that, if such consent shall not be duly given and entered in this cause, then that said system of waterworks shall be sold by the sheriff of Sonoma county, acting as the commissioner of this court, to the highest and best bidder, at public sale, in the same manner as sales are made upon execution as provided by law; and the proceeds of such sale shall be paid to the treasurer of the city of Santa Rosa, and said city of Santa Rosa may, by its officers, become a purchaser at said sale; and, if said city should become the purchaser of said system of waterworks, the purchase price to be paid by said city shall be credited upon the amount of the liability of defendants named in the fourth clause of this judgment to said city, to wit, $165,701.25. (6) That upon the filing of the consent and agreement of all of the defendants made liable for said deficiency as to the value of said system of waterworks, or upon the return of the sheriff of the results of said sale, judgment for the amount of the deficiency, as provided in paragraph 4 hereof, and for the costs of plaintiff up to this time hereby taxed at $537.40, and for accruing costs hereafter incurred on behalf of defendant the city of Santa Rosa, or of plaintiff against said defendants made liable for said deficiency, shall be entered against said defendants as herein provided. (7) That defendant Mobley have and recover from plaintiff his (said Mobley's) costs, hereby taxed at $——."

As this appeal is taken from the judgment upon the judgment roll without any bill of exceptions, it is necessarily admitted by appellants that no errors were committed in the admission or rejection of evidence, and that the evidence sustains and justifies the findings; and in this connection may be noticed appellants' contention that the judgment is not authorized by the pleadings, and that facts occurring after the commencement of the suit cannot be considered in the absence of a supplemental complaint. The failure of the plaintiff to file an amended or supplemental complaint might have been a ground for excluding evidence of transactions occurring after suit commenced, but whether it would or not need not be considered: for, as was said in Poledori v. Newman, 116 Cal. 377, 48 Pac. 326: "Upon a direct appeal from the judgment upon the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence in support of the findings were waived. If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and, after the court has rendered its judgment, object thereto, upon the ground that the evidence sustaining it was inadmissible under the pleadings." Besides, the answer of these appellants was filed more than seven months after this suit was commenced, and it was alleged therein that Perkins had nearly completed said waterworks, and for more than a month had been willing to turn the same over to the city; that appellants should at once commence supplying the city with water, and should not be interfered with in the exercise of their official duties,—thus voluntarily presenting issues as to facts occurring after the suit was commenced. But, for reasons above stated, it is not necessary to consider to what extent these allegations would have constituted a reply to the objection that evidence offered by the plaintiff was outside of the issues.

It is also contended that the relief granted is not warranted by the prayer of the complaint. It often happens that the relief which would be appropriate to the facts and circumstances known to the plaintiff at the time he files his complaint, or which existed at that time, is inadequate and unsuited to the conditions existing at the time of the trial, resulting from the conduct or agency of the defendant; and hence it is usual to add to the prayer for specific relief appropriate to the facts alleged in the complaint the prayer for general relief, as was done in this case. All the appellants answered. Section 580, Code Civ. Proc., provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." The object of the suit, as disclosed by the complaint, was to cancel and have declared void the contract let to Effey for the construction of the waterworks, to prevent the construction of the works thereunder, and to have returned to the treasury the bonds issued by the city, and to prevent any disposal of them otherwise than for money to be paid into the treasury, to the intent that neither the bonds nor their proceeds should be used in payment of work and materials done and furnished under a void and fraudulent contract. So far as the judgment relates to the contract under which the work was performed, the judgment accords with the special prayer of the complaint. As to the bonds, it was alleged, on information and belief, that they were delivered to Effey, September 28, 1895; but the court, after finding the facts as to the disposal of the bonds, and the circumstances under which a deposit of $120,000 was made for the benefit of the contractor in the Santa Rosa National Bank, concluded that the validity of the bonds in the hands of the present holders was not affected by the present action, or by the conclusions of the court concerning the bid and contract for the construction of the works, and that, as the works as constructed were the direct result of the disposal of the bonds, the defendants should be charged with the value of the bonds, and the city should hold the works as if they were a part of said bonds, and upon an accounting that appellants be credited with their value. This, I think, is entirely consistent with the pleadings and the issues actually tried, and is the nearest possible approach to the specific prayer that the bonds be returned and held until lawfully disposed of, and the proceeds placed in the treasury, and is consistent with the case made under the complaint, and fully authorized by the prayer for general relief. Section 580, Code Civ. Proc., is but a concise statement of the rule observed upon this subject in courts of equity. For a construction as to what is consistent with the case made by the complaint, see Hiern v. Mill, 13 Ves. 114, and Poledori v. Newman, 116 Cal. 375, 48 Pac. 325.

It is contended by appellants that no demand was made upon the mayor or council or anybody else for the return of the bonds or that suit be brought. The court found that a prior demand upon the municipal authorities to bring suit in the premises was, under the circumstances, not a necessary condition precedent to bringing the action. This is directly sustained by Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788, and Moyle v. Landers' Adm'rs, 83 Cal. 579, 23 Pac. 798. The facts alleged in the complaint sufficiently show that a demand to bring suit would have been useless; and, if it were conceded that a demand should have been made for the return of the bonds, it cannot avail the defendants as a ground for reversal of the judgment, since the answer disclosed that the bonds had been delivered to Effey, and by him sold to Seligman & Co., in the city of New York, and said purchasers and the bonds were out of and beyond the jurisdiction of the court, and further alleged that the complete construction of the waterworks had been paid for out of the proceeds of such sale. It therefore appears that a demand for the return of the bonds would have been useless, and that appellants are not injured by the omission.

In this connection appellants further contend that "the powers of a taxpayer plaintiff are limited, and can be extended only to acts or threatened acts of ministerial officers"; citing section 1243 of High on Injunctions. It is there laid down that equitable interference by injunction with legislative action by municipal bodies has given rise to some apparent conflict of authority, and is not wholly free from doubt; that purely legislative action will not be enjoined. But the author further says: "And, while courts of equity will not enjoin municipal bodies from the passage of ordinances or resolutions, yet after the passage of such ordinances or resolutions the courts may, and will, on a proper case being shown, prevent their enforcement; and for this purpose may enjoin proceedings thereunder which would otherwise result in irreparable injury." The cases of Merriam v. Board, 72 Cal. 517, 14 Pac. 137, and Linden v. Case, 46 Cal. 171, cited by appellants, do not support their contention. The defendants, except Effey and Perkins, are sued as officers of a municipal corporation, and are so described in the title of the cause, and are not referred to as "individuals," and are formally alleged in the complaint to be such officers; and all the acts complained of as having been done or performed by them were alleged to have been done and performed in the exercise, or pretended or assumed exercise, of official powers and duties; and the judgment fixes upon them, as individuals, a large pecuniary liability to the city of Santa Rosa, the amount to be determined by future proceedings, and gives judgment against them in favor of the plaintiff for costs.

Appellants contend that, "If one is made a defendant in an official capacity, the judgment will not bind him personally;" citing Freem. Judgm. p. 285, § 156. The learned author is there treating of the effect of a judgment against a defendant in an official capacity as an estoppel against the same person when suing as plaintiff in a different capacity in relation to property rights, or title to property, and not, as here, where the misconduct of an officer, or one holding an official position, or acting in other than a personal or individual capacity, creates thereby a personal liability. Here the defendants were in fact officers of the municipality, and their several acts complained of were done and performed under color of this official authority; yet, having exceeded their powers as such officers, as charged in the complaint, whereby the municipality has wrongfully suffered loss, the recovery must be against them as individuals. But their several violations of official powers and duties could not be shown without showing their several official positions; and, besides, relief was also sought against them in their official capacities. They were, therefore, properly sued as officers, the judgment showing the character in which they were liable; and, so far as the character of the relief given by the judgment requires it, the official designation of the several defendants given in the complaint will be regarded as descriptio personarum. Stillman v. Squire, 1 Denio, 329; Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58. In Scott v. Alexander, 23 S. C. 126, it was held that the fact that defendants were sued in their official capacity as aldermen did not protect them from personal liability for costs. In Evans v. Evans, 23 N. J. Eq. 72, the complainant was not styled "executor" in the commencement of the bill, nor were the defendants styled as "executors" in the prayer for process; but the bill, in its premises, fully stated the facts, and correctly described the character and relation of the parties. It was objected that the bill should have been filed by the complainant as executor against the defendants as executors. The chancellor said: "Proceedings in equity are conducted with less regard to mere matters of form and technical objections than proceedings at law. When a bill, in its body, sets forth facts which give the complainant a right as executor, or make the defendant liable as such, so that the court, upon these allegations, can give the relief required, it is mere form, and useless form, to require that each party should be so styled in the commencement or conclusion of the bill." See, also, White v. Davis, 48 N. J. Eq. 22, 21 Atl. 187; Ransom v. Geer, 30 N. J. Eq. 249. Baldwin v. Ellis, 68 Cal. 495, 9

Pac. 652, was an action to recover taxes illegally collected. In the second cause of action the defendant was not sued as an officer, and a demurrer upon that ground was sustained. Se, also, City of Blair v. Langtry, 21 Neb. 247, 31 N. W. 790; Nowell v. Wright, 3 Allen, 166. In Amy v. Supervisors, 11 Wall. 136, is was said: "The rule is well settled that, where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect." And this, it was said, was a common-law liability, and is, therefore, not confined, as appellants seem to suppose, to those cases where the liability is imposed by statute.

It is further contended that the plaintiff is not the real party in interest, but that the action is prosecuted in the interest of the Santa Rosa Waterworks, a private corporation then supplying the city with water; and that this action is one of a series instituted to hinder and delay the construction of waterworks by the city; and that these allegations are not found to be untrue. The court found that one Jones, a taxpayer of said city, commenced an action in 1894 against the city, and which is still pending, to prevent the city from entering into a contract with Effey, upon the ground that his bid was not lawful, in which case the court, on February 26, 1895, gave an opinion, upon demurrer, that any contract made by the city with Effey upon said bid would be void. It does not appear that the defendants offered or gave any evidence tending to support said allegation that plaintiff is not the real party in interest, but, whether they did or not, the issue was immaterial. It is not disputed that the plaintiff is a resident and taxpayer, and therefore qualified to bring the suit. In Mazet v. City of Pittsburg, 137 Pa. St. 548, 20 Atl. 693, it was held, in effect, that if the plaintiff is not a mere volunteer, but has a direct and substantial interest in the controversy, being one who is liable to be taxed, in common with the general public, for the work contracted for, his ulterior motives will not disqualify him. See, also, Times Pub. Co. v. City of Everett (Wash.) 37 Pac. 695.

It is also contended that J. & W. Seligman & Co. are necessary parties. Under the allegations of the complaint they were certainly proper parties, but it was alleged that they were in the state of New York, and, as they were beyond the jurisdiction of the court, they were not indispensable parties. The answer, however, alleges that the bonds were sold to them, and no fact is alleged, either in the complaint or answer, that would affect their title to the bonds if they had been parties. This is, therefore, not a ground for the reversal of the judgment.

It is further contended that, "the answer of Perkins being struck out by the court without authority of law, and the judgment, therefore, being void as to him, it is void as to all the defendants against whom said judgment was jointly given with him." Whether the answer of defendant Perkins was stricken out without authority of law, or whether the judgment against him exceeded the relief prayed for, would seem to be immaterial. He answered separately, has not appealed, and is not complaining; and we fail to see how these appellants are injured by Perkins being joined with them in a joint and several judgment which they say entitles them to contribution from him. Conceding, for the purposes of the argument, that no judgment could properly be rendered against him outside of the prayer of the complaint, it does not follow that the judgment against these appellants whose answer was not stricken out was in any way affected.

It is also said that no loss is alleged to have accrued to the city by the change of plans made by Effey. The allegations in the complaint were made in reference to the invalidity of the contract, and for the purpose of preventing its performance; but when the answer was filed—which was more than seven months after the suit was begun—the situation had changed, and it was alleged therein that the waterworks were substantially completed, that about 600 connections had been made with the mains thereof, and that water was then generally being used therefrom; and it was denied that any of the acts done by defendants subsequent to July, 1894, relating to the sale of said bonds or the letting of the contract, were had or done for the purpose of preventing competition, or in the furtherance of any plan to exchange the bonds for said work, and that the mayor and common council should not be interfered with in taking possession of said works. These allegations opened the door to an investigation of the change of plans, and the findings show many material changes, resulting in loss to the city and gain to the contractor, who had been paid in full for his work before it began. Not only so, but the complaint set out in full the contract made with Effey under which the work was done, and which provided that changes might be made by the city authorities; that, if the cost of the work was thereby increased, the contractor should be paid the additional cost, and, if diminished, the amount thereof should be deducted from the contract price, the amount of the increase or diminution to be agreed upon in writing in advance. The complaint also set out several resolutions, passed by the council after said contract was made, changing the said plans and specifications in several material particulars, and it does not appear that any agreement as to the increased or diminished cost thereof was made.

The defendants moved to strike out parts of the complaint, and to make the complaint more definite and certain, and the motion was denied, and to the order denying the motion the defendants, and each of them, excepted. Neither the motion nor the ruling thereon is any part of the judgment roll (Code Civ. Proc. § 670), and cannot be reviewed on appeal from the judgment in the absence of a bill of exceptions (Spinetti v. Brignardello, 53 Cal. 283; Sichler v. Look, 93 Cal. 607, 29 Pac. 220).

Defendants also demurred to the amended complaint, all joining therein, upon many grounds, the general demurrer for want of facts being interposed as to all and to each of the defendants separately. The other grounds were for misjoinder of parties defendant, in that Mobley and Vanderhoof are unnecessary parties, because no cause of action is alleged against them; and similar grounds are alleged as to the improper joinder of other parties with certain other defendants; that the complaint does not show a joint cause of action against the defendants, and that defendants are not jointly interested in the several causes of action alleged, and that there is a defect of parties, in that Seligman & Co. are necessary parties. It is urged that some of the defendants have no interest in that part of the relief sought relating to the return of the bonds to the treasury, while others have no interest in the other part of the relief prayed for asking that the contract letting the construction to Effey be annulled or declared void. The municipal corporation known as the city of Santa Rosa, on whose behalf this action is prosecuted, had one object in view, viz. the construction of waterworks. The issuance and sale of the bonds, the adoption of plans and specifications for construction, the several steps leading up to and including the execution of the contract and the work done under it, were but the constituent parts of one entire thing, and all the defendants were connected with the proceedings. There was no misjoinder of defendants or statement of different causes of action in this equitable suit prosecuted by the plaintiff for and on behalf of the municipality, and that adequate relief required the presence of all against whom judgment was rendered. The general demurrer should have been sustained as to defendant Mobley, but judgment was rendered in his favor for costs. He has not appealed, and appellants are not injured.

The question whether demurrer or motion is the proper remedy where two or more causes of action are alleged, but not separately stated, need not be considered in view of our conclusion above stated, though appellants seem unable to distinguish between omitting to state separately causes of action that are of the same class, and may be united, and uniting in the same complaint, whether separately stated or not, causes of action of different classes, which the Code declares may not be done.

It is further contended that the court has failed to find upon many of the issues. Many, and, indeed, much the greater number, of the findings are of probative facts, and the alleged failures to make findings relate to these. Some of the findings are of facts occurring after the commencement of the action, and are referred to by appellants as "findings outside of the issues." These findings of probative facts seem to have been made in support of the findings of ultimate facts, and many that were made might have been omitted. Some issues tendered by the answer, it is true, were not passed upon,—as, for example, the character of the water furnished by the corporation known as the Santa Rosa Waterworks, and the insufficiency of that system as a fire protection; but such issues were immaterial. We are not, however, pointed to any failure to find upon any issue or question of fact which, if found upon favorably to appellants, would have changed the result; nor have we discovered any. The controlling findings of ultimate facts are, in substance, that the contract under which the waterworks were assumed to be constructed was void; that the construction of said works was paid for out of the proceeds of a sale of the bonds which was presumptively valid, and that the value of the works as constructed was much less than the value of the bonds, or the amount paid Effey under said void contract; and, as a conclusion of law, that the defendants, except Mobley, are liable for the difference between the value of the works as constructed and the sum paid to Effey.

Some additional points made on the appeal taken by the city remain to be noticed. The brief filed in its behalf presents and discusses elaborately the questions discussed by the other appellants, and these have been noticed so far as space permits and their importance seems to require. It is contended that a taxpayer cannot bring an action for the benefit of the city, or one in which the city is a party, without the consent of the city attorney, unless some valid excuse is alleged and proved for not having requested him to bring it; citing section 21 of the charter of said city. St. 1875–76, p. 262. This section, so far as material here, provides: "It shall be the duty of the city attorney to advise the officers and authorities of the city in all legal matters pertaining to the business of the city; to prosecute all violations of the city ordinances, or noncompliance therewith, and shall represent the city in all suits in which the city may be a party." He is given "power" to sign informations and charges against persons for violating city ordinances, and to collect delinquent taxes. This section gives him no authority upon his own motion to commence suits for the city in other matters. He may advise, but he cannot control, the action of the city in relation to bringing suits other than those specially provided for in said section. He is but an agent of the city, with no power to compel his principal to act. There is, therefore, no merit in this contention.

The appeal by the city from a judgment in its favor, based upon the contention that the judgment is wrong, and that no judgment should have been rendered in its favor, seems upon its face somewhat peculiar. There is, however, one ground upon which the city might properly seek a modification of the judgment. It is said by the city in its brief: "If the court adjudged those officers liable to the city for the proceeds of the bonds, and gave the city execution therefor, the municipality could have no objection. But when the property of the city is directed to be sold to pay the debts of these alleged wrongdoers, the city has a right to object, and does object most strenuously, to any such proceeding." There are certainly difficulties, together with possible injustice, in the way of a proper and just accounting and ascertainment of the value of the works in the mode expressed in paragraph 5 of the judgment. In paragraph 3 it is decreed that the waterworks constructed by Perkins be held and possessed by the defendants the mayor and common council, in trust for the city, as if said works were a part of the water bonds, and that Effey and Perkins never had any lawful right to said works. Paragraph 4 provides that an accounting shall be had of the actual value of said system of waterworks, pipe lines, etc., constructed by Perkins, and that said value be deducted from the value of the bonds, $165,701.25, and judgment entered against the defendants therein named for the difference. To this we see no objection. But paragraph 5 provides that the city shall have the option to take and retain said works as the property of the city, provided the defendants made liable for the deficiency consent thereto, and, if such consent be not given, that the "system of waterworks shall be sold by the sheriff to the highest bidder, and the proceeds of the sale paid into the city treasury, and credited upon the liability of the defendants liable for the value of the bonds." We see no difficulty in ascertaining the value of the works constructed by Perkins, and no reason why the defendants who are decreed to be held liable for the value of the bonds should have the privilege of refusing to consent to the value so ascertained, and thus compel a sale of "said system of waterworks" which already belongs to the city, and not to the other defendants. But, if a sale is to be had, what is to be sold? The water supply, the real estate upon which the works are erected or constructed, and the right of way belong to the municipality, and were not paid for by Perkins. If the whole system, including the water supply and real estate, be sold, the defendants held liable should not have the benefit of the additional value thereof, and, besides, the municipality would be wholly deprived of that for which the people voted, and for which the bonds were issued, if an individual or private corporation should become the purchaser. The judgment should be modified so as to avoid the possibility of such a result.

The judgment is modified: (1) By striking out the fifth paragraph of said judgment. (2) By striking out all the first part of paragraph 6 down to and including the word "sale" in the fifth line of the said paragraph as printed in the transcript on page 261, and inserting in lieu thereof the following: "That upon the value of the work and material done and furnished by said Perkins in the construction of said waterworks being ascertained by the court,"—and, as thus modified, the judgment is affirmed, with costs against all the appellants in the appeal numbered 1,597, and without costs to either party in No. 1,599.

BEATTY, C. J., and TEMPLE, J., did not participate in the foregoing decision.

6 Cal. Unrep. 346

PEOPLE v. WOODRUFF. (Cr. 516.)

(Supreme Court of California. Oct. 21, 1899.)

NEW TRIAL—IDENTITY OF DEFENDANT—NEWLY-DISCOVERED EVIDENCE.

Defendant was convicted of embezzlement, his identity being established by four witnesses, three of whom testified that he had a beard of about two weeks' growth at the time of the crime. Defendant asked a new trial, based on newly-discovered evidence, tending to show that he had no beard, and filed several affidavits. In one of these affiant stated that another told him before the trial that he had committed the crime. Affiant did not make this alleged fact known until after defendant's conviction. This affidavit also seriously contradicted statements made upon defendant's preliminary examination. *Held*, that the affidavits contained nothing which rendered it probable that on a retrial of the case a different result would be reached.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

John Woodruff was convicted of embezzlement, and appeals from the judgment and an order denying his motion for a new trial. Affirmed.

J. N. Phillips and W. H. Shinn, for appellant. Atty. Gen. Ford, for the People.

HAYNES, C. John Woodruff was convicted of the crime of embezzlement, and appeals from the judgment and an order denying his motion for a new trial. The only ground presented for reversal is that the court erred in overruling his said motion. The controverted question is the identity of the embezzler. Fetterman & Son were the proprietors of a livery stable at Long Beach. On July 8, 1897, the senior partner was absent, and the son and his younger brother, a boy of 15, were in charge of the stable. A man, who was not known to either of them, called, and hired a pair of horses and a spring wagon to go to Redondo. The elder brother harnessed the horses, and the younger brother, assisted by the stranger, greased the wagon. These things consumed about 20 minutes, and the stranger drove away, going, not to Redondo, but to Los Angeles, where he and another man disposed of the horses, wagon, and harness. No inquiry was made by the livery keeper as to the name or residence of the hirer. The defendant was arrested on the 3d of September, at Long Beach, the defendant's brother, Charles, being with him. The elder of the Fetterman boys testified on cross-examination that the man who got the team had at least two weeks' growth of beard on his face at the time he got the team, and the next time he saw him he was clean shaven, except that he had a mustache. The witness, however, further testified that he identified him by his eyes, his face, and general appearance, as well as his whiskers; that he was as positive as he could be of anything that defendant is the man who got the team. The younger brother testified that he was positive —had no doubt—that defendant was the man who got the team. He also testified upon cross-examination that the man had long whiskers, "had quite a whisker on his face"; that when he saw him after his arrest he knew he was the man that took the team; that on that occasion he picked him out of a crowd. J. M. Brown testified that he had known the defendant for two years, and saw him the day before he got the team at Long Beach, and talked with him; that he had a beard all over his face; that it was not long, but he had not shaven for some time. At the time the property was disposed of there was another man with the defendant, and they traded the spring wagon to Peter Varlo for a buggy, and Varlo identified the defendant positively as one of the men, and thought Charles Woodruff was the other. There were two men also at Meinhardt's horse market, where the remainder of the property was disposed of, one of whom was identified as the defendant. The defendant offered evidence tending to prove an alibi, and also that he did not wear whiskers or a full beard, and that his brother shaved him on the 4th of July, at his father's house. Six witnesses testified to the fact that defendant wore a mustache, but no whiskers.

One of the grounds for a new trial, and the only one discussed, is that of newly-discovered evidence. The trial was concluded on January 12, 1898. Six affidavits, besides those of the defendant, containing a statement of newly-discovered evidence, were filed, and used in support of defendant's motion for a new trial. Except as hereafter noticed, these affidavits contained matters which were merely cumulative of the evidence touching the existence or absence of a beard. The only new fact in the affidavit of Janie Flint was to the effect that on the evening of July 9th Samuel Woodruff told her that he had been down to Long Beach, and had driven up from there to Los Angeles. She was examined as a witness for the defendant, and, judging from her interest in the defendant's case manifested in her testimony, it is remarkable that she should have failed to communicate this alleged fact to him or his counsel. The affidavit of Walter S. Humbert was to the effect that he was acquainted with both John and Samuel Woodruff prior to July, 1897; that on July 8th, about 5 o'clock p. m., he saw Samuel on Los Angeles street, near Third, driving a span of horses, one gray and one sorrel; that the team appeared tired and dusty, and that the defendant was not with him, and that he did not see them together that day; that he did not know of the arrest and trial of defendant until after his conviction, when he learned of it through the newspapers. Here we have a man passing along a busy street in the heart of a city of 100,000 inhabitants, with nothing to specially call his attention to the circumstance, who seven months afterwards can describe the team and wagon driven by a man whom he has known a few months, and, more wonderful still, is willing to swear positively that it was on the 8th day of July, about 5 o'clock in the afternoon. The affidavit of Charles A. Woodruff was to the effect that on January 3, 1898 (about eight days before the trial began), Samuel Woodruff told him it was he, and not the defendant, who took the team from Fetterman's stable, and that defendant was innocent, and that he (affiant) did not tell anybody of said conversation until after defendant's conviction. If said deponent believed said statement alleged to have been made by Samuel Woodruff, and failed to communicate it to the defendant, but remained silent, and permitted an innocent man to be convicted and the guilty man to escape, he is wholly unworthy of credit. Whether Samuel resembled his brother, the defendant, and wore a beard or not, could not well overcome the testimony of the defendant given upon his preliminary examination to the effect that on the morning of the 10th of July a man named Williams requested him to aid in selling the property, and that he did so, coupled with the fact that the day before he and another man were twice at Varlo's place, and there traded the wagon for a buggy, and was positively identified by Varlo as one of the two men. I see nothing in the affidavits that would render it probable that on a retrial of the case a different result would be reached. People v. Urquidas, 96 Cal. 240, 31 Pac. 52.

I advise that the judgment and order appealed from be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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126 Cal. 366

PEOPLE v. HOFFMAN. (Cr. 514.)

(Supreme Court of California. Oct. 21, 1899.)

EXTORTION—INFORMATION.

Pen. Code, § 518, declares that extortion is obtaining property from another with his consent, induced by a wrongful use of force or fear, or under color of official right, and section 519 declares (subdivision 2) that fear, to constitute extortion, may be induced by a threat to accuse one of a crime. Section 952 requires that an information must be direct and certain, as regards the accused, the offense, and the particular circumstances thereof, when necessary to constitute a complete offense. *Held*, that an information for extortion, stating that the property was obtained by reason of defendant's threat to accuse another of the crime of selling diseased or unwholesome meat, was insufficient, as it did not allege an intent that the meat should be eaten, necessary to constitute a crime under Pen. Code, § 383.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

J. P. Hoffman was convicted of extortion, and from the judgment, order denying motion in arrest, and order denying a new trial, he appeals. Reversed.

W. H. Shinn, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. This is an appeal by defendant from a judgment, order denying his motion in arrest of judgment, and order denying his motion for a new trial. The information stated "that the said J. P. Hoffman on the 5th day of March, 1898, at the county and state aforesaid, did willfully, unlawfully, and feloniously extort and obtain from another, to wit, Simon Maier, certain bank notes and treasury notes, a more particular description of which is to the district attorney unknown, which said notes were then and there of the value of five hundred dollars, lawful money of the United States, and the personal property of the said Simon Maier, under the circumstances not amounting to robbery, and by reason of a threat then and there made by the said J. P. Hoffman to accuse the said Simon Maier of a crime, to wit, of selling diseased and unwholesome meat, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California." The defendant demurred to the information upon the ground that it did not state facts sufficient to constitute a public offense; that it did not allege whether the money was obtained from said Maier with his consent, and did not state the character of the crime of which the defendant threatened to accuse Maier. The court overruled the demurrer, and defendant was convicted "of an attempt to commit the crime of extortion."

"Extortion" is defined by the Penal Code (section 518) as follows: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Section 519 is as follows: "Fear, such as will constitute extortion, may be induced by a threat, either, * * * (2) To accuse him, or any relative of his or member of his family, of any crime." The information (Pen. Code, § 952) "must be direct and certain as it regards: (1) The party charged. (2) The offense charged. (3) The particular circumstances of the offense charged, when they are necessary to constitute a complete offense." When measured by the above provision of our Penal Code, we think the information did not state facts sufficient to constitute a public offense, and that the court erred in overruling the demurrer. The information does not show that the property therein described was obtained from Maier with his consent. It does not show that it was obtained by the wrongful use of force or fear. It simply states that the property was obtained from Maier by reason of a threat made by the said defendant to accuse the said Maier of the crime of selling diseased and unwholesome meat. The act of selling diseased and unwholesome meat is not of itself a crime. To knowingly sell diseased or unwholesome meat, knowing it to be so diseased or unwholesome, with intent to permit it to be eaten, is a crime. Pen. Code, § 383. But it might be sold under many circumstances, and such selling would not be a crime. It might be sold with no knowledge on the part of the seller that it was diseased or unwholesome. It might be sold with no intention on the part of the seller to permit it to be eaten. It might be sold as a fertilizer, or for many other purposes besides that of being eaten. We have the right to presume that defendant threatened to accuse Maier of selling diseased and unwholesome meat for any of these purposes, and we know of no law that would authorize us, in a criminal case, to presume that defendant threatened to accuse Maier of knowingly selling it with intent to permit it to be eaten. Unless the act of selling diseased and unwholesome meat under all circumstances and for any purpose, and even without knowledge on the part of the seller that it is unwholesome or diseased, is a crime, this information does not charge any public offense. The court in its charge to the jury said: "And a threat by the defendant to accuse the said Maier of selling diseased and unwholesome meat is not accusing him of a crime, within the meaning of the law; and, before the defendant can be convicted on the information in this case, it is not only necessary for the people to prove beyond a reasonable doubt that the defendant accused said Maier of selling diseased and unwholesome meat, but they must also prove, beyond a reasonable doubt, that defendant accused said Maier of selling diseased and unwholesome meat with intent to permit the same to be eaten, drank, or otherwise consumed by some person or persons." If the court had measured the information in this case by the law as given to the jury, it would have been found short of the statutory requirements. It becomes unnecessary to notice the other points argued. We advise that the judgment and orders be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders are reversed.

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126 Cal. 454

LANDIS v. WOODMAN. (Sac. 639.)

(Supreme Court of California. Oct. 26, 1899.)

CLAIM AGAINST ESTATE—PRESENTATION—STATEMENT OF PARTICULARS.

The requirement of Code Civ. Proc. § 1494, that the particulars of a claim against an estate must be stated if it is not due when presented, is complied with in the case of a claim based on an ordinary note, if the particulars appearing on the face of the note are stated.

Department 1. Appeal from superior court, Butte county.

Action by A. J. Landis against E. M. Woodman, administrator of the estate of A. Fuller, deceased, to recover on a claim against the intestate. There was a judgment for defendant entered on sustaining a general demurrer to the complaint, and plaintiff appeals. Reversed.

C. A. March, J. C. March, J. D. Sproul, and H. W. Johnson, for appellant. John Gale and F. C. Lusk, for respondent.

GAROUTTE, J. Plaintiff presented a claim against the estate of A. Fuller, deceased, to the administrator. This claim was in the following form, and was rejected:

"The undersigned creditor of A. Fuller, deceased, presents his claim against the estate of said deceased for approval, to wit: Estate of A. Fuller, Deceased, to A. J. Landis, Debtor.

"To principal promissory note, dated June 25, 1897, hereto attached, fifteen thousand dollars.

"To interest on same from June 25, 1897, at seven per cent. per annum, to March 25, 1898, seven hundred and eighty-seven and $^{50}/_{100}$ dollars.

"Which note is in the words and figures following, to wit:

"'$15,000. Chico, Cal., June 25, 1897. One year after date (without grace), I promise to pay to the order of A. J. Landis fifteen thousand dollars, for value received, with interest until paid, both principal and interest payable only in United States gold coin. Alfred Fuller.'

"State of California, County of Butte—ss.: A. J. Landis, whose foregoing claim is herewith presented to the administrator of said deceased, being duly sworn, and says that the amount thereof, to wit, the sum of fifteen thousand dollars, with accruing interest at the rate of seven per cent. per annum on the sum of fifteen thousand dollars, is justly due said claimant, but is not payable until the expiration of one year from June 25, 1897; that no payments have been made thereon which are not credited; and that there are no offsets to the same to the knowledge of said claimant. A. J. Landis.

"Subscribed and sworn to before me this 25th day of March, 1898. [Seal.] J. D. March, Notary Public in and for the County of Butte, State of California."

Upon the rejection of the aforesaid claim this action was brought upon it, and a general demurrer was sustained to the complaint. Thereafter judgment was entered against plaintiff, and this appeal is taken from that judgment. The complaint was held fatally defective upon the ground that the claim therein set out was fatally defective.

Among other matters, section 1494 of the Code of Civil Procedure declares: "Every claim which is due when presented to the executor or administrator must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated." It was held by the trial court that the "particulars" required to be stated in a claim that is not due were not set out in this claim. The single question involved by this appeal is, does the claim presented substantially comply with the requirements of this statute? Respondent rests the case upon the proposition that the "particulars" of this claim are not stated, and in seeking for the meaning of the word "particulars" he declares that it refers to the four essentials of a valid contract, namely, parties capable of contracting, consent, a lawful object, and a sufficient consideration. He then admits that this claim shows three of these essentials, but declares it fails to show a sufficient consideration. Even if it be admitted that this construction of the statute is the sound one, we would be loath to hold this claim too weak to form the basis of a cause of action. We would consider long before declaring such a claim no claim. Especially is this so in view of a statute which is so general and indefinite as the one here under consideration. If respondent rejected this claim for the reason that it contained no statement as to the true consideration actuating these parties in making the contract, it would seem but just and right to the claimant that he should have been so informed by the administrator, in order that an amended claim could have been presented to meet that objection. The "particulars" of this claim are sufficiently stated. The date of the contract is shown. The parties are named. The amount to be paid is stated. When it is to be paid, and kind of coin, are also stated. This must be held to be a substantial compliance with the statute. Especially are we inclined to such conclusion when we find in sections 1494 and 1499 of the Code of Civil Procedure ample power vested in the court and the administrator or executor to investigate to the lowest dregs the validity and honesty of all claims which may be presented to them. We are also disposed to this conclusion in view of the fact that the business world would be badly handicapped in dealing with commercial paper if a history of such paper be required to accompany it from its inception throughout its long and devious travels. To obtain such a history would be impossible in numberless cases. A promissory note past due requires no statement of particulars other than that found upon its face; yet there is no good reason why the law should make any different rule in the two cases. "Particulars" are as necessary in the one case as in the other. Of course, in the case of contingent claims the propriety of the rule is readily apparent, and very possibly in many other cases when claims are not due. But in a simple, plain, ordinary promissory note we see no necessity for stating any other particulars than those appearing upon its face. The Indiana statute requires a "succinct and definite statement of the claim." Under such a requirement a copy of a promissory note has been repeatedly held to constitute a compliance with the law. Wolfe v. Wilsey (Ind. App.) 28 N. E. 1004. Yet it would seem that the language of the Indiana statute is fully as broad and explicit as the word "particulars" found in the aforesaid provision of the Code of Civil Procedure. We conclude that this note upon its face gives the "particulars" called for by the statute. For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

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126 Cal. 377.

LUDWIG v. HARRY. (Sac. 519.)

(Supreme Court of California. Oct. 23, 1899.)

APPEAL AND ERROR—CHANGE OF VENUE—QUESTION OF FACT.

Where a defendant sued in one county is served in another, and moves for change of venue to the latter county on the ground that he resides there, and he files affidavits in support of his motion, and plaintiff files affidavits tending to show that defendant resides in the county where the suit is brought; that the defendant had actually resided in said county with his family, he running a hotel; that defendant in September left said county, and his family ran said hotel for defendant's benefit; that plaintiff informed defendant's wife that she was going to sue defendant, and that said wife tried to dissuade her from suing, and assured her that defendant would return in December, and resume control of said hotel; and that from all information plaintiff could get she has been led to believe that defendant's absence is temporary, and several other affidavits are filed by each party, which materially conflict,—the decision of the trial court will not be disturbed, as there is a conflict in the evidence on a question of fact.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

Action by Caroline Ludwig against John C. Harry. From an order denying a motion for change of venue, defendant appeals. Affirmed.

J. B. Curtin, for appellant. Jo Hamilton and Geo. W. Hamilton, for respondent.

HAYNES, C. This action was brought in the superior court of the county of Placer. The summons was served upon the defendant in the county of Tuolumne, and the defendant in due time filed a demurrer to the complaint and an affidavit of merits, and moved the court to change the place of trial to said last-named county, upon the ground that said county of Tuolumne was his place of residence, as shown by his affidavit filed therewith. The plaintiff filed her affidavit in opposition thereto, and the defendant filed several additional affidavits, tending to sustain and corroborate his original affidavit. Upon the hearing the court denied the motion, and the defendant appeals.

Plaintiff, in her complaint, alleged that she was the owner of a hotel in the town of Auburn, Placer county, and in August, 1896, leased the same, with the furniture, barn, and stable, to the defendant, and brought this action to recover $350, rent due and unpaid. This action was commenced October 18, 1897. In her affidavit in opposition to the motion, it was stated that the defendant actually resided in said leased premises with his family, conducting the business of a hotel keeper, until in September, 1897, when he left Auburn, his wife and family remaining in the leased premises, conducting the hotel business under the lease, and for the benefit of the defendant, until November 19, 1897; that defendant did not inform her that he was going away; that shortly before the commencement of this action she learned for the first time that the defendant was in Sonora, Tuolumne county; that she informed defendant's wife, on the day before the commencement of this action, that she was contemplating bringing it; that defendant's wife tried to dissuade her from doing so, and assured her that the defendant would return about the 1st of December, and resume possession and control of said hotel; that affiant was never informed from any source that defendant had left Auburn intending to change his place of residence, but was led to believe, from all the information she was able to obtain, that his absence was temporary, and that he intended to return.

The defendant's affidavit in reply states that he went to Tuolumne county, intending to change his place of residence to that county, and so expressed himself to various persons before leaving; that he has been since about August 1, 1897, a bona fide resident of Tuolumne county; that soon after he arrived he obtained work in a mine at Soulsbyville, and has ever since been engaged in performing labor in said county; and that a few days after his arrival he informed his wife by letter of the fact of his "residence in Tuolumne county." Several other affidavits were read by defendant. The conflict between defendant's affidavits and that of the plaintiff is material, and in several points not capable of being reconciled, particularly in regard to the result of plaintiff's inquiries as to where the defendant was after he left Auburn, and his intention as to a change of his place of residence. Whether the defendant had changed his place of residence before this action was commenced is a question of fact. That he had been a resident of Auburn, Placer county, is beyond dispute. That the usual indicia of residence there existed at the time this action was commenced is equally clear. His family occupied the premises leased by the defendant from the plaintiff for residence and business purposes. He did not, until a month after the suit was commenced, surrender the leased premises, but the business for which he leased the same, and which he personally conducted up to the time of his departure, was continued for his benefit, and the leased premises continued to be the shelter for his family and household goods, and it does not appear that he had provided any other. That defendant started out in search of a new place of residence may be conceded, but that he had in fact changed his residence at the time this action was commenced may well be questioned. At all events, there was a conflict in the evidence, and the rule that in such cases the action of the court below will not be disturbed on appeal applies to these motions. Daniels v. Church, 96 Cal. 13, 30 Pac. 798, and cases there cited. The order appealed from should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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126 Cal. 373

PEOPLE v. SCHOEDDE. (Cr. 498.)

(Supreme Court of California. Oct. 23, 1899.)

MAYHEM—SUFFICIENCY OF PROOF—PRINCIPAL IN CRIME—AIDER AND ABETTOR—CRIMINAL LAW — INSTRUCTION — REASONABLE DOUBT.

1. One H. was castrated early Monday morning in Santa Cruz. Defendant, a veterinary surgeon, hired by P. to commit the crime, traveled on the preceding Saturday from San Jose to Santa Cruz with P., P.'s wife, and others, for the purpose of executing it on the next morning. On Monday defendant exhibited H.'s members to several persons in San Jose, telling them that he did the castration, but in the trial he testified that in making said statements he lied. Defendant and various credible witnesses testified that defendant returned to San Jose on Sunday evening, which, if true, precluded his presence at the commission of the crime, and defendant further testified that P. gave him H.'s members in San Jose on Monday. *Held*, that as to whether or not defendant was present when the crime was committed was a question for the jury.

2. If defendant had returned to San Jose on Sunday evening, there was not sufficient evidence of his guilt as an aider and abettor.

3. Where one is convicted of mayhem under evidence that would support a verdict if he were present at the crime's commission, but which would not support a verdict if he were not present, and the jury are instructed that, if he were present, he may be convicted, and, if absent, he may be convicted as an aider and abettor, a new trial will be granted, as it cannot be told from the verdict whether the conviction was as a principal present or as an aider and abettor.

4. An instruction that "if, after careful and impartial consideration of all the evidence, the jury can say and feel that they are morally convinced of the defendant's guilt, and are fully satisfied of the truth of the charge, that then they are convinced beyond a reasonable doubt, and the verdict should be conviction," is not a sound legal instruction.

5. An instruction which declares that there has been no evidence introduced in the case on trial which tends in the slightest degree to show any justification of the crime charged is improper, as charging upon matters of fact.

Department 1. Appeal from superior court, Santa Cruz county.

Mark Schoedde was convicted of mayhem, and he appeals. Reversed.

Howell C. Moore, Louis O'Neil, and J. H. Skirm, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of mayhem, and appeals from the judgment and order denying his motion for a new trial.

By the information he is charged with the castration of one Harris in the city of Santa Cruz, June 21, 1897. It is strenuously insisted that the evidence fails to support the charge. In its facts the case is peculiar. It is undisputed that Harris was castrated upon the early Monday morning of June 21st at a lodging house in the city of Santa Cruz. It is also conceded that the defendant, a veterinary surgeon, was hired by one Plyler to do the work, and that upon the preceding Saturday he traveled from the city of San Jose to Santa Cruz, in company with Plyler, Plyler's wife, and others, for the purpose of committing this crime. The crime, by agreement of the conspirators, was to have been committed in an outlying part of the city upon Sunday morning, June 20th. In fact it was committed in a lodging house of the city upon the following Monday morning. Upon this Monday, Schoedde, the defendant, told various parties in the city of San Jose that he had castrated Harris in Santa Cruz upon the preceding day, and thereupon exhibited to them the members of Harris' body as evidence of the fact. Standing alone, the foregoing facts as evidence of defendant's guilt could hardly be stronger; but in defense various witnesses, apparently entirely credible, testified that Schoedde, the defendant, returned to San Jose from Santa Cruz Sunday evening, and it is now conceded that, if such evidence was true, he was not present at the commission of the crime. The defendant upon the witness stand declared that upon Sunday morning he determined to withdraw from the conspiracy, and that he thereupon returned to San Jose upon Sunday evening, and in connection with this evidence various disinterested persons testified that they saw him upon the train at that time while en route from Santa Cruz to San Jose. The defendant also declared that Plyler, a conspirator, and the principal, gave him the members of Harris body in San Jose upon Monday; and he further declared upon the witness stand that he was flatly and entirely lying when he told the various parties in San Jose upon Monday that he committed the crime. Upon the foregoing state of facts it is apparent that the jury had a difficult duty to perform in getting at the truth. Measured by his sworn statements, defendant was a colossal liar, willing to be hired for money to commit a felony. Measured by his unsworn statements, he committed a crime which marked him as a villain of the deepest dye. Hence we say it is a most peculiar case in its facts, and a case presenting serious difficulties to a jury. Yet it is a case presenting facts only, and facts are matters which a jury alone is authorized to weigh and sift and pass upon. It can only be said by the court that there exists a substantial and direct conflict in the evidence, and the truth of the matter rested with the jury.

There is a claim made by the people that, even conceding that defendant did not actually participate in the commission of the crime, but returned to San Jose upon Sunday evening, still he was an aider and abettor, and equally guilty with Plyler. The general principle here contended for is sound, but its application to the facts of this case is wanting. We will not go at length into a discussion of this contention. It is sufficient to say that under the evidence disclosed by this record, if it be conceded that the defendant was not at Santa Cruz when the crime was committed, but had previously returned to San Jose upon Sunday evening, as testified to by various witnesses, then the verdict has not sufficient support in the evidence. In other words, under the evidence there is not disclosed that aiding and abetting by defendant which would make him a principal in the crime. A great many instructions as to the law bearing upon this particular branch of the case were given to the jury, but, in view of what has been said, we pass them by without consideration; for, assuming that the evidence given upon a second trial as to this point will be the same, no instructions should be given bearing upon the facts in this regard. As illustrative of this class of instructions, the following may be cited: "Even though you believe the defendant was not present at the commission of the alleged crime, it does not necessarily follow that you must acquit him." In view of the evidence, we are satisfied that the defendant should have been acquitted, unless he was present at the commission of the crime.

From what has been said a new trial must be ordered. It is impossible to say from the verdict and the instructions whether the jury found that the defendant was present at the time the crime was actually committed, and participated in that commission, or whether they found that, though he was in San Jose at the time of the commission of the crime, still he was guilty as an aider and abettor. As we have seen, if the jury based its verdict of guilty upon the ground that the defendant was simply an aider and abettor of the crime, then the evidence does not justify the verdict.

The court gave the following instruction to the jury: "If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you are morally convinced of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are convinced beyond a reasonable doubt, and your verdict should be one of conviction." This instruction has some support in a few of the early decisions of this court, but it is not a perfectly sound legal instruction by any means, and should never be given. It is better by all means to define a reasonable doubt in the way so often declared unobjectionable by this court, rather than attempt new departures. The court also gave the following instruction: "I instruct you further that there has been no evidence introduced in this case which tends in the slightest degree to show any justification of the crime alleged in the information." This instruction comes very near the border line of error as charging the jury upon matters of fact. It should not be given upon a second trial. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J

126 Cal. 379

PEOPLE v. PLYER. (Cr. 523.)

(Supreme Court of California. Oct. 23, 1899.)

CRIMINAL LAW—EXAMINATION OF JURORS—EVIDENCE AT PRELIMINARY EXAMINATION—PROOF OF DEATH—REPORTER'S NOTES—INSANITY—INSTRUCTIONS—HARMLESS ERROR.

1. Jurors on their voir dire may be asked whether they believe a man has the right to take the law in his own hands, and thereby commit a crime.

2. Pen. Code, § 686, provides that evidence taken at the preliminary examination of a defendant may be introduced at trial, upon it being satisfactorily shown to the court that the witness is dead or insane. *Held*, that the fact of death must be shown at trial by relevant and competent evidence, and cannot be shown by affidavit.

3. The statute allowing the admission in evidence at trial of reporter's notes of testimony taken at the preliminary examination of defendant is constitutional.

4. Error in striking out a certain answer of a witness is harmless, where it was afterwards given by the witness without objection.

5. Though expert evidence, as well as opinion evidence of friends and acquaintances, all point to defendant's insanity, the jury may weigh that evidence in conjunction with defendant's conduct and all the circumstances of the case.

6. An instruction "that there has been no evidence introduced in this case which tends to show any justification of the crime alleged" is improper, as charging upon matters of fact.

Department 1. Appeal from superior court, Santa Cruz county.

George F. Plyer was convicted of mayhem, and appeals. Reversed.

Josselyn & Houck and Jos. H. Skirm, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of mayhem, and appeals from the judgment and order denying his motion for a new trial. Under objection and exception, the court allowed various jurors upon their voir dire to answer the question, "Do you believe that a man has the right to take the law into his own hands, and thereby commit a crime?" The attorney general contends that the question was clearly proper, for the purpose of securing light upon the minds of the jurors, with a view to a peremptory challenge, and for authority relies upon People v. Car Soy, 57 Cal. 102. It would seem that People v. Hamilton, 62 Cal. 378, to some degree, at least, curtails the doctrine of the previous case. Yet, aside from any question of peremptory challenge, we deem the action of the court in allowing the question entirely proper. It is, in effect, to ask the prospective juror, if taken upon the panel, will he decide the case according to the law and the evidence. Certainly, a juror who declares that he believes a party is justified in taking the law into his own hands in certain cases, notwithstanding he commits a crime thereby, should not be taken upon a jury. The identical case upon trial might be one of those cases which the juror had in mind when making such a statement, and a man in that mental condition should not be taken as a juror. He has a bias, which in law disqualifies him as a competent juror. To be sure, if it should be developed upon further examination that the case upon trial could not, under any circumstances, come within the class towards which the witness' bias extended, then, possibly, the juror would be qualified. But in this case the various jurors in answer to this question declared in the negative, and the examination there closed. Clearly, there was no substantial error in allowing the question to be answered.

One Bradley testified at the preliminary examination of the defendant. He was a very important witness. At the trial his evidence taken at the preliminary examination was offered, supported by an attempted showing that he had since died. Section 686 of the Penal Code provides that this kind of evidence may be introduced "upon it being satisfactorily shown to the court" that the party is dead or insane, or cannot after due diligence be found in the state. The sole showing made by the prosecution going to the fact of the death of the witness was in the form of an affidavit made by his sister to the effect that he was dead. This affidavit was admitted under objection. The evidence introduced to show the death of the witness was as much a part of the trial as any other part of it, and the fact that the witness was dead could no more be shown by affidavit than the fact that dying declarations could be shown by affidavit to have been made under the sense of impending death, or that the contents of a written document could be shown, supplemented by an affidavit to the effect that the document was lost. The statute says the fact of death must be satisfactorily shown to the court. It means the fact of death must be shown by relevant and competent evidence. We know of no case where it has ever been held that an affidavit may be introduced as evidence at the actual trial of a defendant. The statute (section 2019, Code Civ. Proc.) forbids it. The only answer found in the brief of the attorney general to appellant's contention in this particular is the claim that an affidavit may be used upon the hearing of a motion, and that the introduction of this evidence partook of the character of a motion. We cannot indorse this contention. Almost every state constitution in the Union has a provision declaring that a defendant is entitled to be confronted at his trial by the witnesses against him. While our constitution has no such provision, yet that declaration is found in the Penal Code of the state, and, while there are a few statutory exceptions made to the rule there declared, still the right thus given to a defendant by the statute is deemed a most substantial one. If the practice here adopted could be allowed, then a defendant would be deprived of the right to cross-examine the witnesses against him,—a right of the highest importance.

Various objections are made to the admission in evidence of the reporter's notes of the testimony of Harris and Bradley, given and taken at the preliminary examination. The statute allowing this character of evidence to be introduced at the trial is constitutional. People v. Oiler, 66 Cal. 101, 4 Pac. 1066; Same v. Chin Hane, 108 Cal. 597, 41 Pac. 697; Same v. Sierp, 116 Cal. 250, 48 Pac. 88; Same v. Cady, 117 Cal. 10, 48 Pac. 908. The various objections raised by appellant's brief upon this branch of the case are entirely too technical to possess substantial merit. A review of the soundness of the ruling of the court in striking out the answer of the witness to the effect that defendant's "manner was bad, desperate, crazy," becomes immaterial, for subsequently the same evidence was given by the witness without objection.

It is claimed that the verdict of the jury is contrary to the evidence in this: that defendant's insanity was established without substantial conflict. There is nothing whatever in this contention. Even conceding that the expert evidence and the opinion evidence of friends and acquaintances all pointed to defendant's insanity, still the jury had the right, and it was their duty, to measure and weigh that evidence in conjunction with defendant's conduct and acts as that conduct and those acts were disclosed by all the circumstances of the case; and, after so weighing all the evidence, it was their duty to say whether or not the insanity of the defendant was shown by a preponderance of evidence.

Error is complained of in the giving of an instruction which is in part as follows: "I instruct you further that there has been no evidence introduced in this case which tends to show any justification of the crime alleged in the information." This instruction is near the border line of error, as charging upon matters of fact. Upon a second trial it should not be given. Many objections are made to other instructions given to the jury, and also objections are presented to some which were offered and refused. We have examined all these objections with care, and find the great majority of them of a highly technical character. Many of the instructions find support in the authorities of this state, while others need no authority to support them. There is no substantial merit to be found in any of these contentions, and they are overruled. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN DYKE, J.; HARRISON, J.

126 Cal. 458

POTTER v. RANDOLPH et al. (Sac. 549.)

(Supreme Court of California. Oct. 26, 1899.)

PUBLIC LANDS—CONTEST OF TITLE—JURISDICTION OF STATE COURTS.

1. The state courts have jurisdiction of an action to quiet title, pending the determination of a contest of plaintiff's title before the United

States land department, dependent on whether the lands are agricultural or mineral, and of which question only the land department has jurisdiction, and the court will delay its judgment until the decision of such question by the land department.

2. On the determination of such contest, there is no error in admitting in evidence the decision of the land department, though such decisions have not the formalities of judgments.

3. The decision by the land department of such question is conclusive on the courts, and evidence on the question is inadmissible.

Department 2. Appeal from superior court, Amador county.

Action to quiet title by Frank M. Potter against Clark Randolph and others. From a judgment in favor of plaintiff, defendants appealed. Affirmed.

Reddy, Campbell & Metson, for appellants. Wm. J. McGee, for respondent.

PER CURIAM. The action was to quiet title to land, and the appeal is from the judgment and from an order refusing a new trial. Plaintiff claims title derived from the United States under a commuted homestead entry, and a duplicate receipt for a patent dated prior to the commencement of the action. The answers set up claims to portions of the land under mining locations, and aver a contest with plaintiff, still pending in the United States land department, and contend that, therefore, the superior court had no jurisdiction to render judgment "until said cause in said land department of the United States has been fully determined." The matter of the contest was whether the land was more valuable for mineral than for agricultural purposes, and the court found that such contest, at the time of the trial, had been determined in favor of plaintiff, and that he was therefore entitled to his patent, and consequently to judgment. The appellants contend that the court had no jurisdiction of a suit to quiet title while the contest for the right to purchase was pending in the land office; that the question of title depended upon the further question as to whether the land claimed was mineral or not. If mineral, plaintiff had no title, and could acquire none, and, therefore, as soon as the nature of the issue was made to appear, the court should have dismissed the action, as it had no jurisdiction to determine that question. A special tribunal had been created by congress to determine such matters, and that tribunal alone could determine the issue.

The court certainly had jurisdiction of the cause. The real contention was that it could not determine the issues raised by the pleadings, because they involved a question which it could not try, and for the determination of which a special tribunal had been created. If that were so, a dismissal would have been the proper course. But was it so? Astiazaran v. Mining Co., 148 U. S. 80, 13 Sup. Ct. 457, is cited as authority. That was an action to quiet title, brought in the territorial courts of Arizona. The land was claimed under an unconfirmed Mexican grant. Congress did not establish a tribunal to determine the validity of such grants, but by law directed the surveyor general to ascertain certain facts, and report to congress, with his decision as to the validity of the grant. When congress confirmed the decision, it was final. It does not appear that the title conferred any rights, as to possession or otherwise, until confirmed. Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. 399. The court said, in substance, that the suit was, in effect, to determine whether the grant was valid. To determine that question a special tribunal had been provided. Therefore the judiciary cannot act upon it while the matter is pending in the special tribunal; "for if congress should decide the same way as the court the judgment of the court would be nugatory, and if congress should decide the other way its decision would control." That was held valid ground for a dismissal. The cases are not precisely similar. The land department of the United States is not a special tribunal organized to determine who is the owner of land. The department is the medium through which parties may acquire the title of the United States. Its functions are mostly administrative, and only incidentally judicial. It determines the existence or nonexistence of alleged facts, to enable it to select the person who is entitled to purchase. The proceeding is to acquire title, not to determine who has it. The title, when acquired, will, however, for many purposes, date back to the first step in the procedure. The court very properly then delayed the trial until the question as to the character of the land was determined by the land department, which alone had the power to decide that controversy. The court had jurisdiction of the action, but could not try that particular controversy which was involved in the action. Being a suit to quiet title, and not to recover possession, there was no special reason for anticipating the action of the department.

The case might have been different had the suit been to recover possession. Whether a person entitled to immediate possession should be kept out until these proceedings were ended may be a serious question. In a suit for possession, the court might be called upon to determine many questions involved in a contest. It would try such questions, so far as was necessary to determine the right to the possession. Such trial would not trench upon the jurisdiction of the special tribunal, or affect the proceedings, or the force and validity of any title which might be acquired in the proceeding.

We see no error in allowing in evidence the decisions of the land department, which proved that the controversy had been determined for the plaintiff since the commencement of the action. These executive officers do not enter up judgments or keep records, like the judgment roll of a court. We are not informed by the parties that notices of appeal were required, or, if so, by whom and to whom they were to be given. The land department having decided that the land was more valuable for agricultural than for mining purposes, the court was bound by the conclusion, and properly refused to consider the evidence upon that subject offered by defendants. The judgment and order are affirmed.

(6 Cal. Unrep. 349)

PEOPLE ex rel. FOGG v. PERRIS IRR. DIST. (HUTCHINGS et al., Interveners. L. A. 743).

(Supreme Court of California. Oct. 30, 1899.)

APPEAL—MERITS—MOTION TO DISMISS.

Motion to dismiss appeal on the ground that appellants have no interest will not be sustained.

In bank. Appeal from superior court Riverside county.

Quo warranto by the people, on the relation of one Fogg, against the Perris Irrigation District (one Hutchings and others, interveners). There was a judgment for plaintiffs, and interveners appeal. Motion to dismiss appeal denied.

C. C. Wright, Wm. C. Cox, and L. L. Boone, for appellants. W. F. Fitzgerald, Atty. Gen. Ford, and Works & Lee, for respondents.

PER CURIAM. This is a proceeding by quo warranto to determine the de jure existence of a de facto irrigation district. Certain bondholders of the district were allowed to intervene against the people, and have appealed from a judgment declaring the organization illegal. The people now move to dismiss the appeal upon the ground that the interveners have no interest, there being no judgment against them. The motion involves the whole merits of the case as presented on the part of the appellants by their intervention in the superior court and by their appeal. Want of merit in an appeal is not a ground for dismissing it. Motion denied.

(126 Cal. 467)

HIGGINS v. MANSON. (S. F. 1,738.)

(Supreme Court of California. Oct. 27, 1899.)

EQUITABLE MORTGAGE—DESCRIPTION—EXECUTORY CONTRACT.

1. A writing accompanying a deposit of title deeds recited, "I further agree to transfer to H. all my right and title to said 160 acres of land,—certificate No. 7,072,—should I fail to pay my obligation of $100 and interest." *Held*, that the intention was to transfer the land itself in case of delinquency, and hence an equitable mortgage was created.

2. It was no objection that the agreement was executory, as equity regards as done that which ought to be done.

3. As the patent described the land, the reference to it was a sufficient description of the mortgaged premises.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county.

Suit by Charles H. Higgins against Carrie A. Manson, administratrix of the estate of Homer Manson, deceased. There was a judgment for defendant, and plaintiff appeals. Reversed.

Geo. D. Collins, for appellant. J. N. Gillette, for respondent.

CHIPMAN, C. Foreclosure. Defendant had judgment on a general demurrer to the complaint, from which plaintiff appeals.

The action is brought against defendant as administratrix of her deceased husband's estate. The complaint alleges that Homer Manson in his lifetime executed and delivered to plaintiff his certain written instrument, of which the following is a copy:

"$100.00. San Francisco, Cal., Sept. 2d, 1896. One day after date (without grace), I promise to pay to the order of Charles H. Higgins the sum of one hundred and no/$_{100}$ dollars, for value received, with interest at the rate of one per cent. per month until paid; both principal and interest payable only in United States gold coin. [Signed] H. Manson.

"San Francisco, Cal., Sept. 2, 1896. In consideration of the sum of one hundred no/$_{100}$ dollars, loaned me by Chas. H. Higgins, I this day deposit with him as security my government patent to 160 acres of timber land in Humboldt county,—certificate No. 7,072,—dated at Washington, D. C., the 18th day of October, 1889; said certificate to be returned to me if the sum of one hundred dollars and interest at the rate of one per cent. per mo. is paid in one year from date. I further agree to transfer and assign over to Chas. H. Higgins all my right and title to said 160 acres of land,—certificate No. 7,072,—should I fail to pay my obligation of one hundred dollars and interest on September 2, 1897. [Signed] Homer Manson. Witness: [Signed] Geo. E. Dodge."

The complaint alleges that the patent referred to in the instrument was issued to Manson on October 18, 1889, by the United States, whereby title was transferred to Manson to the land sought to be sold (describing it); alleges nonpayment, and waives recourse against the property of the estate, other than the above-described property; and prays judgment "for the foreclosure of said lien, and for the sale of said real property in satisfaction of said lien," and for general relief.

Appellant concedes that a lien cannot be created by the mere deposit of title deeds, but he contends that a lien in the nature of a mortgage may be imposed upon land without compliance with section 2922, Civ. Code; citing Dingley v. Bank, 57 Cal. 471; Hill v. Eldred, 49 Cal. 398; Kreling v. Kreling, 118 Cal. 419, 50 Pac. 549; and some other causes; also, sections 2872, 2881, 1636, 1643, 1647, 1656, Civ. Code. As to when a written memorandum makes the deposit of a title deed a mortgage, he cites 1 Jones, Mortg. § 187; 3 Pom. Eq. Jur. §§ 1266, 1235, 1237; 1 Beach, Mod. Eq. Jur. § 291. To the point that the contract does not set forth a description of the mortgaged premises, it is claimed that reference is made to the patent, and by the latter the description is furnished; that the maxim, "Id certum est quod certum reddi potest," applies, —citing Preble v. Abrahams, 88 Cal. 251, 26 Pac. 99; Towle v. Coal Co., 99 Cal. 398, 33 Pac. 1126.

Respondent concedes that the law of this state recognizes an equitable mortgage, and also concedes that an instrument may be drawn contemporaneously with the deposit of the title deeds which a court of equity will enforce as an equitable mortgage; but it is contended that it must be such an agreement as meets the requirements of our Code, and must leave no doubt, and, further, that the instrument should "expressly state that the debt was 'secured by, or be a charge on, the land described in the deed,' "—citing 3 Pom. Eq. Jur. § 1266, and relying especially upon Gardner v. McClure, 6 Minn. 250 (Gil. 167). The parties, by their mutual concessions, have reduced the inquiry to the single question as to the true purport and meaning of the written instrument pleaded. The true rule, as we think, was correctly stated in Howard v. Land Co., 62 Minn. 298, 64 N. W. 896: "Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged,"—citing in support thereof Pom. Eq. Jur. §§ 1235, 1236; Payne v. Wilson, 74 N. Y. 348; Daggett v. Rankin, 31 Cal. 321; Canal Co. v. Vallette, 21 How. 414. We are not concerned at this time as to the rights of third persons or creditors of the estate. If the complaint is good as between the parties to the action, it is not demurrable. Howard v. Land Co., supra. Gardner v. McClure, supra, is a very well considered and instructive case. The agreement there, however, clearly showed an intention to fix the lien upon the deed, and not upon the land described therein, and the opinion in the case is mainly a learned review of the doctrine from its inception in England as applicable to the mere deposit of the deed unaccompanied by any clear intention to place a lien upon the land itself. There was in that case no such clause in the contract as the concluding paragraph of the instrument here. In this paragraph there is, we think, a clear intention to make a transfer of the land itself by Manson, should he fail to pay as agreed. Reading the entire instrument, it seems to us the intention is made manifest that the land should stand as security for the debt, and the land is sufficiently described to indicate what was intended to be mortgaged. It is no answer that this part of the agreement was executory, for equity regards as done that which ought to be done. 2 Pom. Eq. Jur. § 1237. In Daggett v. Rankin, 31 Cal. 321, Mr. Justice Currey gives what Mr. Pomeroy calls "an admirable statement of this truth," namely: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific [equitable] lien on the property intended to be mortgaged." I advise that the judgment be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

126 Cal. 482

RYER v. FLETCHER-RYER CO. (Sac. 520.)

(Supreme Court of California. Oct. 27, 1899.)

PARTITION—STATUTORY PROCEEDING—RIGHT OF ADMINISTRATOR TO MAINTAIN ACTION.

1. Partition is a special statutory proceeding under the Code of this state.

2. Code Civ. Proc. § 1581, providing that, for the purpose of suits to partition the estate of a decedent, the possession of the executors or administrators is the possession of the heirs or devisees; that such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration,—contemplates actions by the heirs or devisees to partition the property of the estate, and does not authorize an administrator to maintain an action for partition of real estate owned by deceased at the time of his death as tenant in common with others.

In bank. Appeal from superior court, Solano county.

Action by Mary Jane Ryer, administratrix of the estate of William T. S. Ryer, deceased, against the Fletcher-Ryer Company for partition. From an interlocutory judgment ordering the property to be partitioned, and appointing referees to make such partition, defendant appeals. Reversed.

R. H. Countryman, for appellant. M. M. Estee and Oscar B. Coghlan, for respondent.

PER CURIAM. This action was brought by plaintiff, as administratrix of the estate of William T. S. Ryer, deceased, against the defendant corporation, for the purpose of having the lands described in the amended complaint partitioned acording to the respective rights of the plaintiff, as such administratrix, and of defendant corporation. A demurrer was interposed by defendant to the amended complaint, and overruled. The defendant then answered, and after trial an interlocutory judgment or order was entered, ordering the property to be partitioned in certain proportions, and appointing referees to make such partition. The defendant has appealed from said interlocutory judgment.

The first point urged is that the court erred in overruling the demurrer to the amended complaint. The question for determination here is as to whether the administratrix of the estate of deceased, in her representative capacity, can maintain an action for the partition of real estate owned by deceased at the time of his death as tenant in common with defendant. Partition, under our Code, is a special statutory proceeding. Waterman v. Lawrence, 19 Cal. 218; Gates v. Salmon, 35 Cal. 597. We must therefore look to the statute for the authority to bring the action. It is provided in our Code (Code Civ. Proc. § 752): "When several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof," etc. The plaintiff is not one of the parties named in the statute. She is not a co-tenant, either as parcener, joint tenant, or tenant in common. The Code (Code Civ. Proc. § 1675 et seq.) provides that in probate proceedings, "when the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made," etc.; but the proceeding in this case is not claimed to be under the authority given by this section of the Code, and in fact is not a proceeding in the estate, but an action in the superior court for partition. We look in vain for any authority to bring such action, and our attention has been called to none. The estate of a deceased vests, immediately upon his death, in his heirs or devisees,—subject, of course, to the payment of his debts. The administrator is entitled to the possession of the estate for the purposes of administration. It is his duty to preserve it and distribute it as the court may direct. He may, for certain purposes named in the statute, sell either the real or personal property, by order of the court first obtained. He cannot represent either side in a contest between heirs, devisees, or legatees. He should perform his duty, preserve the estate, pay the debts, and turn over the property to the parties to whom it is given by decree of the court. Roach v. Coffey, 73 Cal. 282, 14 Pac 840. The statute (Code Civ. Proc. § 1582 gives the administrator the right to maintain actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereto. But this is not such action. It is said that authority to bring this action exists under Code Civ. Proc. § 1581, which provides "for the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title." We think the section refers to and contemplates actions by the heirs or devisees for quieting title to or partitioning the property of the estate; the intent being to give the heirs or devisees all the rights which actual possession would give them, and to make the possession of the administrator the same as if the heirs or devisees were actually in possession, preserving, however, all the rights of the executor or administrator for the purposes of administration. This construction is consistent with the authority expressly given to the heirs or devisees to maintain actions in ejectment, or for the purpose of quieting title, by section 1452, Id. The "partition of such estate" evidently refers to suits brought by the heirs or devisees. The possession of the administrator does not devest the heir or devisee of the fee. His possession is for the heirs or devisees who are the owners and seised in fee, subject to the temporary right of the administrator to the possession, and subject to the defined statutory authority and powers of sale given to the administrator. In partition proceedings all parties are actors, and a judgment in the case binds all parties, —the plaintiff as well as the defendant. The administrator performs his trust when he carefully preserves the property, and delivers it over to the heir or devisee with such title as the deceased had at his death. Whether it be an estate in fee, for life, or for years; whether it be the entire fee, or an undivided interest as tenant in common,—it should follow the same rule, and, after the administration, go to its rightful owner.

In Freem. Co-Ten. § 454, it is said, "An administrator, though the estate be shown to be insolvent, has no such seisin in the land of the deceased as entitles him to apply for partition." The same rule is laid down in 2 Woerner, Adm'n (2d Ed.) pp. 1244, 1245, § 567. It is, we believe, universally held that the administrator of an estate has no such interest in the land as entitles him to institute partition proceedings unless power is expressly given him by statute, as in Indiana and Utah. Whitlock v. Willard, 18 Fla. 166; Foster v. Newton, 46 Miss. 661; Speer v. Speer, 14 N. J. Eq. 240; Nason v. Willard, 2 Mass. 478; Richards v. Richards, 136 Mass. 126; Tindal v. Drake, 51 Ala. 578; Campau v. Campau, 19 Mich. 116; Beecher v. Beecher, 43 Conn. 560; Throckmorton v. Pence, 121 Mo. 58, 25 S. W. 843; Nelson v. Haisley (Fla.) 22 South. 265; Garrison v. Cox, 99 N. C. 478, 6 S. E. 124. In the case of Whitlock v. Willard, 18 Fla. 166, it is said: "In the matter of partition in equity, however, we cannot see where, either before or since the statute of this state controlling this subject, an administrator can be held to have such right; and we have been unable, in our examination, to find a single case which sustains such proposition. On the contrary, the law as announced, so far as we know, without exception, under every statutory policy, is that he cannot." Counsel quote a sentence from Bath v. Valdez, 70 Cal. 350, 11 Pac. 724, in which it is said, "Actions may be maintained by the executor or administrator of an estate to recover possession of the real property, for partition thereof, or to quiet title thereto." The language used was not necessary in the case, as no question was in any way at issue involving the right of an administrator to maintain an action for partition, and was clearly obiter dictum. It becomes unnecessary to discuss the many other questions in the case. The judgment is reversed, and the court below directed to dismiss the action.

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126 Cal. 471

HART v. CHURCH et al. (L. A. 507.)

(Supreme Court of California. Oct. 27, 1899.)

HOMESTEAD—MORTGAGES—EXECUTION—RATIFICATION—CANCELLATION—PARTIES—MARRIED WOMEN — NOTES — BONA FIDE PURCHASERS—EVIDENCE—BURDEN OF PROOF.

1. Under Civ. Code, § 1242, requiring an incumbrance on a homestead to be acknowledged by both husband and wife, a mortgage on a homestead, executed by a wife alone, is void, though five months after such execution and delivery the husband executes a declaration on the mortgage, stating that he concurs in the mortgage as of the date of its execution.

2. The statute requiring one to bring an action for the rescission of a contract for fraud within three years after discovery of the fraud does not preclude him from interposing fraud as a defense in an action on such a contract, brought by the person guilty of the fraud more than three years after the former had discovered the fraud.

3. A mortgage on a homestead that is void for want of a joint execution by the husband and wife, as required by Civ. Code, § 1242, cannot be ratified by either spouse alone, nor could either be estopped by his or her conduct alone from asserting the invalidity.

4. A married woman, who has been fraudulently induced to execute a note, may condone the fraud, or so conduct herself as to be estopped from asserting the invalidity of the note.

5. A married woman cannot assert the invalidity of a note executed by her on the ground of fraud as against a bona fide purchaser.

6. Where a holder of a note in an action thereon proves that he purchased it before maturity, and that he paid a valuable consideration therefor, the maker, alleging fraud as a defense, has the burden of showing that the holder knew when he purchased that the note was procured by fraud, and knew of the seller's fraudulent intention in making the sale.

7. Where a purchaser of a note that had been procured by fraud brings an action thereon, and the defendant maker shows the seller's fraudulent intent, the purchaser has the burden of showing a valuable consideration.

8. Under Code Civ. Proc. § 370, making the joining of a husband with a wife, when she is a party, unnecessary where the action concerns her claim to the homestead property, a husband is not a necessary party in a suit by his wife to cancel a mortgage on their homestead.

Department 2. Appeal from superior court, Riverside county.

Action by Eleanor Hart against Katharine A. Church and another. Judgment for plaintiff, and defendants appeal. Affirmed in part.

John G. North, for appellants. Wm. J. Hunsaker and Wm. Peck, for respondent.

HENSHAW, J. Plaintiff brought her action to procure the surrender and cancellation of a mortgage in the sum of $5,000 upon the homestead. She pleaded: That in January, 1894, when she was the wife of Hart, the latter executed and acknowledged the declaration of homestead upon the premises in question. Thereafter, in January, 1895, her husband, for a valuable consideration, conveyed to her all his interest in the land, and that ever since that day she has been the owner in fee thereof. That she was induced by her husband to admit to her household the defendant Katharine A. Church. That said Katharine A. Church and her husband became and continued to be unduly intimate with each other. That in the month of December, 1894, they entered into a conspiracy and agreement "whereby they confederated and agreed together that they would, for their joint and mutual use and benefit, by threats, intimidation, and undue influence, compel plaintiff to execute and deliver to said defendant Katharine A. Church a mortgage upon said real estate to secure the payment to her of the sum of $5,000, notwithstanding the fact that said plaintiff was not indebted to said defendant in any sum whatever." That, while plaintiff was in a distracted mental and feeble bodily condition, in pursuance of the conspiracy, Katharine A. Church threatened and told plaintiff that, if plaintiff did not at once execute the mortgage, "she, said defendant, would procure the husband of plaintiff to obtain a divorce from plaintiff," and Katharine A. Church induced the husband to write plaintiff a letter, and he did write her a letter, threatening that he would procure a divorce from her if she did not immediately execute the mortgage demanded by the defendant. That "by reason of the representations and threats of the defendant and the commands of her husband she was put in fear, and greatly distressed, and believed, in her enfeebled mental and physical condition, that her husband would sue for a divorce, and attempt to ruin her in character, if she refused to execute the mortgage," and under such fear she executed it upon the 7th day of March, 1895. That, upon the 1st day of August following, Roswell Hart, her husband, executed the following written instrument upon the same paper which contained the mortgage: "I, Roswell Hart, hurband of Eleanor Hart, for a valuable consideration, hereby join and concur in the foregoing mortgage as of the 6th day of March, 1895." This was signed and acknowledged by Hart, and the mortgage, together with Hart's declarations as above given, was recorded on the 2d day of August, 1895. This action was commenced by plaintiff upon March 20, 1896. In excuse for her delay in seeking to enforce a cancellation, she pleaded that from the 7th day of March, 1895, the time of the execution of the mortgage, to the 28th day of April, 1895, she was ill, and unable to attend to business; that on

May 1, 1895, she commenced a suit for divorce against her husband, charging him with adultery with the defendant Katharine Church, "and her said husband, acting for himself and said Katharine A. Church, and for the purpose of inducing the said plaintiff to dismiss her suit for divorce against him, and to refrain from bringing an action against said defendant to procure the cancellation of said mortgage, promised plaintiff to procure from said defendant a satisfaction of said mortgage, and said Roswell Hart from time to time thereafter until about March 1, 1896, renewed said promise to procure such satisfaction, and plaintiff, relying upon the aforesaid promises of her husband to procure such satisfaction, did refrain from taking any measures to rescind the mortgage, or bring an action to procure a rescission and cancellation thereof; that plaintiff was not informed that said Roswell Hart could not and would not procure such satisfaction of said mortgage until about the 1st day of March, 1896, whereupon she employed counsel to commence this action, and did commence this action on the 20th day of March, 1896." Her prayer was that she be adjudged the owner in fee of the property, that the mortgage be declared void and canceled, and for general relief. To this complaint defendants interposed demurrers, both general and special. These being overruled, the defendant Katharine Church answered, denying the averments of the complaint, and pleading that the mortgage was freely and voluntarily given as security for a debt due her from Roswell Hart; pleading further that Roswell Hart never conveyed the mortgaged land to his wife, but that she had surreptitiously and fraudulently secured possession of a deed to this land which had never been delivered to her, and caused it to be placed upon record; that Roswell Hart thereafter began a suit against her to set aside the deed, when, on the 13th day of May, 1895, plaintiff executed to him her deed to an undivided one-half of the land, subject to the mortgage made to this defendant. The defendant Elton Church, who is the son of the defendant Katharine Church, answered, denying the allegations of the complaint, and filed a cross complaint, and alleging that he was the owner by purchase for a valuable consideration, and, without notice of the note and mortgage in question, pleaded certain acts and declarations of the plaintiff by way of ratification of her contract of mortgage, and asked that she be estopped from contesting the validity of the same, and that he be decreed the bona fide owner and holder of them. In this condition of the pleadings the cause went to trial before a jury.

It is contended by appellant that this is not an action to determine the validity of an adverse claim, under section 738 of the Code of Civil Procedure, but is an action under section 3412 of the Civil Code, which declares that a written instrument, in respect to which there is reasonable apprehension that, if left outstanding, it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged and ordered to be delivered up or canceled; and in this connection reference is had to the case of Castro v. Barry, 79 Cal. 445, 21 Pac. 946. It is further argued that the sole ground presented for the rescission and cancellation of this contract is that it was procured from the plaintiff by menace and fraud, and, if the complaint does not show equity, the relief prayed for will be withheld. If we could adopt appellant's view that the complaint seeks relief solely upon the ground of fraud, and that the contract of mortgage was, therefore, not absolutely void, but voidable merely, appellant's conclusion would be impregnable, and it would become necessary in the first instance to consider the sufficiency of the complaint as a pleading seeking such relief. But, if all the allegations respecting the fraud were eliminated from the complaint, there would still be left averments sufficient to constitute a cause of action. It would be a cause of action directed against this particular written instrument, and under it the court would be asked to decree, not that the instrument was voidable, but that, because of the manner of its attempted execution, it was void absolutely. These particular averments of the complaint—and as to them it may be said that they are sustained by the evidence and findings—are substantially the following: The plaintiff, the wife of Roswell Hart, executed a mortgage upon the homestead to the defendant Katharine Church for the sum of $5,000. The mortgage was simply a mortgage from Eleanor Hart, mortgagor, to Katharine A. Church, mortgagee, and did not contemplate nor provide for the joining therein of plaintiff's husband. The mortgagor, at the time of the execution of the mortgage, was not indebted to the mortgagee in any sum whatever. This mortgage, dated the 6th day of March, 1895, was acknowledged by the mortgagor upon the 7th day of March following, and was filed for record upon the last-named day. Nearly five months thereafter,—that is to say, upon the 1st day of August, 1895,—Roswell Hart, husband of plaintiff, signed and acknowledged the following writing, which had been transcribed upon the mortgage theretofore given by his wife: "I, Roswell Hart, husband of Eleanor Hart, for a valuable consideration, hereby join and concur in the foregoing mortgage as of the 6th day of March, 1895," and upon August 2, 1895, the mortgage was again filed for record in the recorder's office.

Under these allegations the question arises whether or not a mortgage so executed upon the homestead property creates any lien thereon, and, if not, the judgment annulling it must be upheld, regardless of any consideration of the alleged fraud. "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both the husband and wife." Civ. Code, § 1242. The provisions of the earlier homestead act of 1860, as amended in 1862, were somewhat different in their phraseology, but in effect they were the same as those now set forth in the Code. Gleason v. Spray, 81 Cal. 217, 22 Pac. 551. As early as Poole v. Gerrard, 6 Cal. 71, it was said by this court, "To make a valid sale of the homestead requires the joint deed of husband and wife." In Barber v. Babel, 36 Cal. 11, the homestead act received elaborate consideration from this court, and Chief Justice Sawyer, in delivering its opinion, not once, but repeatedly, enunciated an interpretation of the statute to the effect that the interest in the land to the extent of the homestead value cannot, after the declaration, and while both spouses are alive, "be severed, alienated, incumbered, devested, destroyed, or impaired without the concurrent act of both parties in the mode prescribed by the act." In Gagliardo v. Dumont, 54 Cal. 496, still considering the statute of 1860, it is said: "Under the restraints imposed by the homestead law, neither the husband nor the wife had power to transfer the homestead by a separate conveyance, nor could either incumber it to the prejudice of the other, or of both, or to the destruction of the homestead itself. * * * Neither could, without the consent and concurrence of the other, alienate or transfer it. It was created as a place of residence for the family, and it is the policy of the law to preserve it intact for that purpose until both the husband and wife shall mutually resolve to destroy it by alienation or abandonment. In pursuance of that policy, its destruction is prohibited except by the joint act of both in the mode provided by the homestead law." The case of Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715, arose when the homestead statute had been superseded by the Code provision, and in discussing the Code provision it is said: "The object of the statute, as construed by this court, is to prevent the destruction of the homestead except by the consent of the parties expressed by a joint conveyance." We have been at pains thus to quote from the decisions of this court to show that uniformly and without any conflict the statute and the Code, though not using the term "jointly" or "concurrently," have been construed to mean that the homestead cannot be alienated or incumbered by separate instruments separately executed by the husband and wife, and that it can only be so alienated or incumbered by the joint and concurrent execution of the instrument by the two. Neither Ingoldsby v. Juan, 12 Cal. 564, nor Dentzel v. Waldie, 30 Cal. 138, at all militate against this declaration. In both of these cases the attempt was made to convey the wife's separate property. In both cases it was found that the assent of the husband to the execution of the deed was contemporaneous with, and part of, the execution of the deed of the wife.

Such being our law relative to the alienation or incumbrance of homesteads, it is apparent at once that this attempted mortgage is absolutely void. Clearly, the execution and acknowledgment by the wife alone of a mortgage upon the homestead were the merest nullity. Nor did the fact that the husband five months thereafter wrote upon the mortgage paper a statement that he joined and concurred therein, and signed and acknowledged this declaration, add any validity to an instrument, which at the time when it was drawn, signed, acknowledged, and delivered by the wife was nothing more than her own futile and abortive attempt to incumber the homestead. The husband's declaration, five months after, that he joined in this separate mortgage of his wife as of the date when it was executed, did not make the mortgage an instrument jointly and concurrently executed by the parties in the following essential respect, if in no other: The law declares that the mortgage shall be executed by both parties, and, as this law has been construed, it is to be jointly and concurrently executed by both parties in one instrument. An essential part of execution is delivery. It must be concurrently delivered by both parties. It was delivered by the wife upon March 7th, and, the husband not joining therein, such a delivery was a nullity. Five months thereafter, when the husband took into his hands the mortgage, and indorsed upon it the words above quoted, and in turn handed it back to the mortgagee, it was in no sense a joint delivery, or a delivery of the wife at all. The conclusion thus reached, that the mortgage was absolutely void for a failure to execute it in compliance with the terms of the Code, justifies the judgment of the trial court, without regard to the question of its fraudulent procurement.

The complaint asked merely for the rescission and cancellation of the mortgage, and did not ask for the surrender and cancellation of the note for $5,000 executed by plaintiff to the defendant Katharine Church, which note was secured by the mortgage. The mortgage being but an incident to the debt, it could well be that one might procure through fraud security for a valid obligation. The result, therefore, of a decision upon the issues tendered by plaintiff would be to leave the note outstanding while canceling the mortgage which secured it. But the defendant Elton Church, in addition to answering, filed a cross complaint, in which he alleged the execution by plaintiff to defendant Katharine Church of her promissory note for $5,000, secured by the mortgage in question; that the note was indorsed and the mortgage assigned to him before maturity; that he became the owner and holder of the note and mortgage without knowledge or notice of any of the fraudulent matters set forth by the plaintiff; and he further set forth facts which he contended amounted to a ratification of the contract by the plaintiff, and which also estopped her from contesting the validity of the instruments she had executed. This cross complaint further asked that plaintiff's husband be made a party to the action, and this was done. A decree was sought that the note and mortgage in the hands of the cross complainant be decreed good and valid. To this cross complaint plaintiff made answer by denial, and affirmatively set up in avoidance of both the note and the mortgage the fraudulent matters which she had pleaded in her complaint. Special issues upon many of these questions were submitted to the jury. Upon each and all of them they found for the plaintiff. The court adopted most of their findings, and supplemented them with others of its own, and so rendered judgment. It was found that both the note and mortgage were secured by fraud; that plaintiff had been guilty of no laches, nor had she acquiesced in or ratified her contract; and that the cross complainant took with notice and knowledge of the facts.

It is insisted that the complaint itself shows a lack of equity, in that plaintiff's delay in commencing her action for cancellation is not sufficiently explained, and it is argued that the same omissions which render her complaint defective make her defense to the cross complaint upon the ground of fraud itself insufficient. It is true, as appellant contends, that where a party seeks a rescission of a contract he must ask with promptness, and that the question as to what is or is not a prompt effort to rescind must depend in each case upon its own peculiar facts. It is also true that, where a party seeks relief upon the ground of fraud or mistake, the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid, or to enforce its executory terms, and is thus himself asking affirmative relief. The three-years statute of limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court, and ask relief, but he may abide his time, and, when enforcement is sought against him, excuse himself from performance by proof of the fraud. Of course, in such a case he incurs the risk of defeat by the intervention of the rights of innocent parties. As to the mortgage considered as security apart from the promissory note, it has already been said that, regardless of the question of fraud in its procurement, it is a void instrument for a lack of execution in the manner demanded by the Code. Since, to be a valid mortgage upon the homestead, it must be concurrently executed and acknowledged by both spouses, where not so executed neither could separately ratify it so as to give it validity, nor be estopped by conduct from asserting its invalidity, because, under no circumstances, could the act or conduct of either separately be held to validate such a void instrument without doing violence to the plain letter of the law, which declares that the homestead may be incumbered in but one way. A different question might be presented if the husband and wife, their minds meeting upon the matter, jointly and concurrently by their conduct raised against themselves an estoppel in pais. But such is not the case here presented. As neither could be separately estopped so as to validate the mortgage, the absence of a finding upon the question of estoppel, if it be conceded that such an omission exists, is immaterial. As to the note, however, the legal considerations are quite different. A wife defrauded or coerced into executing her promissory note may, after discovery of the fraud, or when freed from duress, condone the wrong, waive her right of action, and ratify her contract, or she may, by conduct, estop herself from future reliance upon the fraud or duress. But if, for a valuable consideration, her note shall, before maturity, have passed into the hands of an innocent holder, such holder takes it free from these equities and defenses. It was charged in this complaint that the defendant Elton Church took with knowledge and without consideration. Upon the trial it was shown that he became the owner of the note before its maturity. The evidence was uncontradicted and corroborated that he paid a valuable and sufficient consideration for the note and mortgage by the extinguishment of a pre-existing debt owed by his mother to himself. It is well settled in this state that the extinguishment or security of a pre-existing debt constitutes a valuable consideration for the sale or assignment of property. Frey v. Clifford, 44 Cal. 335. Elton Church having shown that he took the note and mortgage before maturity, and that he paid a valuable consideration therefor, it was incumbent upon the plaintiff to prove that he had knowledge of the fraud and of the fraudulent intent of the vendor in making the sale to him. Upon this point we think plaintiff has failed. There was introduced in evidence a letter by the defendant Katharine Church to the mother of Roswell Hart, written after the transfer of the note and mortgage to her son. In this appear expressions sufficient to raise a doubt as to the honesty of the motive which actuated Mrs. Church in making the transfer, but we are unable to discern anything in the nature of evidence to show that the son took with knowledge of the alleged fraud which had been practiced upon the plaintiff, or of the fraudulent intent of his mother in making the transfer, if such existed. It is the well-settled rule that, where a plaintiff attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the vendor. Ross v. Wellman, 102 Cal. 4, 36 Pac. 402. As we read the evidence, there was a failure to show this knowledge upon the part of Elton Church. It follows therefrom that while, as to the mortgage, the finding that he took with knowledge, even though erroneous, is without injury, because the mortgage is absolutely void as to the note, this finding being unsupported; and since, from the evidence introduced, Elton Church stands in the position of an innocent purchaser, the decree declaring the note to be fraudulent and voidable and ordering its cancellation cannot be maintained.

Plaintiff's action being one in protection of her homestead right, her husband, Roswell Hart, was not a necessary party. Code Civ. Proc. § 370; Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

It is therefore ordered that the judgment, in so far as it decrees invalid and orders the cancellation of the mortgage, be affirmed; but that, in so far as it decrees invalid and orders the cancellation of the note, it be reversed, and that the cause of action pleaded in defendant Elton Church's cross complaint, so far as concerns the note in question, be remanded for further proceedings.

I concur: TEMPLE, J.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice HENSHAW. It is proper to say, however, that this decision is not to be taken as authority, one way or the other, on the question whether or not one, knowing the facts, who takes a note which, though negotiable in form, is secured by mortgage, is in the position of an indorsee in due course of negotiable paper, and can avoid equities existing between the original parties. That question was not raised in this case. It was raised in Hays v. Plummer (Cal.) 58 Pac. 447, but was not there determined.

(126 Cal. 413)

SAVINGS BANK OF SAN DIEGO COUNTY v. BARRETT. (L. A. 480.)[1]

(Supreme Court of California. Oct. 24, 1899.)

SAVINGS AND LOAN CORPORATIONS—POWERS—INVESTMENT OF FUNDS—PURCHASE OF REAL-ESTATE MORTGAGES—CORPORATE POWERS—EXERCISE BY DIRECTORS—MORTGAGES—FORECLOSURE—IDLE ACT—REDEMPTION.

1. By the power conferred by Civ. Code, § 571, on savings and loan corporations, to "invest" the funds of their members, stockholders, and depositors, they may use their funds to buy interest-bearing notes and mortgages.

2. The exception by Civ. Code, § 574, subd. 5, of mortgages on real estate from personal property which it prohibited savings and loan corporations from purchasing, implies that they are authorized to purchase such mortgages; and the authority to do so necessarily carries with it the right to purchase the obligations secured thereby.

3. Whether the purchase of a mortgage is required by the purposes of the corporation, within Civ. Code, § 354, subd. 4, authorizing all corporations to purchase such personal estate "as the purposes of the corporation may require," not exceeding limitations thereon, is to be determined by its board of directors, by whom, as provided by section 305, its corporate powers are exercised; and it is not open to investigation at the instance of the mortgagor.

4. Where plaintiff bought defendant's note and mortgage, and surrendered and delivered the same to him in consideration for his execution of a new note and mortgage directly to plaintiff, his claim, in avoidance of his obligation, that plaintiff made no "loan" of money to him, is without merit, as the handling of money in the transaction would have been an idle act, which Civ. Code, § 3532, declares the law does not require.

5. St. 1897, p. 41, amending Code Civ. Proc. § 702, so as to extend the time for redemption from sales under execution to one year, does not apply to sales under foreclosure of mortgages executed prior to its enactment.

6. Defects in the complaint may be cured by the answer, notwithstanding a demurrer directed against them was overruled.

Department 1. Appeal from superior court, San Diego county.

Action by the Savings Bank of San Diego County, a corporation, against George N. Barrett. Judgment for plaintiff, and defendant appeals. Affirmed.

Hammack & Jerauld, for appellant. W. T. McNeally, for respondent.

HARRISON, J. The plaintiff is a corporation organized under the provisions of title 10 of the part of the Civil Code relating to corporations, and seeks by this action the foreclosure of a mortgage executed to it by the defendant June 15, 1893, to secure the payment of his promissory note of the same date. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The defendant admits the execution of the note and mortgage, but defends the action thereon upon the ground that the same was without consideration, and in support of his defense alleges that in June, 1888, he executed a promissory note, and a mortgage securing the same upon the lands described in the complaint, to one Hamilton, who afterwards sold and transferred the same to the Consolidated National Bank of San Diego; that in June, 1891, this bank sold and transferred the same to the plaintiff herein; that shortly before the maturity of this note he executed to the plaintiff the note and mortgage upon which the action was brought; and that the sole consideration therefor was the surrender and delivery to him by the plaintiff of the Hamilton note and mortgage. It is contended by him that upon these facts it appears that the note and mortgage sued upon were without consideration; that under the power conferred upon the plaintiff in section 571, Civ. Code, it could only "loan" the funds of its stockholders and depositors, and was incapable of purchasing or becoming the owner of the Hamilton note; that, notwithstanding the transfer of said note to the plaintiff, it was worthless in its hands, and its surrender to the defendant did not constitute a consideration for the execution of the note and mortgage sued on. It is unnecessary to determine whether the defendant is in a position to make this defense to the payment of the note executed by him to the plaintiff, since we are of the opinion that for other reasons the judgment of the superior court must be affirmed.

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[1] Rehearing denied November 23, 1899.

Section 571, Civ. Code, provides: "Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders and depositors may loan and invest the funds thereof, receive deposits of money, loan, invest and collect the same, with interest, and may repay depositors with or without interest." The authority given by this section to such corporation to "invest" its funds is distinct from that given to "loan" them, and may be exercised with the same effect. While the latter term is technically limited to transactions in which the corporation delivers to the borrower, and the borrower receives from it, a given sum of money upon his agreement with it to repay the same, the former includes all of the transactions in which the funds of the corporation are placed or employed by it for the purpose of receiving an income therefrom. Webster defines the term "invest" as follows: "To lay out [money or capital] in business, with the view of obtaining an income, or profit; as to invest money in bank stock." The Century Dictionary gives the following definition of the word: "To employ for some profitable use; convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by mortgage, etc.; said of money or capital." The meaning to be given to the term was presented in Jennings v. Davis, 31 Conn. 134. By the laws then prevailing in that state the husband was entitled to all personal property coming to the wife during coverture, but it was provided that when her real estate was sold, and the proceeds thereof were "secured or invested in her name," it should, in equity, be deemed to belong to her. Certain real estate of the wife had been sold, and a note for the price given by the purchaser to her. Before the payment of the note both husband and wife died, and the note was claimed by the personal representatives of each. The court held that the note belonged to the wife; that, as it was taken in her name for the proceeds of the sale of her real estate, those proceeds were "invested" in it,—saying: "Promissory notes are the subject of sale and transfer like ordinary articles of merchandise, and money paid for a note, and especially for a note carrying interest, may with entire propriety be said to be 'invested' in that note." In Una v. Dodd, 39 N. J. Eq. 186, the vice chancellor said upon the same subject: "So far as I am aware, there is no technical, legal definition of the term 'investment,' as applied to money. In its most comprehensive sense, I think it is generally understood to signify the laying out of money in such manner that it may produce a revenue, whether the particular method be a loan, or the purchase of stocks, securities, or other property. In common parlance it means putting out money on interest, either by way of loan or of the purchase of income-producing property." See, also, Duncan v. Institution, 10 Gill & J. 299; Shoemaker v. Smith, 37 Ind. 123; Neel v. Beach, 92 Pa. St. 226; Insurance Co. v. Phillips, 141 Mass. 540, 6 N. E. 534.

Under subdivision 4, § 354, Civ. Code, all corporations have power "to purchase, hold and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part." The limitation thus referred to upon the class of corporations to which the plaintiff belongs is found in section 574, Civ. Code. The right of the plaintiff to purchase or hold real estate is not involved in the present case. The prohibition in subdivision 5 of this section of the purchase by such corporation of personal property, "except * * * mortgages on real estate," implies that it is authorized to purchase mortgages on real estate. The exception to this class of personal property from that which it is prohibited to purchase leaves the corporation free to exercise the power given in section 354. The authority to purchase mortgages on real estate necessarily carries with it the right to purchase the obligations secured by the mortgages, since otherwise the mortgages would be valueless. Whether the purchase of the mortgage in question was "such as the purposes of the corporation required" was to be determined by its board of directors (Civ. Code, § 305), and is not open to investigation at the instance of the defendant. The plaintiff, therefore, by its purchase of the Hamilton note and mortgage, became vested with the title thereto, and with the right to enforce their obligation against the defendant; and, as stated by appellant in his brief, if the plaintiff could have recovered from the defendant upon the Hamilton note and mortgage, according to the express terms of that contract, then the surrender of the same to the defendant would be a good consideration for the contract in suit.

The further contention that, as the note and mortgage sued on were executed in consideration of the surrender and delivery to him of the Hamilton note and mortgage, the plaintiff made no "loan" of money to the defendant, is without merit. It would not be claimed that if the plaintiff at the time of the transaction had delivered the money to the defendant, and the defendant had immediately handed it back to the plaintiff and received therefor the Hamilton note and mortgage, he would not be liable upon his note to the plaintiff. The law does not require idle acts (Civ. Code, § 3532), and the rights and obligations of the parties to the transaction could not be varied by the physical handling of the money, as thus suggested, or by its omission.

The amendment of section 702, Code Civ. Proc., in 1897 (St. 1897, p. 41), extending the time for redemption from sales under execution to one year, has no application to sales under the foreclosure of a mortgage executed prior to the enactment of this statute. Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042.

The defendant set forth in his answer the class of corporations to which the plaintiff belongs, and thereby obviated the defects of the complaint to which his demurrer was directed. Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546. The judgment and order are affirmed.

We concur: BEATTY, C. J.; VAN DYKE, J.

CHAPMAN v. HUGHES et al. (S. F. 968.)

(Supreme Court of California. Oct. 7, 1899.)

In bank.

On rehearing. Granted, and judgment in department (58 Pac. 298) vacated.

PER CURIAM. The judgment of the department (58 Pac. 298) in this case is vacated, and a rehearing ordered before the court in bank upon the points presented in the respective petitions of W. S. Chapman and O. J. Woodward and the First National Bank of Fresno.

(126 Cal. 429)

Ex parte McKENNA. (Cr. 524.)

(Supreme Court of California. Oct. 24, 1899.)

MUNICIPAL CORPORATIONS—LICENSES—DISCRETION—VALIDITY.

1. Imposition of a discriminating and prohibitory tax on merchants using trading stamps, by a city authorized to license, for the purposes of regulation and revenue, all kinds of business, lawful games, etc., cannot be justified on the ground that such tax is levied on a lottery, since a lottery, being unlawful, cannot be licensed.

2. Where a city having power to license all kinds of business, lawful games, etc., for the purposes of regulation and revenue, adopted a graduated license tax on merchants according to the amount of monthly sales, and imposed a prohibitory license tax, eight times the maximum tax authorized, on merchants issuing trading stamps, such issuance of trading stamps not being an essentially different business from that of other merchants, or furnishing any justification for a discriminating ordinance, it is unreasonable and invalid, as in restraint of trade.

In bank. Appeal from superior court, Fresno county.

Application by C. E. McKenna for a writ of habeas corpus. Prisoner discharged.

Frank H. Short, for petitioner.

BEATTY, C. J. The petitioner was arrested upon a complaint charging him with the offense of carrying on and conducting at the city of Fresno the business of selling trading stamps redeemable in money, merchandise, or other things, and so redeeming the same, without the necessary license, contrary to the provisions of a city ordinance, etc. This charge is in the language of an ordinance of the city of Fresno imposing a license tax of $200 per quarter upon all persons carrying on such a business. The prisoner contends that the ordinance is oppressive, discriminating, prohibitory, and unreasonable; that it is therefore void, and his imprisonment unlawful. Fresno is a city of the fifth class, and has the power to license, for the purposes of regulation and revenue, all kinds of business, lawful games, etc. In pursuance of this power, it has adopted a general ordinance imposing a graduated license tax upon merchants, ranging from $2.50 to $25, according to the amount of monthly sales; $25 being the amount required of those whose sales equal or exceed $30,000 per month. The ordinance in question here is a recent amendment to the general license ordinance, and, in exacting from every person issuing trading stamps, no matter how insignificant his monthly sales, a tax eight times the amount required of merchants doing the very largest business without the use of such stamps, was evidently designed to be prohibitory, as it necessarily must be with respect to any dealer whose profits do not considerably exceed $200 per quarter. The sole question to be decided is whether such an ordinance is so oppressive, discriminating, and unreasonable that a court may pronounce it invalid upon that ground.

The complaint upon which the prisoner was arrested means nothing more than this: That in conducting the business of a merchant he makes a practice of issuing stamps or tickets, which he agrees to redeem, and does redeem, in merchandise or money. If such a practice is not embraced within the terms of the ordinance, the complaint charges no offense, and the imprisonment is, of course, unlawful. But it is claimed on the one hand, and conceded on the other, that the ordinance was intended to apply, and does apply, to the practice alleged, and, as above stated, the sole question is the validity of the regulation. In support of the ordinance, it is contended that the trading-stamp device is a lottery in disguise, and therefore immoral. But we cannot see that it has any resemblance to a lottery. There is in it no element of chance, and nothing in the nature of gaming. It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this aspect is as innocent as any form of advertising. And, besides, if it were a lottery in disguise,—a mere device to cloak a gambling scheme,—it would be unlawful, and not the subject of a license. The ordinance, therefore, cannot be upheld on this ground. It is not an ordinance to prohibit an immoral practice or to regulate a hazardous or offensive business, or the conduct of a lawful game or public exhibition. It is, under the guise of a revenue measure, an evident attempt to put an end to the issue and redemption of trading stamps by levying a discriminating and prohibitory tax upon those dealers who resort to that method of attracting customers. Many decisions are cited by the petitioner in which the courts of other states have condemned and set aside municipal ordinances such as this, upon the ground that they were unreasonable and contrary to public policy because in restraint of trade, but it is contended on the part of the people that this court in the case of Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, has established a different principle and rule of decision. It was said in that case that a municipal ordinance must be very clearly obnoxious to the objection that it is oppressive and unreasonable before it will be declared invalid by the court. "Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached on slight consideration. It is the province and right of the municipality to regulate its local affairs, within the law, of course, and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof." Upon these principles it was held that an ordinance of the city of Chico imposing a license tax of $50 a quarter upon traveling salesmen could not be declared invalid merely because it imposed a license somewhat less in proportion upon merchants having a fixed place of business within the city. The ground of that decision was that the manner in which Haskell conducted his business—by which he avoided the payment of rents, property tax, etc.—made it an essentially different business from that conducted by regular merchants, and was therefore a good reason for discrimination. The same cannot be said in defense of the Fresno ordinance. The persons to whom it applies pay the same rents and local taxes as other merchants, and it is not perceived how the issue of trading stamps makes theirs an essentially different business, or furnishes any justification for a discriminating ordinance. It is not necessary, therefore, to overrule, or in any respect to depart from the doctrine of, the Haskell Case, in order to pronounce the ordinance here in question invalid. Accepting the principles above quoted from the opinion in that case, it remains that in this case there is lacking a ground of discrimination which was there found to be sufficient to support the ordinance. Besides, there is no hard and fast line which divides the reasonable from the unreasonable, in such matters. Where the question is in doubt, as in the Chico Case, the ordinance will be upheld, but there may be such a palpable discrimination that there can be no doubt. We think this case furnishes an instance. To tax the smallest retail establishment eight times as much as the largest mercantile business, merely on account of its method of advertising or attracting customers, is clearly unreasonable. The prisoner is discharged.

We concur: TEMPLE, J.; HARRISON, J.; HENSHAW, J.

(126 Cal. 462)

PEOPLE v. HOLMES. (Cr. 548.)[1]

(Supreme Court of California. Oct. 26, 1899.)

LARCENY—CHARGE—CONTINUANCE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. To an inquiry by a juror whether a certain amount must be taken, to comprise grand larceny, the court replied: "No. Grand larceny is committed when the property in question exceeds $50 in value, or when it is taken from the person of another. Any property of value taken from the person of another is grand larceny, without regard to its value." *Held* not error, the court having previously properly defined larceny and grand larceny.

2. Where the court charged the jury to consider the testimony of the accused as they would that of any other witness, in determining its weight, and that they should carefully determine the credibility to which it was entitled, and impartially consider it, it was not error to refuse to charge that they had no right to disregard accused's testimony on the ground alone that he was the defendant, and stood charged with a crime.

3. Accused cannot complain of a charge requested by himself.

4. Refusal to continue the time for pronouncing judgment is not error, several continuances having been had.

5. Newly-discovered evidence which is merely contradictory of a witness for the prosecution is not ground for new trial.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county.

J. William Holmes was convicted of grand larceny, and he appeals. Affirmed.

Hiram W. Johnson and Peter J. Shields, for appellant. Atty. Gen. Ford, for the People.

GRAY, C. The defendant was convicted of the crime of grand larceny, for having feloniously taken from the person of L. H. Poston one certain $20 bill. The crime was committed in the city of Sacramento, at the defendant's place of business, known as the "Real Thing Saloon."

1. The most of the evidence against the defendant came from said Poston, two women who accompanied him to the saloon, and from the defendant himself. It would serve no useful purpose to either state or analyze this evidence. We deem it sufficient to say that the verdict of the jury finds ample support in the testimony, both as to the money having been feloniously taken from the person of Poston, and as to defendant's complicity in such taking.

2. When the court had concluded the instructions to the jury, and had told the clerk

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[1] Rehearing denied November 24, 1899.

to swear an officer to take charge of the jury, a juror asked, "May I ask one question, for information,—whether a certain amount has to be taken, to compose grand larceny?" to which the court replied: "No, sir. As I instructed you, grand larceny is of three kinds. I will read it to you again. And, if it comes within any of those degrees, it constitutes grand larceny. Grand larceny is larceny committed in either of the following cases: First, when the property taken is of a value exceeding fifty dollars; second, when the property is taken from the person of another. Any property of value taken from the person of another is grand larceny, without regard to its value." The court, in an instruction previously given, had properly defined larceny to be "the felonious stealing, taking, carrying, leading, or driving away the personal property of another," and had also given the full statutory definition of grand larceny. In view of these previous instructions, we see no error in the court's reply to the juror except perhaps in the use of the word "degrees," and that is immaterial.

3. At the request of defendant, the court instructed the jury as follows: "The defendant has been examined as a witness in his own behalf. This is his right, and you will consider his testimony as you would that of any other witness, in determining the weight and effect to be given to it, and to be taken into consideration with other evidence in the case. You will carefully determine the amount of credibility to which his testimony is entitled, and thoroughly and impartially consider his testimony, together with all the other evidence in the case." The court refused to give the following instruction offered by defendant, to wit: "The jury have no right to disregard the testimony of the defendant on the ground alone that he is the defendant, and stands charged with the commission of a crime." The court committed no error in refusing this latter instruction. The instruction given was fair and full, and substantially covered the point contained in the rejected instruction.

4. At the request of defendant the court instructed the jury that "the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony." The defendant cannot be heard to complain of an instruction requested by himself. People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984.

5. There was no error in the court's refusing to continue further the time for pronouncing judgment. Several continuances had already been had, and, besides, the ground on which the continuance was asked was not good. The defendant wanted time to procure the affidavit of a witness to show newly-discovered evidence. It appears that this newly-discovered evidence was merely contradictory of one of the witnesses for the prosecution, and would not, therefore, have tuted any ground for a new trial. We advise that the judgment and order denying a new trial be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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126 Cal. 425

PEOPLE v. HETTICK. (Cr. 521.)

(Supreme Court of California. Oct. 24, 1899.)

CRIMINAL LAW — SANITY OF DEFENDANT — DETERMINATION — SUBMISSION TO JURY — DOUBT OF JUDGE—FORMER CONVICTION—EVIDENCE—INSTRUCTION ON DEFENSE OF INSANITY.

1. Pen. Code, § 1368, provides that when a case is called for trial, or at any time during the trial, or when defendant is brought up for judgment on conviction, if a doubt arise as to the sanity of defendant, the court must submit the question of sanity to a jury. When defendant's case was called for trial, his attorney suggested that he was insane, and moved the submission of the question to a jury. The court refused to impanel a jury to try the issue, but stated that the evidence could be introduced on the trial, and, if it then warranted, he would suspend the trial, and impanel a jury to try such issue. The defendant introduced evidence of insanity, and admitted that the defendant's mental condition at the time of the trial was not different from that at the time of the commission of the crime. The judge announced at the hearing of the motion for a new trial "that he never at any time had the slightest doubt of the sanity of defendant." *Held*, there was no error in the refusal of the trial judge to impanel a jury to try the question of defendant's sanity.

2. On the trial of one accused of burglary, and who was also charged with a previous conviction of larceny, the state introduced the records of the superior court of another county, showing the conviction of a person bearing the same name as defendant, for stealing a mare from one J. P. A witness testified that he knew defendant, and that he knew him at the time of the former conviction; that defendant at that time was working for J. P.; and that he had admitted to witness that he was sent to state's prison for stealing a horse from J. P. *Held* sufficient to support a verdict of former conviction.

3. An instruction, where defendant set up a defense of insanity, that "the defense of insanity is one which may be resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction seems hopeless"; that, therefore, while insanity was a defense to be weighed fully and justly, and, where satisfactorily established, must recommend itself to the favorable consideration of the jury, they should examine it with care, lest an ingenious counterfeit should furnish immunity for guilt,—is not erroneous.

4. One setting up insanity as a defense has the burden of proving it.

5. The defendant cannot on appeal complain of the refusal of the trial court to give certain instructions, where it does not appear from the transcript that they were requested by defendant.

6. The defendant cannot on appeal complain of the refusal of the trial court to give certain instructions, where the substance of the instructions was contained in other instructions given by the court.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

George E. Hettick was convicted of burglary in the first degree, and appealed. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Capps & Capps and Callen & Rippey, for appellant. Atty. Gen. Ford, for the People.

GRAY, C. Defendant was convicted of burglary in the first degree, a former conviction of grand larceny was found against him, and he was sentenced to a term of 10 years in the state prison at San Quentin.

When the case was called for trial, his attorney suggested a doubt of the sanity of the defendant, and moved the court to submit that question to a jury to be specially impaneled for the purpose, under the provisions of sections 1368 and 1369 of the Penal Code. The defendant also offered to present evidence for the purpose of creating a doubt as to defendant's sanity. The claim of the defense was that there had been no material change in the mental condition of defendant since the commission of the acts upon which the charge of burglary was based, and that his general mental condition had been the same for a period of years prior to the time of the trial, and that he had been of unsound mind during all that time, as the result of a fracture of the skull received in his childhood. The judge declined to hear evidence previous to the defendant being put upon his trial, but suggested that he would listen to the evidence taken at the trial of the case, and whenever a doubt arose in his mind as to defendant's sanity he would discontinue the trial, and impanel another jury to try the question alone of defendant's sanity. The defendant excepted to the action of the court. The trial on the information against defendant was then had. The evidence as to the burglary was strongly against the defendant, and without conflict, and left the defendant to rely solely on the defense of insanity, upon which defense evidence was taken as to the actions, conversations, and history of defendant from his birth down to and including the time of the trial. The opinions of many acquaintances of defendant, and the testimony of many experts who had examined defendant, were also received in evidence at the trial. The trial judge, after listening to all this, announced at the hearing of the motion for new trial "that he never at any time had the slightest doubt of the sanity of the defendant." The meaning of section 1368 of the Penal Code evidently is that the doubt therein referred to must exist in the mind of the judge before whom the cause is pending before the court will be authorized to grant a request of the defendant in a criminal case to have the question of his sanity tried before a jury summoned for that exclusive purpose. Webber v. Com., 119 Pa. St. 223, 13 Atl. 427. The Code provides no procedure for creating a doubt in the mind of the judge, and yet it seems to be the purpose of the law that no person should be tried for a crime while he is insane. Pen. Code, § 1367. Much, however, must be left to the judicial conscience of the trial judge in a matter of this kind. Webber v. Com., supra. In view of the absence of any claim by the defense that there had been any change in the mental condition of defendant, and in view of the express admission that there was no material difference in his condition between the time of the alleged commission of the offense and the time when the case was called for trial, we see no error in the refusal of the court to hear evidence, offered before the trial, to raise a doubt of defendant's sanity, and think the method adopted in the matter could work no prejudice to defendant. It seems there was in fact no doubt of defendant's sanity at the time of the trial, and no evidence existed that could reasonably cause such a doubt to arise. It is to be presumed that the counsel for the defendant placed all the evidence tending to show insanity, that he could discover, before the court on the trial. He was entitled to and did introduce testimony as to the mental condition of the defendant at the time of the trial, yet it appears from the record that the judge who heard this evidence never for an instant had any doubt as to the sanity of the defendant. It is not probable that it would have had any different effect on the mind of the court had this evidence been presented before the trial began. The trial judge was in a better position to estimate the evidence than this court can be, and yet, reading the evidence from the printed page, as we have, we can find nothing in it to convince us that the court was wrong in entertaining no doubt at any time as to the defendant's sanity. In the absence of such doubt, the court was not warranted in calling a special jury. People v. Geiger, 116 Cal. 440, 48 Pac. 389.

In support of the charge of previous conviction of grand larceny the prosecution placed in evidence records of the superior court of San Diego county showing the conviction and sentence to one year in the state prison at San Quentin of "George Hettick" for the crime of grand larceny in having stolen a mare, the personal property of J. C. Pelton. The testimony of Charles Bell, a witness for the prosecution, was to the effect that the defendant had admitted to him that he was sent to state prison at San Quentin for stealing a horse from John C. Pelton. This witness also testified: "I knew the defendant as a boy, and at the time he was sent to San Quentin for stealing John C. Pelton's mare. I knew him at that time. I was then living in National City. I knew at that time of the offense. * * * I knew he was working at the time for John C. Pelton." There was nothing to contradict or discredit the foregoing evidence, and we deem it sufficient to support the verdict for the people on the charge of a prior conviction of larceny. People v. Rolfe, 61 Cal. 540.

The jury were instructed that: "The defense of insanity is one which may be resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and, when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of such mental disorder should furnish immunity for guilt." It is the settled law of this state that this is a proper instruction in cases where the defense of insanity is interposed. People v. Allender, 117 Cal. 81, 48 Pac. 1014; People v. Larrabee, 115 Cal. 158, 46 Pac. 922. The burden of proof as to this defense of insanity is on the defendant, and his insanity must be established by a preponderance of the evidence, and there was no error in the instruction to that effect. People v. Allender, supra.

The defendant complains of the action of the court in refusing a number of instructions. There are two reasons why this complaint is not available to defendant: First, it does not appear from the transcript that any of these instructions were requested by the defendant; second, a part of these instructions were properly refused because they were not sound in law, and the rest of them were contained, in substance at least, in the instructions that were given to the jury. We advise that the judgment and order denying a new trial be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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126 Cal. 443

RAMISH et al. v. HARTWELL, City Treasurer (HAYES, Intervener. L. A. 503).

(Supreme Court of California. Oct. 25, 1899.)

MUNICIPAL ASSESSMENTS—ENFORCEMENT—SALE—CONSTITUTIONAL LAW.

1. Act Feb. 27, 1893 (St. 1893, p. 33) § 5, provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided by law for the collection of delinquent state and county taxes. Pol. Code, § 3771, at the time of the passage of the above act, provided that the tax collector should sell land for delinquent state and county taxes, at public auction, to the person who would take the least quantity of land and pay the taxes and costs of sale. St. 1895, p. 327, amended section 3771 by providing that, instead of selling the land at auction, the property on which the taxes were delinquent should be sold to the state. *Held*, the act of 1895 did not affect the remedy afforded by the act of February 27, 1893, and the treasurer could sell the land to the holder of the bonds or any other person.

2. Act Feb. 27, 1893 (St. 1893, p. 33) § 4, which provides that a city assessment shall be a first lien on the property affected thereby, and the bonds issued therefor shall be conclusive evidence of the validity of said lien, is unconstitutional, as depriving the owner of his property without due process of law.

3. Act Feb. 27, 1893 (St. 1893, p. 33) § 4, which provides that a city assessment shall be a first lien on the property affected thereby, and the bonds issued therefor shall be conclusive evidence of the regularity of the proceedings and of the validity of said lien, will be enforced as to the regularity of the proceedings, they not being jurisdictional in their nature.

4. A city street improvement contract, which provided that the work contracted for should be commenced within 10 days from the date thereof, and completed within 240 days thereafter, sufficiently complies with Street Improvement Act, § 6, which provides that the superintendent shall fix the time for the commencement and completion of the work.

Department 1. Appeal from superior court, Los Angeles county.

Application for mandamus by Adolph Ramish and others against William A. Hartwell, as treasurer of Los Angeles, and William Hayes, intervener. From a judgment in favor of plaintiffs, defendant and intervener appealed. Affirmed.

W. E. Dunn and R. A. Redman, for appellants. Finlayson & Finlayson, for respondents.

HARRISON, J. The city council of Los Angeles, in January, 1896, ordered the improvement of a portion of Sixth street in that city in accordance with the provisions of the street improvement act, and the work thus authorized was completed to the satisfaction of the superintendent of streets, and an assessment made therefor by him. Before passing its ordinance of intention therefor, the city council found, upon estimates of the city engineer, that the cost of the work would be in excess of one dollar per front foot along the line of the street upon which the improvement was to be made, and thereupon determined that serial bonds should be issued to represent the cost of the improvement, in accordance with the provisions of Act Feb. 27, 1893 (St. 1893, p. 33), and so declared in its ordinance of intention. After the completion of the work, the assessment, together with the warrant for its collection attached thereto, and the certificate of the city engineer, were recorded by the superintendent, and delivered to the contractors, the plaintiffs herein; and within 30 days thereafter the said warrant, with the return indorsed thereon, was returned to the said superintendent, and by him recorded in the margin of the aforesaid record. No appeal was taken to the city council, and after the expiration of 30 days from the date of the warrant the superintendent certified to the city treasurer a list of the assessments which amounted to $50 and over, and which remained unpaid, among which was an assessment upon the lot of land described in the complaint herein, amounting to $128.33. Thereupon, March 23, 1897, the city treasurer made out and issued to the said contractors, the plaintiffs herein, a bond representing the amount of this assessment against said lot of land, in accordance with the form prescribed in the aforenamed statute, by which the first installment of interest thereon was made payable July 2, 1897. No payment was made for either principal or interest on said bond, and on July 16, 1897, the plaintiffs herein elected to declare the whole amount unpaid to be due and payable, and demanded in writing of the city treasurer that he proceed to advertise and sell the lot of land upon which said bond was issued to pay the same, with interest thereon, and again, on the 19th of July, delivered to him a written demand that he forthwith proceed to advertise and sell said land by proceedings in all respects the same as were provided by law for the collection of delinquent state or county taxes on the 27th of February, 1893. The city treasurer, the defendant herein, failed to so advertise or sell the same, and gave to the plaintiffs a written statement to the effect that he refused to sell the said lot of land to any purchaser whatever except to the state, as provided by section 3771 of the Political Code, as amended March 28, 1895. The plaintiffs thereupon applied to the superior court for a writ of mandate, commanding the defendant, as such city treasurer, to proceed forthwith to advertise and sell said lot under proceedings in accordance with their aforesaid demand. A complaint in intervention was filed by the intervener herein, claiming to be the owner of said land. A demurrer to the complaint of the plaintiffs was overruled, and the defendant thereupon filed an answer, to which a demurrer of the plaintiffs was sustained. The plaintiffs also demurred to the complaint in intervention, and, their demurrer having been sustained, judgment was entered in favor of the plaintiffs, from which the defendant and the intervener have appealed.

1. Section 5 of the act of February 27, 1893, after providing for the sale of the land to satisfy the amount of the bond in case of delinquency in its payment, declares that "the city treasurer shall have and shall act thereafter with all the powers and duties of the tax collector in the collection of unpaid state and county taxes, and shall forthwith proceed to advertise and sell said lot or parcel of land by proceedings in all respects the same as are provided by law for the collection of delinquent state and county taxes." At the date of that act, Pol. Code, § 3771 et seq., provided that, in case of delinquent state and county taxes, the tax collector should sell the real estate of the delinquent upon which the taxes were a lien at public auction, to the person who would take the least quantity of land and pay the taxes and costs of sale, and that, in case there should be no redemption therefor within a year, the purchaser should be entitled to a deed of conveyance of the land so purchased. In 1895 (St. 1895, p. 327) section 3771 of the Political Code was amended by providing that, instead of selling the land at auction, the property upon which the taxes are delinquent "shall by operation of law and the declaration of the tax collector be sold to the state, and said tax collector shall make an entry 'Sold to the state' on the delinquent assessment list opposite the tax." It is contended by the appellants that by this amendment to the Political Code its provisions are ipso facto incorporated into the act of February 27, 1893, and that the city treasurer can proceed only in accordance with the provisions of the Political Code as thus amended.

It is a rule of statutory construction that the adoption in one statute, for the purpose of carrying its provisions into effect, of the provisions of another statute, by reference thereto, does not include subsequent modifications of these provisions in the statute referred to, unless a clear intent to do so is expressed. This rule is subject to a qualified exception in cases of the adoption into a special act of the provisions of law then in force by virtue of general laws. In such cases subsequent modifications of the general law will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act. See Kirk v. Rhoads, 46 Cal. 403. A repeal of the adopted statute will not take from the adopting statute the operative force of these provisions so far as they may be necessary to carry the later statute into effect, but these provisions will be regarded as if they had been originally incorporated therein at length. Spring Valley Waterworks v. City of San Francisco, 22 Cal. 434; People v. Clunie, 70 Cal. 504, 11 Pac. 775; Collins v. Blake, 79 Me. 218, 9 Atl. 358; Darmstaetter v. Moloney, 45 Mich. 621, 8 N. W. 574; Suth. St. Const. § 257. Under the same principles, any amendment of these provisions of the statute thus adopted, whether it be a particular act or a general law, which so far modifies them as to subvert the purpose of the statute by which they were adopted, will be regarded in the same light as a repeal. The main object of all statutory construction is to ascertain the legislative will, and, as it is to be assumed that the legislature intends its acts to have effective operation, such amendments will not be construed as depriving the adopting statute of all effect, unless there is a clear necessity for such construction.

A comparison of the act of 1893 with the provisions of the Political Code, as amended in 1895, shows that the provisions in the latter, as thus amended, are entirely inapplicable to the former, and ineffective to carry its objects into effect. The provision in section 5, above quoted, was to enable the contractors to receive the amount of the assessment as the several installments should mature, and to provide means for enforcing its collection in case of delinquency. The provision for a sale of the land at public auction to any one who would pay the assessment, with the right in the contractor to become such purchaser, was an efficient mode of securing such payment; but if, instead thereof, the land should be struck off to the state, with no power for its sale within five years, and no fund from which to pay the amount for which the sale was made, there would be no means by which the contractor could receive his payment, and the entire purpose of the act would be frustrated. We hold, therefore, that the above amendments to the Political Code in 1895 are inapplicable to the provisions of the act of February 27, 1893, and that the sale of land for delinquency in the payment of the bond is to be made according to the provisions of the law for the collection and enforcement of taxes at the date of the act.

2. The obligation of the defendant to proceed to advertise and sell the land is further contested upon the ground that the statute under which the bond was issued, and which directs such sale to be made, is unconstitutional, in that by its provisions the owner of the land is deprived of his property without due process of law. This contention is based upon the provision in section 4 of the statute that "the assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof and the accrued interest thereon shall be fully paid," and the further provision that "said bonds by their issuance shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and this act, previous to the making of the certified list of all assessments unpaid to the amount of fifty dollars or over by the street superintendent to the city treasurer, and of the validity of said lien up to the date of said list." The power of the legislature to declare any evidence conclusive against the right of an individual to controvert it, in any action which involves the taking of his property, has been extensively considered in cases involving taxation. It may be regarded as settled that the legislature may make a tax deed conclusive evidence of a compliance with all provisions of the statute which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are jurisdictional in their nature, and without which the power of taxation cannot be called into exercise,—such as the listing or assessment of the property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor, —the legislature cannot deprive the owner of the right to show want of compliance. Mr. Cooley says (Const. Lim. p. 452): "A statute which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property." And in his treatise on Taxation he says (page 521, 2d Ed.): "The legislature cannot make the tax deed conclusive evidence of the holder's title to the land, or of the jurisdictional facts which would make out title, but the legislature might doubtless make the deed conclusive evidence of the correct performance of all mere acts of routine, and of acts in which the public rather than the taxpayer was specially concerned; in short, of everything except the essentials." In McCready v. Sexton, 29 Iowa, 389, the supreme court of that state said: "The legislature may prescribe the time or manner in which these essential and jurisdictional acts shall be done, but it cannot, either constitutionally or in the nature of things, provide for passing the title to property for the nonpayment of taxes without them. As to the time or manner in which they shall be done, the discretion of the legislature is absolute and supreme, and cannot be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to manner shall not defeat the end, or that no person shall question the legality of the manner, and that any subsequent act or fact shall be either prima facie or conclusive evidence that the law as to time or manner was complied with. As to the essential and jurisdictional facts, so to speak, which the legislature cannot annul or change, it cannot excuse the nonperformance of them, and, of course, cannot make the doing of any other thing a substitute for them or conclusive evidence of their being done." See, also, Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; Haaren v. High, 97 Cal. 445, 32 Pac. 518; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, and 15 N. E. 401; Williams v. Supervisors, 122 U. S. 154, 7 Sup. Ct. 1244; Chamberlain v. Taylor, 36 Hun, 24.

This question has generally arisen in cases in which tax deeds have been made conclusive evidence of certain preliminary steps, and also in determining the effect of curative acts; but, whenever it is within the power of the legislature to give this force to evidence, the species of evidence to which it is given is immaterial, and it may also declare the effect of the evidence in advance of its existence as well as subsequent thereto. As was said in McCready v. Sexton, supra: "Whatever the legislature is at liberty to authorize or not, it may waive or estop denial, but not so as to that which it must require." The declaration in the statute herein, that the issuance of the bond shall be conclusive evidence of the validity of the lien, is to be regarded with the same effect as a similar declaration with reference to the deed that might be issued upon the sale therein authorized; for, if the lien is to be held valid and paramount to all other claims, the purchaser at the sale will obtain the property freed from any right in the owner to contest his title. It must be held, therefore, that the provision in the statute that the issuance of the bond is conclusive evidence of the validity of the lien was without the power of the legislature to enact, and is, consequently, unavailing to the plaintiffs.

Although this provision in the statute was without the power of the legislature to enact, the remaining provisions, relating to the effect of the issuance of the bond as evidence, are not necessarily invalid. We have seen that the legislature had the authority to declare that the issuance of the bond should be conclusive evidence of certain facts, provided such facts were not essential to the jurisdiction of the officers to create the assessment, and to the extent that the legislature could exercise this power it should be upheld. In the first portion of the sentence above quoted the legislature has not assumed to make the bond conclusive evidence of the existence of any jurisdictional fact, or that any step essential to the creation of an assessment has been taken, but has merely declared that it shall be conclusive evidence of the "regularity" of all proceedings prior thereto. This clause does not necessarily imply that any proceedings were in fact taken, but is limited to the "regularity" of such as were taken, and leaves the owner at liberty to show, in defense of his property, that no jurisdiction to authorize the work or to make the assessment was in fact acquired. Such provision in a statute is held to apply only to proceedings to be had after the right and power to sell are acquired. Doughty v. Hope, 3 Denio, 249, affirmed in court of appeals, Id. 594, 1 N. Y. 79; Tallman v. White, 2 N. Y. 66; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, and 15 N. E. 401. To the extent that the provisions of the statute are within the constitutional power of the legislature, it is to be sustained, and only that portion thereof rejected which the legislature had no power to enact. Hence, in determining whether in any particular case the provisions of the statute which are invoked in support of the bond are such as were without the power of the legislature to make, it is necessary, in the first place, to determine whether the proceedings of which the issuance of the bond is made conclusive evidence were of a jurisdictional nature, or whether they related merely to the regularity in the manner or time of exercise of its jurisdiction. As was said by the supreme court of the United States in Castillo v. McConnico, 168 U. S. 680, 18 Sup. Ct. 232: "The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the constitution. His right is limited solely to the inquiry whether, in the case which he presents, the effect of applying the statute is to deprive him of his property without due process of law."

Turning now to the respect in which the appellants claim that the proceedings were defective, we find that the only defect alleged in response to the plaintiffs' application is that the contract for doing the work provided: "The work to be commenced within ten days from the date hereof, and its completion to be within two hundred and forty days thereafter;" and it is urged that the superintendent did not thereby "fix" the time for the commencement and completion of the work, as required by the statute. In Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, we held that a similar provision in the contract in that case was a sufficient compliance with the statute, and, under the authority of that case, it must be held that the appellants presented no defense to the application of the plaintiffs.

It may be added that the statute does not deprive the owner of the right to challenge the validity of the assessment, or to present any irregularities in the proceedings therefor which would defeat an action for its enforcement, since it is provided by section 4 that at any time before the issuance of the bond the owner may notify the city treasurer that he desires no bond to be issued for the assessment against his land, and that upon such notice no bond shall be issued therefor, but the payee of the warrant must enforce the collection of the assessment by action. As the bond cannot be issued until after 30 days from the date of the warrant, and as the assessment must be demanded within that period of time, the owner has at all times the option to insist upon the collection of the assessment by a suit therefor, in which he may present all defenses, either in matters of jurisdiction or irregularity of proceedings. The judgment is affirmed.

We concur: BEATTY, C. J.; VAN DYKE, J.

126 Cal. 383

FRAGLEY v. PHELAN et al. (S. F. 2,048.)

(Supreme Court of California. Oct. 23, 1899.)

MUNICIPAL CORPORATIONS — FREEHOLDERS' CHARTER—CONSTITUTIONAL LAW—SPECIAL LEGISLATION—ELECTIONS—CHANGE OF PRECINCTS — REGISTRATION—APPOINTMENT OF OFFICERS.

1. Const. art. 11, § 6, declares that cities and towns heretofore or hereafter organized, and all charters thereof, framed and adopted by authority of this constitution, except in municipal affairs, shall be subject to, and controlled by, general laws; and section 8 authorizes the adoption of freeholders' charters by cities of more than 3,500 inhabitants. *Held*, that since the adoption of a city charter was not "a municipal affair," within the meaning of the constitution, St. 1897, p. 288, providing for the election of freeholders to draft freeholders' charters, and the election for its subsequent ratification, in cities specified in Const. art. 11, § 8, was not unconstitutional.

Per Garoutte, Van Dyke, and McFarland, JJ.

2. Const. art. 11, § 8, authorizes the adoption of freeholders' charters in cities of more than 3,500 inhabitants; and St. 1897, p. 288, entitled "An act in relation to elections held under the authority of Const. art. 11, § 8, to elect boards of freeholders or to vote upon proposed charters or upon amendments to existing charters," provides the manner of electing freeholders to draft such charters, and for conducting the elections subsequently held to ratify the same. *Held* that, since the act applied with equal force to all cities of the class specified in the constitutional provision, it was not unconstitutional, as special legislation.

Per Garoutte, Van Dyke, and McFarland, JJ.

3. Since, under Pol. Code, § 1129, the board of election commissioners of San Francisco were

authorized to change the boundaries of, create new, or consolidate established election precincts, the fact that such commissioners redistricted a city under St. 1897, p. 288, providing the manner for the holding of elections for the adoption of freeholders' charters, which act was claimed to be unconstitutional, as violating Const. art. 11, § 6, declaring that cities and towns, except in matters relating to municipal affairs, shall be subject to, and controlled by, the general laws, is immaterial.

Per Beatty, C. J., and Harrison and Henshaw, JJ.

4. Pol. Code, § 1129, as amended by St. 1889, p. 424, authorizes the change of election precincts, and provides that boards having control of elections may from time to time change the boundaries, so that there shall always be as many precincts as shall be sufficient to make the number of votes at any one precinct not more than 200, as nearly as can be ascertained. *Held*, that the change of election precincts was within the discretion of election boards, and that in the absence of any action preceding an election at which such precincts had been changed, to correct alleged erroneous actions of the board, or show that a fair election was thereby prevented, an elector cannot thereafter impeach an election held on that ground alone.

Per Beatty, C. J., and Harrison and Henshaw, JJ.

5. Act 1878, § 22, requires boards of precinct registration to continue registering voters within their precincts until the time provided by law for registration to cease. Section 24 requires them to deliver the precinct registers to the registrar not later than three days after the cessation of registration; and section 28 declares that fifteen days before a general election all registration shall cease, and the precinct registers, as they stand, shall be the precinct registers for said ensuing election, and until the next general election, subject only to changes under regulations fixed by the board of election commissioners. *Held* that, since there was no express provision directing precinct registration for special elections, the act of election board commissioners in providing for supplemental registration at the registrar's office, instead of in the different precincts, was valid.

Per Beatty, C. J., and Harrison and Henshaw, JJ.

6. Where election commissioners were authorized to appoint election officers for each precinct, their failure to appoint as many officers as they were authorized to appoint for an election was a mere irregularity, not sufficient to invalidate the election.

Per Beatty, C. J., and Harrison and Henshaw, JJ.

Temple, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by M. F. Fragley against James D. Phelan and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

A. Ruef, Thos. V. Cator, E. S. Pillsbury, and John Garber, for appellant. F. K. Lane, H. N. Clement, and Garrett W. McEnerney, for respondents.

GAROUTTE, J. This is an action brought by a taxpayer by injunction against the board of election commissioners and other municipal officers of the city and county of San Francisco to restrain the expenditures of certain public moneys for the conduct and carrying on of an election in said city and county. The primary and direct purpose of the litigation is to test the validity of the new charter of the city and county of San Francisco, which is to take effect January 1, 1900.

The state legislature of 1897 placed upon the statute books an act which may be called the "Charter Election Act." It is entitled "An act in relation to elections held under the authority of section 8 of article 11 of the constitution to elect boards of freeholders, or to vote upon proposed charters or upon amendments to existing charters." The election to secure a board of freeholders in this city to draft a charter, and the election subsequently held to ratify the action of that board of freeholders, were held under the aforesaid act. The manner of holding and conducting these elections, while in strict conformity with the act, was widely at variance with the provisions of the general law as to the manner and conduct of holding elections in the city and county of San Francisco; and it is now claimed that these elections as held were absolutely void, by reason of the unconstitutionality of the statute under which they were held, and that, the elections being void, therefore the new charter is a void and barren instrument.

The parties now attacking the constitutionality of this act of the legislature rest the entire results of the litigation upon that attack, conceding in open court that they have no case if that statute be a valid and constitutional law. They insist that the act is unconstitutional, in this: that it is violative of section 6 of article 11 of the constitution of the state. That part of section 6, art. 11, of the constitution, here directly involved, reads: "Cities and towns heretofore or hereafter organized and all charters thereof framed and adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." It is now claimed that these two elections to which reference has already been made were "municipal affairs," within the meaning of the constitution, and therefore not subject to, and controlled by, general laws. In this connection it is then claimed that said act of 1897 is a general law attempting to deal with and control "municipal affairs," and for that reason violative of this constitutional prohibition. As a second contention, it is asserted that this statute is special legislation, and also lacking in uniformity of operation. We at once pass to an examination of these constitutional objections.

The solution of the questions thus presented largely revolves around the meaning of the words, "except in municipal affairs," as these words are used in the constitution of the state. The phrase formed by these words has a meaning, and a most significant one. This is apparent when we pause a moment to consider that this single phrase forms the subject-matter of an amendment to the constitution of the state. The relationship existing between a state and its municipalities is so close that it may be said every city ordinance and every state statute is a matter of interest to both state and municipality. It may be said that all state affairs are a matter of substantial interest to the municipality, and that likewise all municipal affairs are a matter of concern to the state. Yet those interests are incidental and indirect, and the meaning of this phrase necessarily takes a narrower scope. Indeed, in the very wording of the constitutional provision itself, we find that all matters of legislation pertaining to, and bearing upon, municipalities do not come within the signification of the words "municipal affairs," as used in the constitution. A mere glance at the provision demonstrates this fact. The constitution provides that cities and towns, "except as to municipal affairs," shall be subject to, and controlled by, general laws. It is here plainly indicated that a vast amount of legislation pertaining to cities and towns does not come under the classification of "municipal affairs."

For the purpose of getting at the true significance of these words, there is no brighter light to be shed upon them than is disclosed by a consideration of the reasons which moved the legislature to propose the amendment and the people to adopt it. What was the evil to be remedied? What was the good to be gained by this amendment? The answer is common, everyday history. It was to prevent existing provisions of charters from being frittered away by general laws, which would repeal those provisions by implication. It was to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs. These are a few of the reasons which gave occasion for this concise, but all-significant, amendment to section 6 of article 11 of the constitution of the state. This amendment, then, was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, and this internal regulation and control by municipalities form those "municipal affairs" spoken of in the constitution.

"Municipal affairs," as those words are used in the organic law, refer to the internal business affairs of a municipality. It was the internal business affairs of municipalities then existing and those of municipalities to be hereafter created that the constitutional amendment was framed to meet. There is absolutely no sound reason why freeholders' charters should not be framed and ratified under general laws. There are a multitude of sound reasons to be urged why the conduct and procedure of elections for the election of freeholders and ratification of charters should be held under general laws. No sound policy exists demanding special legislation upon such a subject-matter. As far as there has been given us light to see, neither the legislature nor the people ever thought of such a thing as the adoption of charters when they placed the words "municipal affairs" in the organic law. In defining the phrase "county affairs," the court said in Hankins v. Mayor, 64 N. Y. 22: "County affairs are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers." Tested by this rule, elections held as preliminary steps towards the creation of a freeholders' charter are not municipal affairs.

The city and county of San Francisco is a municipality. The municipal affairs of this municipality are a multitude, covering its business transactions. These business matters are the municipal affairs of the present municipality, but the drafting and ratification of a new charter is not one of its business matters. The conduct of the present municipality's business affairs has nothing to do with the question of the creation of a new municipality. The new municipality will have municipal affairs of its own after it is created, and not before. The old municipality performs its functions when it carries on the business intrusted to it. As a municipality it has no voice in saying whether or not there shall be a new charter. In that matter it is wholly passive. If its inhabitants say to it, "Stay with us yet a while," it stays. If they say, "Your days are ended; you have outlived your usefulness; stand aside,"—it makes no protest. The decree of the people is its will. A municipal affair pertains to something which may be done by the municipality. The creation of a new charter is a matter not placed in the hands of the municipality, but in the hands of the inhabitants thereof, with the consent of the state.

As the legislature alone has the power to approve a charter, it inherently, in the absence of constitutional prohibition, must have the power to prescribe the terms, conditions, and mode upon which it will give its approval; and, if an election is made necessary by the constitution as a condition precedent to the validity of the charter, the legislature has the power to say what shall be the nature of that election, and how it shall be conducted. And such power gives it the right to say how many voting precincts shall be used upon election day, and what shall be the manner and time for registration.

Viewing this question from another angle, it seems that the creation of a charter is not essentially and alone a municipal affair. It is a state affair, and that fact is recognized in unmistakable terms by the state when the constitution demands that the state legislature approve the instrument by a majority vote, and until such approval it has no life. Notwithstanding all the people of the municipality with a single voice may ask for a new charter, yet the state, by and through its legislature, may deny that request. The legislature stands as the representative of the sovereign power of the state, and has the arbitrary right to grant or refuse charters to municipalities. A grant of a charter to a municipality is a grant of so much power. It is a delegation of a certain amount of power to the municipality theretofore vested in the state. It is a parting with a portion of its sovereignty. It is for this reason that the state, through its legislature, must breathe into the charter the breath of life; and, if the state withhold its breath, such action is beyond all review. When the constitution vested this omnipotent power in the legislature, it would seem that the framers of that instrument deemed the creation of a municipal corporation a state affair of the greatest import.

In speaking to the general principle here involved, Judge Cooley says, in People v. Hurlbut, 24 Mich. 44: "There is no doubt of the right of the state to do any of these things; not by virtue of any general authority to take to itself the management of the local concerns, but because the inauguration and modification of local government can only be provided for, without confusion and injustice, by the aid of the guiding and assisting hand of the authority that creates and modifies. The right in the state is a right, not to run and operate the machinery of local government, but to provide for and put it in motion." This seems to be the very principle recognized by the framers of the constitution, and carried into effect by the aforesaid amendment to that instrument. And it may well be said that, while general legislation as to municipal affairs is there prohibited, yet at the same time the very same section of the constitution reserves to the state, not the right "to run and operate the machinery of local government," but the right to provide for and put that machinery into motion. In People v. City of Oakland, 123 Cal. 604, 56 Pac. 445, it is held that a general law providing for the manner of annexing adjacent territory to a municipality did not deal with "municipal affairs," and was therefore without constitutional objection. It would seem that the adding of adjacent territory to a municipality, and bringing the inhabitants of that territory within the government of the municipality, was a matter of great moment and interest to the municipality. Yet it was held not to be such a municipal affair as contemplated by the constitution. This court there said: "As the legislature alone has the power to authorize such annexation, it must have the power to prescribe the terms, conditions, and mode of annexation." This language applies with full force to the question under discussion in the case at bar.

The charter act of 1897 is neither special legislation, nor does it lack uniformity of operation. The title of the act itself stamps the law as general legislation. The title purports upon its face to deal with a class of municipalities created by section 8 of article 11 of the constitution. Legislation bearing upon a constitutional class of municipalities is not special legislation. The authorities in this state without exception so declare the law. Again, the act applies to all municipalities that are authorized to adopt freeholder charters. Such municipalities intrinsically constitute a class in themselves, and probably, even in the absence of constitutional classification, could be dealt with by general laws; but, in view of the constitutional classification, it cannot be denied for a moment but that legislation relating to such a class is both general and uniform. Mintzer v. Schilling, 117 Cal. 361, 49 Pac. 209.

It is not a light thing to set aside an act of the legislature, and the rule is elementary that unless it is perfectly plain that such act is violative of constitutional provisions a court will uphold it. With the policy of the legislation found in the act the court has nothing to do. This legislation may be wise or unwise. That is a matter with which the court has no concern. It is for us alone to declare the law void or valid, and that declaration must rest upon the test, namely, is this act clearly violative of some constitutional provision? In other words, the real question here is, does it plainly and clearly appear that these two elections constituted "municipal affairs," within the meaning of those words as used in the constitution? In view of what has been said, we are not prepared to make that declaration. The judgment and order are affirmed.

We concur: VAN DYKE, J.; McFARLAND, J.

HARRISON, J. The board of election commissioners of San Francisco directed that an election for freeholders to frame a charter for that city and county be held December 27, 1897; and, a board of 15 freeholders having been chosen upon that day, a charter framed by them was submitted to the voters of the city and county at an election held therefor, under the direction and control of the board of election commissioners, on the 26th day of May, 1898, and, having received a majority of the votes cast at that election, was approved by the legislature on the 26th day of January, A. D. 1899. Under a provision therefor in the charter, this board of election commissioners has directed that an election be held on the 7th day of November, 1899, to fill certain offices named in the charter. The plaintiff herein, a taxpayer of the city and county, brought the present action to enjoin certain of its officers from incurring any expense in holding said election, and from paying out or disbursing any of the public moneys for any expense that may be incurred in holding the election, upon the ground that the elections at which the freeholders were chosen, and upon the adoption of the charter framed by them, were illegally held, and for that reason the charter, never having been legally adopted, was invalid.

After the board of election commissioners had directed the election for the freeholders, it caused the city and county to be redistricted into special election precincts for the purpose of said election, and consolidated the 313 general election precincts into which the city had been divided for the last preceding election into 94 special election precincts, and designated one polling place within each of said special election precincts, and held this election, and also the one upon the adoption of the charter, in the same precincts. Prior to the holding of each of said elections the board of election commissioners provided for supplemental registration at the office of the registrar at the city hall, but made no provision for precinct registration. Before the consolidation of the precincts as aforesaid, the board passed a resolution that the special election for freeholders should be conducted in accordance with the act relating to the election of freeholders and charters, approved March 31, 1897 (St. 1897, p. 288), and that the number of votes for each special election precinct be estimated at 750, or as near thereto as possible. The superior court rendered judgment in favor of the defendants, and from this judgment and an order denying a new trial the plaintiff has appealed.

The grounds urged in support of the appeal herein are that the act of 1897 is unconstitutional, and that inasmuch as the elections for freeholders and upon the adoption of the charter were held in conformity with the provisions of this act, instead of under the provisions of the act entitled "An act to regulate the registration of voters and to secure the purity of elections in the city and county of San Francisco," passed March 18, 1878, they were invalid, and that the charter adopted thereat was invalid, and confers no authority to hold an election for the offices therein named. The particulars in which the invalidity of the elections is urged are that the board of election commissioners had no authority to consolidate the election precincts or to omit precinct registration, and that they did not appoint proper election boards for the precincts in which the elections were held.

The act of 1878 was a special act relating to San Francisco alone, and at the adoption of the constitution of 1879 formed a part of the charter of that city and county. By its provisions the conduct, management, and control of elections, and matters pertaining to elections, were taken from the board of supervisors, which, under the Political Code, then exercised this power throughout the state, and were conferred upon the board of election commissioners therein created. Section 6 of article 11 of the constitution of 1879, as originally adopted, after directing the legislature to provide, by general laws, for the organization of cities and towns, declared that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." In Staude v. Commissioners, 61 Cal. 321, it was said that the effect of this section was that San Francisco "shall be subject to, and controlled by, such general laws as the legislature shall enact, other than those for the incorporation, organization, and classification, in proportion to population, of cities and towns." The Political Code is a general law whose force extends throughout the state, and, in the absence of any qualifying words, the legislature must be deemed to intend that its provisions shall have uniform operation in all parts of the state; and it was held in the case just cited that an amendment to section 4109 of the Political Code, by which the time for the election of all city and county officers was made uniform throughout the state, superseded a provision in the charter of San Francisco providing a different time for the election of those officers within that city and county. In 1889 the legislature amended several sections of this Code relating to elections by extending their provisions to each of the counties and cities and counties of the state, and by placing every board having charge and control of elections in the same category with the board of supervisors in each of the counties of the state, and making the same provisions for cities and counties as for counties. By so doing it is manifest that it was the intention of the legislature that its provisions should be operative in San Francisco. The city and county of San Francisco was the only political subdivision of the state in which any board other than the board of supervisors had the control and management of elections, and, as was said in Staude's Case, we know judicially that it was the only city and county in the state. To the extent, therefore, that these amendments are inconsistent with, or variant from, the provisions of the act of March 18, 1878, the latter is superseded, and the city and county is subject to, and controlled by, the provisions of the Political Code.

By the act of 1878, the board of election commissioners was required to divide the city and county into election precincts "as soon after each general election as convenient, not to exceed ninety days." By the amendment to section 1127 of the Political Code, the board is required to divide the city and county into election precincts "as soon before a general election as is convenient." Section 1129 of the Code, as originally enacted, gave to the board of supervisors in each county authority "from time to time to change the boundaries of, create new, or consolidate established precincts"; but there was no provision in the act of 1878 for changing the boundaries of the election precincts, when once made, until after another general election. Section 1129 was, however, amended in 1889 to read as follows: "The board of supervisors or other board having charge and control of elections in each of the counties and cities and counties of the state may, from time to time, change the boundaries of, create or consolidate established new precincts; provided, that there shall always be as many precincts as shall be sufficient to make the number of votes polled at any one precinct to be not more than two hundred as nearly as can be ascertained." Under this section, as thus amended, the authority of the board of election commissioners of San Francisco, prior to the adoption of the amendment to section 6 of article 2 of the constitution, in 1896, to consolidate established precincts, is without question; and, unless that amendment has taken from them this authority, they must be held to have been authorized to consolidate the precincts for the purposes of the elections herein considered.

In 1896 the above clause in section 6 of article 11 was amended to read as follows: "Cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of the constitution, except in municipal affairs, shall be subject to and controlled by general laws." It is contended by the appellants that the elections for freeholders, and upon the adoption of the charter, proposed by them, were "municipal affairs," and were therefore not subject to, or controlled by, general laws.

The construction of the section, as thus amended, involves a determination of the meaning to be given to the term "municipal affairs," as used therein. The term "affair" is a word of wide import, and has been held to be more comprehensive than the word "business." See Morrison v. Bachert, 112 Pa. St. 322, 5 Atl. 739. Although it may be difficult to give a definition of the term "municipal affairs," as used in this section, which will be exhaustive or precise, it cannot be held that the effect of the amendment is to preclude the legislature from enacting laws relating to matters which might be made the subject of municipal control, or that all municipalities are exempt from all general laws which the legislature may enact. It has been decided so frequently, that it may be said to have become a maxim in jurisprudence, that a municipal corporation has only such powers as are given to it by its charter, and that it must find authority in its charter or under some general law for every municipal act which it may perform. The municipal affairs of any individual municipal corporation are therefore such affairs only as that municipality has the power to engage in or perform, and the municipal affairs of one city may vary greatly from those of any other city; and this, too, whether the charter of the city has been conferred upon it by the legislature or has been framed by a board of freeholders of its own choice, and afterwards adopted by its citizens and approved by the legislature. In either case, the municipality can exercise only the powers found in its charter. If, however, the charter of a city, whether given to it by the legislature prior to the constitution of 1879, or framed by a board of freeholders, contains no provision in reference to subjects which might have been included therein, that city or its inhabitants is not thereby freed from legislative control. The legislature is vested with the lawmaking power of the state, and the general laws passed by it have force in all parts of the state, unless by virtue of some provision in the constitution such effect is limited, or the lawmaking power has been lodged elsewhere. A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the legislature. If in framing its charter its board of freeholders should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city. It is not within the constitutional power of the legislature, by approving a freeholders' charter which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter. If, by adopting a charter which failed to give to it power to act upon affairs which are properly municipal, a city could be freed from any legislative control in reference to those affairs, either by itself or by the legislature, that city would become a veritable Alsatia.

Under these considerations, it must be held that the exception in the above clause in section 6 of article 11, placed there by the amendment of 1896, applies only to such municipal affairs as are within the power of the particular municipality to perform, and that every city in the state is subject to, and controlled by, general laws relating to municipal affairs, unless, by virtue of some provision of the charter under which it exists and is acting, such municipal affairs may be engaged in and performed by it. The clause is to receive a distributive construction, and is to be read as if its language were: "Any city or town heretofore or hereafter organized, and every charter thereof framed or adopted by authority of this constitution, except in its municipal affairs, shall be subject to and controlled by general laws."

We have seen that the provisions of the act of March 18, 1878, relating to the division of San Francisco into election precincts, were superseded by the amendments to the Political Code in 1889, and that from that date these provisions of the Political Code constituted the only law upon that subject which was applicable to San Francisco. It may be conceded that each of the elections herein considered, as well as the creation or consolidation of the precincts at which the elections were held, is a "municipal affair"; but as, since the amendment to the Political Code in 1889, there has been no provision in the charter of San Francisco relating to the creation or consolidation of election precincts, the city was subject to, and controlled by, the general laws existing in reference thereto. Section 1129 of the Political Code was in force within the city and county of San Francisco at the dates of these elections, and under this section the consolidation of the election precincts for the purpose of these elections was within the power conferred upon the board of election commissioners.

Inasmuch as the board had the power to consolidate the precincts "from time to time," as might seem to it desirable or proper, this power was not diminished, or its exercise impaired, by the fact that the board purported to exercise it under the act of 1897. If it had authority to consolidate the election precincts irrespective of this statute, it had the right to adopt its provisions in this respect as the basis of its consolidation, even though the legislature had no authority to enact the statute. It is unnecessary, therefore, to determine whether this statute is obnoxious to the charge of being special legislation, or whether it was within the power of the legislature to enact.

The provision in section 1129, that the precinct shall be sufficient "to make the number of votes polled at any one precinct to be not more than two hundred, as nearly as can be ascertained," is not to be regarded as jurisdictional, but is merely directory. The concluding clause, "as nearly as can be ascertained," shows that much is left to the discretion of the board, and, in the absence of any showing that by reason of a failure to observe this direction the fairness of the election or the completeness of the vote was affected, the act of the board in making the consolidation must be upheld. The finding of the court that at least one week before either election was held a written notification was mailed to each and every elector in the city and county whose name appeared upon the register, informing him specifically of the exact location of the polling place in his special election precinct, and inclosing therewith a sample of the ballot to be used at said election, takes away all claim of any want of notice to voters. It is not claimed that the board acted in bad faith, or that any citizen was deprived of his vote; the only claim being that, by reason of the registered vote within each of said precincts being much greater than 200, the board must be presumed to have abused its discretion in consolidating the precincts in the manner it did.

We need not determine whether this provision in section 1129 is to be construed as requiring the registered vote to be the criterion for fixing the extent of the precincts, or whether the board had the right to fix their extent upon its estimate of the number of registered votes which would be polled at the election. The wording of the section is such that the board might act in good faith in making the number of precincts such as in their opinion would make the number of votes which would be polled at each precinct not more than 200. It was competent for any citizen, if he deemed the boundaries of the precincts to be in violation of this clause in the section, to seek their correction prior to the election. He ought not, after the election has taken place, to be allowed to impeach it upon this ground alone, unless he can show that by reason thereof a fair election was prevented.

There is no express provision in the act of 1878 directing precinct registration to be had for special elections, and a consideration of the entire act leads to the conclusion that such registration is not authorized. Section 20 of the act requires the boards of precinct registration to meet in their respective precincts, "commencing five days before the day fixed by this act for the cessation of registration of electors in said city and county, and to sit in open session from nine o'clock a. m. until ten o'clock p. m. of each day until the day of such cessation"; and by section 22 they are required to continue registration of voters within their respective precincts "until the time provided by law for registration to cease"; and by section 24 to deliver the precinct registers to the registrar "not later than three full days after the cessation of registration, as provided by law." Section 28 declares: "Fifteen days before a general election all registration or enrollment of voters shall cease, and the precinct registers as they stand shall be the precinct registers for said ensuing election and until the next general election," subject only to changes in certain cases; and at the close of this section it is provided that changes and additions to said precinct registers for use at other than general elections may be made after the general election, and prior to any special election, "under the regulations fixed by the board of election commissioners." Under a proper construction of these provisions, registration for a special election is to be made under regulations fixed by the board of election commissioners, and need not be made in the several precincts. The provision in section 31, that the additional names shall be "noted upon the register for each special election thereafter or added in supplements thereto, and conformatory so far as the same is applicable to the provisions of the law governing the making of the general election register," has reference to the manner of preparing the precinct registers for use at the special elections, and not to the mode or time of registration. The provision in this section, that after the voter has been legally registered in the precinct register he may vote in such precinct at any election taking place before the next general election, was for the purpose of giving him the right to vote at such election without renewing his registration, and not for the purpose of defining the place at which he should vote. His right to vote in the same precinct is subordinate to the right of the board of election commissioners to change that precinct or consolidate it with others, and is not impaired by such enlargement of its boundaries, and fixing a different polling place within the boundaries thus extended.

A consideration of the spirit and object of the act of 1878 leads also to the same conclusion. The main purpose of the act, as shown by its provisions, was to secure a full registration of the voters of the city, with as little inconvenience to them as was practicable. For this purpose the act provides an extended period for registration at the office of the registrar, within which voters may be enrolled, and that at the close of this period those who have been unable to avail themselves of this opportunity may resort to some designated place within their respective precincts, and there be registered. To still further accommodate the voters, they are not required to present themselves for precinct registration within the usual hours for public offices, but the act provides that the boards of precinct registration shall sit in open session each day of their session until 10 o'clock p. m. It must be assumed that in this mode the registration for a general election will contain the names of all who are qualified to vote, and as the registers thus prepared for use at the general election are to be used at all special elections that may be held before another general election, with such additions as may be made thereto, there is no manifest reason for requiring precinct registration in connection with any special election, and, in the absence of direct provision therefor, it should be held that it is not required. The few changes or additions that may be desired are readily to be made at the office of the registrar, under the regulations of the board of election commissioners.

The omission of the board of election commissioners to appoint for each precinct as many officers of election as it was authorized to appoint (a proposition upon which we pass no opinion) does not authorize the election to be set aside. Such omission was but an irregularity, and it is not shown that it had any effect upon the election, either in the number of votes that were cast, or in the correctness of their canvass and return. The judgment and order are affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.

TEMPLE, J. I concur in the judgment. But I am of the opinion that the "framing of a charter" by a city "for its own government," under the authority given by section 8, art. 11, is a municipal affair, and I also think there was in the charter of the city and county of San Francisco a provision under which the elections here questioned might have been held. I am therefore unable to concur in either of the opinions already prepared.

It is unfortunate that when section 6, art. 11, was amended its meaning should be left in doubt. Before amendment it had been the subject of much contention, and we were entitled to expect that when amended there would be no ambiguity left. The clause amended had been construed and its meaning determined by numerous decisions of this court in which there was no conflict. It was contended on one side that the general laws which the constitution provided should control cities and towns and the charters thereof, were those general laws which operated upon all persons throughout the state, such as the Criminal Code, the Code of Civil Procedure, the statute of frauds, etc. But the court steadily ruled against this contention, and held that the restriction did not "at all affect the power to control or regulate the charters of all municipal corporations by laws general in their character. This power is expressly recognized by the last clause of section 6, above cited, where it is declared that 'cities and towns heretofore or hereafter organized, and all charters thereof framed and adopted by authority of this constitution, shall be subject to and controlled by general laws.'" Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615. Many attempts were made to overthrow this conclusion, and in various cases earnest dissenting opinions were filed, insisting upon a contrary view. But, notwithstanding many changes in the personnel of the court, that ruling was never reversed or modified. It was argued by those who favored the view adopted by the court that the last clause of section 6 was put in for the express purpose of showing that, although a novel municipal organization was authorized which secured some degree of home rule, and which had been made "immune" from attacks by special laws, they were nevertheless subject to general laws which would control and might alter their charters. It was certainly an assurance of legislative power and authority over such charters for some purposes. General laws, like the statute of frauds or the Code of Civil Procedure, do not and could not control cities and towns as such, and certainly not their charters. And, even if there were any way in which they could indirectly do so, it is impossible to imagine that the members of the constitutional convention apprehended any danger that it could be held that such laws did not prevail in cities and towns. But, if the contrary view was intended, there was reason to fear that the construction would be contended for which actually was asserted, notwithstanding the precaution that such charters could not be controlled by general laws. At all events, this rule was persistently maintained by this court, and in the face of and because of it the clause was amended.

That the form of the amendment is unfortunate is, in my opinion, demonstrated by the two opinions filed in this case. They differ widely as to what are "municipal affairs," within the meaning of the amendment. The language is in itself quite unambiguous, but the difficulty arises solely from the fact that the exception, construed in the light of the meaning uniformly given to the unamended clause by this court, and also giving the language its obvious import, plainly includes the entire proposition excepted to. I think we must suppose that the author of the amendment had in mind the contention of the justices who dissented from the established doctrine, and that it means that the legislature cannot by any general law add to, modify, or control the charter of any municipality. This is also the natural force and effect of the unambiguous language used. And, if it be admitted that all the power in terms granted is expressly denied by the exception, still it must stand as an inhibition upon any legislation which would directly affect cities and towns as municipal corporations. Indeed, the first few clauses in section 6, in substance, declare that any purposes for which cities and towns are organized are municipal affairs. The word "affair" would include all possible laws. "Municipal" means simply pertaining to a municipality. It is not permitted to construe unambiguous language used in statutes.

If the legislature may still control such charters by general laws in regard to matters not expressly provided for, a wide margin of uncertainty is still left, and a charter by such laws may yet be made; "quite another [municipal] affair." Presumptively, that which was omitted was not desired.

The other definition, as I understand it, confines the immunity to "municipal business." The phrase conveys no definite meaning to my mind. Does it include such police regulations as might prohibit opium joints, or fast driving in the streets, and a thousand and one other matters which make up the city government?

I submit that there is no warrant in any language found in the constitution for either construction. To hold, notwithstanding the plain language of the constitution, that these charters are to be practically amended in some respects, or by some general laws, in regard to municipal affairs, is to disregard the words of the amendment, and not to construe it. It may be found that the municipal offspring was badly crippled in the accouchement.

My views do not require me to discuss at length many matters found important in the other opinions. I think, however, the constitution authorizes the city to frame a charter for its own government by causing 15 freeholders to be elected, who pro hac vice represent the city. It is none the less the act of the city, as such, because a referendum is provided to its constituent members, who, collectively incorporated, are the municipality. I think there was a provision in its charter under which the elections called in question could and should have been held, and that the election was not held as this charter provision required. I refer, of course, to the act of 1878.

But I think we are neither authorized nor required to determine whether the municipal elections were duly and regularly conducted. That was settled by the legislature when it enacted the charter into a law. This position is admitted in People v. Gunn, 85 Cal. 238, 24 Pac. 718, if the legislature, as to the charter, is the lawmaking power. It is there said, however, that as to the charter the legislature is not the lawmaking power. This question was again reviewed in Ex parte Sparks, 120 Cal. 395, 52 Pac. 715. Some of the justices, though not constituting a majority of the court, held that since an amendment was made to the constitution, providing that the charter may be approved by joint resolution, such charter becomes the law of the state through the action of the legislature. It was said: "It prevails and has force as a law of this state, and is not made a law by the people of the municipality or by virtue of authority delegated to them. It is proposed by the municipality, and accepted and passed into law by the legislature, or rejected, as it shall see fit." Many reasons additional to these stated in Ex parte Sparks might be given, but it is unnecessary, for all the attorneys in this case admit that such is the law; that the doctrine laid down in Ex parte Sparks is the true doctrine.

It was necessary for the legislature to determine that the charter had been framed by the city for its own government before it proceeded to enact it into a law. No record was required to be kept which should furnish conclusive evidence as to what was actually done in holding these elections. No private rights were involved. No one had a peculiar interest in the question. The whole proceeding was governmental and political. And the fact that the legislature enacted the charter into a law is conclusive evidence that it made the proper investigation and found the requisite facts which would warrant its action. Many cases upon this subject are cited in Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, where the principle is fully discussed.

But I contend that, even if it were admitted that the function of the legislature is correctly stated in People v. Gunn, still, on principle, the action of the legislature is conclusive. If the action is legislative in its character,—that is, something that is within the domain of the legislature as a co-ordinate department of the government,—its action is conclusive upon the other departments. This rule applies to each department,—to the executive as well as to any other. In the performance of a purely executive act the governor cannot be controlled, and all his determinations of facts which induced his action are conclusive. This is illustrated in the power of the executive to declare martial law, or to suspend the right to issue certain writs in case of insurrection or rebellion. Possibly, in regard to matters where the law requires records to be kept and makes them conclusive on all departments, this may not be so. We may look to see if the governor or the legislature has acted in the mode required by the constitution. That is not the question here. Admittedly the legislature pursued the method required by the constitution, and the question is as to the effect of legislative action which is regular and valid. There is nothing giving peculiar force to the action of the legislature in enacting a statute rather than any other action which is made a function of that department of the government by the constitution. To approve or disapprove a freeholders' charter is especially committed to the legislature by the constitution. Whether it performs this duty by resolution or by bill, it is equally a legislative act, which concludes the other two departments. If the legislature were to refuse to act at all upon a proposed charter, no power could compel it to do so, simply because it is a peculiar function of the legislature. It approves or disapproves as a legislature,—a co-ordinate department of the state government.

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126 Cal. 404

MARTIN et al. v. BOARD OF ELECTION COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 1,974.)

(Supreme Court of California. Oct. 23, 1899.)

MUNICIPAL CORPORATIONS — CONSOLIDATION OF CITY AND COUNTY — FREEHOLDERS' CHARTERS—CONSTITUTIONAL LAW—CONSTITUTIONAL AMENDMENTS—VALIDITY.

1. Const. art. 11, § 8½, subd. 4, provides that, where a city and county has been "merged and consolidated" into one municipal government, it shall be competent, in any charter framed under section 8, authorizing the adoption of freeholders' charters, to provide for the election, terms, and salaries of county officers. Act April 19, 1856, entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the governments thereof," declares that the corporation now existing, and known as the "City of San Francisco," shall continue a body politic in name and in fact, by the name of the "City and County of San Francisco," and by that name shall possess all the attributes of a municipal corporation. Section 2 vests the title to all city and county property in the consolidated corporation; and the act further declares that the existing provisions of law defining the powers and duties of county officers, except those relative to supervisors, so far as they are not repealed or altered by such act, shall be applicable to the officers of the city and county of San Francisco; and the officers enumerated to be elected for the consolidated corporation comprise both city and county officers. Act April 1, 1897, passed pursuant to certain sections of Const. art. 11, provides for a uniform system of county and township government. *Held*, that since the city and county of San Francisco were merged, within the meaning of the constitution, by Act April 19, 1856, Act April 1, 1897, had no application to such city and county, and hence the provisions of a freeholders' charter for such city and county, providing for the election of county officers, was valid, though not in conformity with such act.

2. Since the legislature has power to form general laws for the submission of constitutional amendments to the people, the fact that Const. art. 11, § 8½, authorizing provisions in freeholders' charters, in addition to those authorized by the constitution and laws of the state, was submitted under St. 1883, p. 53, providing generally for the submission of constitutional amendments, instead of being submitted by a special act proposing such amendments, was immaterial.

3. The fact that a freeholders' charter, providing for the election of officers of a consolidated city comprising the city and county in which it is located, as authorized by Const. art. 11, § 8, specifies a manner of election different from that defined by Act April 1, 1897, establishing a uniform system of county and township government generally, passed pursuant to certain sections of Const. art. 11, does not render such charter unconstitutional, since the charter becomes a special act controlling the general law, the two to be construed in pari materia.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Henry S. Martin and others against the board of election commissioners of the city and county of San Francisco and others. From a judgment in favor of defendants sustaining a demurrer to plaintiffs' complaint, they appeal. Affirmed.

Geo. D. Collins, for appellants. F. K. Lane, H. N. Clement, and G. W. McEnerney, for respondents.

VAN DYKE, J. This action is in some measure connected with that of Fragley v. Phelan (S. F. 2,048; just decided) 58 Pac. 923, involving the validity of the freeholders' charter. In the complaint of the plaintiffs it is stated "that this action is not designed or intended to impeach the validity of the said charter in any respect other than to have it adjudged herein that the provisions of said charter concerning the county officers of said city and county of San Francisco are in open and flagrant conflict with the constitution of the state of California, are an invasion of, and an infringement upon, the sovereignty of said state, are a revolutionary usurpation of power, and are a palpable violation of the law adopted by the legislature of said state in obedience to the constitution, and entitled 'An act to establish a uniform system of county and township government,' approved April 1, 1897." A demurrer to the complaint was sustained by the court below, and, plaintiffs declining to amend, judgment was entered in favor of the defendants, from which judgment this appeal is taken.

The provisions of the freeholders' charter concerning the so-called "county officers," in whose behalf this action is prosecuted, were inserted in said charter in pursuance of the amendment to article 11 of the constitution, concerning counties, cities, and towns, and is entitled section 8½, adopted in 1896. By that amendment it is declared: "It shall be competent, in all charters framed under the authority given by section 8 of article 11 of this constitution, to provide, in addition to those provisions allowable by this constitution and by the laws of the state, as follows: * * * (4) Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said section 8 of said article 11, to provide for the manner in which, the times at which and the terms for which the several county officers shall be elected or appointed, for their compensation, and for the number of deputies that each shall have, and for the compensation payable to each of such deputies."

By the act of the first legislature dividing the state into counties, passed February 18, 1850, the county of San Francisco was bounded on the south by the San Francisquito creek, and from the head of said creek due west to the ocean, and three miles therein, and on the northerly end including all of the present city and county, counties lying to the south being Santa Clara and Branciforte. The latter was changed subsequently to the county of Santa Cruz. At the same session of the legislature an act was passed, April 15, 1850, to incorporate the city of San Francisco. The southern boundary line of said city, as thus incorporated, was two miles distant from the center of Portsmouth Square, "and parallel to the street known as 'Clay Street' "; and the western boundary was a line a mile and a half in a westerly direction from Portsmouth Square, "and parallel to a street known as 'Kearney Street.' " The act provided for a complete organization and a full set of officers for the city, independent of the county officers of the county of San Francisco. The acts creating the county, and also the city, were amended at subsequent sessions of the legislature; and April 19, 1856, an act was passed "to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof." By the first section of said act it is provided that "the corporation or body politic and corporate, now existing and known as the city of San Francisco, shall remain and continue to be a body politic and corporate in name and in fact, by the name of the city and county of San Francisco, and by that name shall have perpetual succession, may sue and defend in all courts and places, and in all matters and proceedings whatever, and may have and may use a common seal, and the same may alter at pleasure; and may purchase, receive, hold and enjoy real and personal property, and sell, convey, mortgage and dispose of the same for the common benefit." By the second section it is provided that "the public buildings, lands and property, all rights of property and rights of action, and all moneys, revenues and income belonging or appertaining either to the corporation of the city of San Francisco, or to the county of San Francisco, are hereby declared to be vested in, and to appertain to, the said city and county of San Francisco; and the moneys in the treasury of said city, and in the treasury of said county of San Francisco, and all the revenues and income from whatsoever source arising, including delinquent taxes upon persons and property appertaining to the said city or to the said county, shall be handed over, paid and received into the treasury of the city and county of San Francisco as a part of the general fund." The boundaries of the new municipal corporation designated as the "City and County of San Francisco" were fixed as at present, and there was formed out of the southern portion of the county of San Francisco the county of San Mateo; and the eighth section of the act dividing the state into counties, providing for the formation of the county of San Francisco, was repealed. It was further provided in said act that the existing provisions of law defining the powers and duties of county officers, excepting those relating to supervisors, so far as the same were not repealed or altered by said act, should be considered as applicable to the officers of said city and county of San Francisco; and among the enumerated officers to be elected for said new municipal corporation were, in addition to purely city officers, the officers formerly designated as county officers.

From the passage of the consolidation act to the constitutional convention of 1878–79, the city and county of San Francisco had been a subdivision of the state, and as such, and by that name and style, organized and existing as a body politic and corporate. Its charter—the consolidation act—had been added to and amended, but the general form and substance of the municipal government had not been changed. And since the passage of the consolidation act the county of San Francisco has ceased to exist as a body politic or corporate, independently of, and separate from, the municipal corporation created by that act, and known and designated as the "City and County of San Francisco."

One of the contentions on the part of the appellants is that, although the former city and county were consolidated, they were not "merged," within the meaning of the constitution. As already shown, the consolidation act repealed the various acts creating and amending the charter of the city of San Francisco, as well as the provisions of the act creating the county of San Francisco; and all the funds and property of every kind theretofore belonging either to the city or county became vested in, and belonged to, the new municipal corporation known as the "City and County of San Francisco." It would seem difficult to more effectually merge two separate bodies into one. Besides, in the constitutional convention of 1878–79, the city and county of San Francisco was referred to and treated as a merged and consolidated municipal government, and it was then, as now, the only municipal government of that kind in the state. That portion of section 7 of article 11 of the constitution, where merged and consolidated municipal governments are referred to, has not been changed since it was reported to the convention by the committee on municipal corporations, and the debates show that the terms there used referred to a municipal government like that of the city and county of San Francisco. During the debate on the various amendments proposed to that portion of section 7 referring to the two houses of legislation (since omitted by constitutional amendment), Judge Hager, the chairman of the committee, in replying, said: "I had no idea that this section was going to create so much difficulty in the convention, or receive so much apparent opposition. The section as drawn was intended to be for the city of San Francisco." Debates of Constitutional Convention, p. 1058. These remarks of Judge Hager were not questioned by any member, and it is fair, therefore, to assume that the convention understood that when using the term, "merged and consolidated into one municipal government," it had reference at that time only to the city and county of San Francisco, and also to any similar consolidated corporation that might thereafter be created. When the following section, 8 (then section 9), providing for freeholders' charters, was under debate, Judge Hager remarked: "This applies strictly and only to the city and county of San Francisco." (The section originally required a population of more than 100,000 to entitle the inhabitants of such city to frame such a charter.) He further said: "I cannot see that any evil will come from it. We have this peculiar government there,—a consolidated city and county government. I do not agree with my friend from Sacramento, that the tendency is to multiply offices. The tendency is to reduce the number of offices. Instead of having a set of city officers and a set of county officers, they are consolidated. We have a sheriff who is the sheriff of the county and of the city. * * * We have a tax collector and we have an auditor that acts for both; formerly we had one for each. The tendency of a consolidated government is to reduce the offices from two to one in every case, and reduce the expense in every particular, and not, as the gentleman said, for the purpose of multiplying offices."

It is further contended by the appellant that section 8½ of article 11 is invalid, for the reason that it was submitted to the people under the general law, passed March 7, 1883, providing for the submission of constitutional amendments, instead of being submitted specially by the legislature proposing the amendment. St. 1883, p. 53. This contention is entirely untenable. The amendment to section 6 of the same article, by the insertion of the words "except in municipal affairs," was submitted and adopted at the same time and in the same manner as section 8½, now under consideration, and the validity of that amendment has been considered and sustained by this court. Besides, there are many other amendments that have been in like manner submitted and adopted since the passage of the act of 1883. There is no constitutional objection to the passage of such an act, and, that being the case, it is entirely proper for the legislature to provide by general, instead of special, legislation for submitting constitutional amendments to the people.

The causes leading up to the adoption of constitutional amendment section 8½ are well known. In the freeholders' charter of the city of Los Angeles provision was made for the establishment of a police court and the election of judges thereof. In People v. Toal, 85 Cal. 333, 24 Pac. 603, it was held by this court that such provision of that charter was invalid, for the reason that inferior courts, including police courts, could only be established as provided by article 6, concerning the judicial power of the state, and that it is there provided that the legislature may establish inferior courts in any incorporated city or town or city and county; and this meant that an act must be passed by the legislature in the form and manner prescribed in article 4, legislative department; and that the approval of the freeholders' charter by a vote of the two houses of the legislature was not equivalent to the passage of a law as provided in said legislative article. Hence the new section (8½) of article 11 of the constitution (subdivision 1) confers in express terms the power to provide in freeholders' charters "for the constitution, regulation, government and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the compensation of such judges and their clerks and attaches." And to remove any doubt that may have previously existed concerning the status of officers of the class prosecuting this action, in merged and consolidated municipalities, it is further expressly provided in the amended section (8½) that it should be competent in a freeholders' charter of such consolidated government to provide for the election of such officers for such municipality. There is no room for doubt, therefore, as to the purpose of the legislature in proposing said amended section 8½ of article 11, or of the people in voting upon and approving the same.

It is contended, however, on the part of the appellants, that the provisions of said amended section 8½, under consideration, cannot be carried out, for the reason that it would conflict with the general law of the state establishing a uniform system of county and township government; in other words, that the law (and a freeholders' charter adopted as provided for in the constitution is a law of the highest grade) cannot be passed, although in pursuance of express power granted by the constitution, because it may perhaps infringe upon some other law. The rule of construction invoked by appellants seems to be that a provision in a law or constitution in reference to a particular matter is inoperative and void if it be inconsistent with the general provisions of said law or constitution. The direct opposite is the true construction in such cases. "The more specific provision controls the general, without regard to their comparative dates; the two acts operating together, and neither working the repeal of the other." Bish. Wr. Law, §§ 112–126; Desmond v. Dunn, 55 Cal. 247; Dwar. St. 765; Cooley, Const. Lim. 63; Com. v. Council of Montrose Borough, 52 Pa. St. 391; Coxe v. State, 144 N. Y. 396, 39 N. E. 400; People v. Keller, 157 N. Y. 97, 51 N. E. 431; State v. Kelly, 34 N. J. Law, 75; McGavisk v. State, Id. 509; State v. Inhabitants of City of Trenton, 38 N. J. Law, 64; Crane v. Reeder, 22 Mich. 323.

Under this rule of construction, it would be immaterial whether the general county government act applies to the county of San Francisco or not; for, although said new section (8½) of article 11 may conflict with other sections of the same article providing for a uniform system of county and township government, it would still be valid as to the particular cases for which it is intended; for in such case the particular and the general both stand together. Neither abrogates the other; the former furnishing the rule for the freeholders' charter, the latter for all other cases.

But the act establishing a uniform system of county and township government does not, and never has, applied to the county of San Francisco, in the sense claimed by the appellants. The first section provides that the several counties of this state, as they now exist, and such others as may be hereafter organized, are bodies corporate and politic, and as such have the power specified in said act. Among these are the power to sue and to be sued; to purchase and hold land within its limits; to make contracts, and purchase and hold personal property, as may be necessary to the exercise of its powers; to manage and dispose of its property as the interests of its inhabitants may require; to levy and collect such taxes as are authorized by law. The county of San Francisco, as already shown, since the passage of the consolidation act, has never, as such, owned or possessed any property or performed any of the acts of a corporate body. Further, the general law provides that "each county must have a board of supervisors consisting of five members." The county of San Francisco never has had such a board, or any board of supervisors, since the consolidation act. The general county government act also provides for justices of the peace and constables in the several townships of the county, and there are no justices of the peace or constables in the townships of the county of San Francisco, since there are no townships in San Francisco. In fact, it is too obvious for question or argument that the general law establishing a uniform system of county government does not apply to the city and county of San Francisco. Further, section 8 of article 11, as it now stands, declares that, when said charter is approved as therein provided, "it shall become the charter of such city, or, if such city be consolidated with a county, then for such city and county, and shall become the organic law thereof and supersede any existing charter, and all amendments thereof, and all laws inconsistent with such charter." As the section originally stood it read, "all special laws inconsistent with such charter." The purpose of the amendment is in line with other amendments to the other sections of the article in question, and would seem to remove all doubt that such charters are not subject to existing laws, whether general or special. Judgment affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.

TEMPLE, J. I concur in the judgment.

McFARLAND, J. I concur in the judgment solely on the ground that the constitutional amendment (section 8½) definitely settles the question involved in favor of the contention of respondents.

(126 Cal. 465)

STACKPOLE v. HERMANN. (S. F. 2,063.)

(Supreme Court of California. Oct. 27, 1899.)

APPEAL AND ERROR—UNDERTAKING ON APPEAL—DATE OF UNDERTAKING—FILING NEW UNDERTAKING IN APPELLATE COURT—DISMISSAL.

1. Where an undated undertaking on appeal is filed after service of notice of appeal, and on the same day said notice is filed, and an affidavit of the surety annexed to the undertaking is dated prior to the date of said service and filing, and prior to the date on which a motion for a new trial was overruled, it must be assumed that the undertaking was signed before the motion for new trial was overruled, and before said notice was served or filed.

2. Where an undertaking on appeal is executed before the overruling of a motion for a new trial, and the appellant files a new undertaking in the supreme court, to get the benefit of Code Civ. Proc. § 954, providing that no appeal shall be dismissed if a good and sufficient undertaking, approved by a justice of the supreme court, be filed before the hearing of a motion to dismiss, the appeal from the order denying a new trial will be dismissed, as the original undertaking is without consideration, and is equivalent to a total lack of any undertaking to perfect an appeal from said order.

3. An appeal from a judgment is valid though the undertaking is signed by the sureties before the notice of appeal is served.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by W. H. Stackpole against R. Hermann. There was judgment for plaintiff, and defendant appeals from judgment, and also from an order denying a new trial. Appeal from the order is dismissed, but motion to dismiss the appeal from the judgment is overruled.

John J. Roche, for appellant. F. W. Van Reynegon, for respondent.

HARRISON, J. Motion to dismiss the appeal. Judgment herein was entered in the superior court, April 8, 1899, and on June 23d an order denying the defendant's motion for a new trial was made. June 27th the defendant served upon the plaintiff a notice of appeal from both the judgment and the order, and on the next day filed the same with the clerk. June 28th he filed with the clerk an undertaking on appeal in proper form, but it did not show the date upon which it was executed. The affidavit of the sureties annexed to their undertaking was dated June 21st, and it must be assumed that the undertaking was not signed by them later than that date. At that time, however, there had been no order made denying a new trial, and there was therefore no right of appeal therefrom, or consideration for an undertaking upon such appeal. Clarke v. Mohr (Cal.) 58 Pac. 176.

Prior to the hearing of this motion, the appellant filed herein an undertaking on appeal, which had been approved by the Chief Justice, and upon that ground asks that the motion be denied. As the undertaking on the appeal from the order which was originally filed herein was without any consideration to support it, and was therefore incapable of sustaining the appeal, there was more than an "insufficiency" in the undertaking, and it must be regarded with the same effect as if no undertaking had been filed. It created no obligation upon the sureties, and gave to the respondent no right to recover from them the costs and damages to which he might be entitled if the judgment should be affirmed or the appeal be dismissed. Such want of validity in the instrument is equivalent to the entire want of an undertaking, and the appellant is not entitled, by virtue of section 954, Code Civ. Proc., to supply its absence by filing a new undertaking. Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; In re Heydenfeldt's Estate, 119 Cal. 346, 51 Pac. 543.

The objection to the undertaking, on appeal from the judgment, that it was signed by the sureties before the notice of appeal was given, was considered in Clarke v. Mohr, supra, and held to be untenable. The appeal from the order denying a new trial is dismissed. The motion to dismiss the appeal from the judgment is denied.

We concur: GAROUTTE, J.; VAN DYKE, J.

(126 Cal. 457)

In re FAY'S ESTATE. (S. F. 2,032.)

(Supreme Court of California. Oct. 26, 1899.)

APPEAL BONDS—CONDITIONS—PAYMENT ON DISMISSAL.

Under Code Civ. Proc. § 954, requiring the dismissal of an appeal unless a "good and sufficient undertaking" is filed, an appeal will be dismissed, where the sureties in the undertaking promise "that the appellant will pay all damages and costs which may be awarded against him in the appeal, not exceeding $300," but do not agree to make such payment "on a dismissal thereof," as required by section 941.

Department 1. Appeal from superior court, Santa Clara county.

In the matter of the estate of George W. Fay an appeal was taken from the judgment. Dismissed.

H. A. Gabriel, J. Samuels, and C. D. Wright, for appellant. E. E. Cothran, for respondent.

PER CURIAM. Motion to dismiss the appeal. In the undertaking on appeal herein the sureties undertook and promised "that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars," but the undertaking does not contain an agreement on their part that he will make such payment "on a dismissal thereof," as required by section 941, Code Civ. Proc. In Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147, it was held that the omission of these words is fatal, and the appeal therein was for that reason dismissed. In Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74, and 13 Pac. 323, it was held that the appellant did not obviate this defect in the undertaking by having inserted the provision in the undertaking to stay execution of the judgment. Prior to the hearing upon this motion the appellant presented another undertaking on appeal, and asked that the same may be filed herein, under the provisions of section 954, Code Civ. Proc., but the same defect exists in the proposed undertaking as in the one originally filed. Under section 954, the appeal must be dismissed unless a "good and sufficient undertaking" is filed in this court. See, also, Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; In re Heydenfeldt's Estate, 119 Cal. 346, 51 Pac. 543. The motion is granted, and the appeal dismissed.

(126 Cal. 433)

CALIFORNIA NAV. & IMP. CO. v. UNION TRANSP. CO. (Sac. 513.)

(Supreme Court of California. Oct. 25, 1899.)

SHORE OF NAVIGABLE WATERS—DEDICATION FOR PUBLIC LANDING PLACE—AGENT'S TESTIMONY OF PRINCIPALS' INTENTION—ADMISSIBILITY.

1. The dedication of a country highway along the shore of navigable waters does not carry with it the right to use it as a public landing place to discharge and receive freight and passengers.

2. Testimony of an agent as to the intention of his principals, tending to deprive them of their property, is inadmissible if unsupported by facts tending to show that he knew what their intention was, and unaccompanied by any of their declarations and acts.

3. The public used as a landing a part of the shore of navigable waters for a long period of years, with the consent of an agent of the owners, but it did not appear that he was authorized to dedicate the same to the use of the public further than that he was authorized to

manage and reclaim for its owners a large area of swamp land, of which it was a part, and his testimony showed that it was their intention to retain control thereof. *Held* not to justify a finding that the landing had been dedicated to the public, conceding that such a dedication may be made.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by the California Navigation & Improvement Company, a corporation, against the Union Transportation Company, a corporation. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Woods & Levinsky and Thos. H. Breeze, for appellant. Fairall & Carrol, Reddy, Campbell & Metson, and S. M. Spencer, for respondent.

CHIPMAN, C. Injunction. Defendant had judgment, from which, and from the order denying its motion for a new trial, plaintiff appeals.

Plaintiff and defendant are corporations engaged in transporting freight and passengers by river between the city of Stockton and the city of San Francisco and intermediate points. About June 1, 1897, plaintiff became lessee of a certain piece of land situate on Roberts Island, in San Joaquin county, known as "Wakefield's Landing," the same being a portion of the so-called "Wakefield Ranch," adjacent to the San Joaquin river. It is alleged in the complaint that defendant, "without the consent of plaintiff, and against the will of the said plaintiff, has for many days past continuously entered upon the said land and premises, and used the same for the purpose of making landings and receiving therefrom freight and passengers, and of delivering thereon freight and passengers; and that the said defendant, although requested so to do, has refused to cease from said use of the said land and premises, and threatens to, and will, unless restrained, * * * continue to enter upon and use the said land and premises for the aforesaid purposes." It is also alleged that said entry has caused and does cause continual and daily damage, and that to recover the amount of damages suffered and which will be suffered will require a multiplicity of suits. The defense to the action set up in the answer is that plaintiff is not damaged, and that the leased premises had long been dedicated and set apart and used as a public highway, and denies any right in plaintiff's lessor to lease the same; and also that the said premises had been, in 1876, set apart and dedicated as a free public wharf and landing, and accepted and used by the public as such. The cause was tried upon the complaint and answer, no demurrer to either having been interposed. At the request of defendant, and against plaintiff's objection, certain questions were submitted to a jury, and answered as follows: (1) That plaintiff was not in possession of the premises on July 8, 1897, "otherwise than as one of the public." (2) The premises on that day were "a part of a public highway, which had theretofore been dedicated to the public by the owners of the land." (3) On that day the premises constituted a public landing, which had been dedicated to the public, prior to the commencement of this action, by the owners of the land, and the same had been accepted by the public by the use and occupation of the same for 20 years last past. (4) That plaintiff had not been damaged other than nominally. (5) The premises, "for more than twenty years prior to the commencement of the action, have been continuously, peaceably, uninterruptedly, notoriously, openly, and with the knowledge of plaintiff and its grantors used as a public highway, road, and landing place by the public in general, and by all persons who chose to travel over said highway, road, and landing place, and use the same." The court adopted these answers as part of the findings, and also found that on June 1, 1897, one Ralph P. Lane was the owner of the fee of the property in controversy, and that plaintiff, "by means of mesne leases, leased the same from said Lane."

The principal question involved is: Did the evidence justify the decision that Wakefield Landing was, prior to the commencement of the action, dedicated to public use as a public landing place, and had defendant a right to occupy it for landing purposes against plaintiff's consent? The evidence in support of respondent's position was of two classes, —one relating to the dedication of a highway, and the other to the long use by the public, and the dedication to the public of the land for a wharf and landing. The land in question is part of a tract of about 38,000 acres, which, in 1876, was the property of the Glasgow-California Land Company. At that time Roberts Island was an unreclaimed swamp, and its reclamation was undertaken in two parts, called the upper and the lower divisions; Wakefield Landing being on the lower division. As the levee system progressed, the land was occupied from time to time by tenants of the company, and later by purchasers from it. Roads were used indiscriminately at first, but finally settled down in recognized locations. Landing places also became necessary at different points upon the island for landing supplies and receiving the products grown on the land. There were several of these landing places, and, among others, the one in question. It consisted simply of a levee, somewhat higher and broader than the levees generally protecting the island. The leased land embraced a strip along the river 1,000 feet in length and 100 feet in width, measured from the river. The evidence tends to show that roads leading from the cultivated portions of the island approached this landing from above and below, following inside of the levees, and converging at Wakefield Landing, where they ran upon this more elevated land, which formed both a levee and roadway.

Some of the witnesses testified that the road ran all over this higher ground, and that the road and levee were practically identical at that place. The evidence tended to show use by the company and by the public of these roads as public highways for many years by acquiescence of the agent having charge of the property. Whether this was sufficient to justify the finding need not be decided, but, assuming that it was sufficient for that purpose, we cannot concur with respondent in his contention that proof of dedication of the highway establishes a dedication of the land for a landing and wharves, even if identical in situation and area with that used for the highway,—which is by no means clearly shown to be the fact. The evidence is that the levee was built up and broadened out for landing purposes at this point, and the roads came to the landing. The landing did not go to the roads. The dedication of the roads was entirely consistent with nondedication of land for wharfage purposes. Nor can we agree with respondent that the dedication of the locus in quo for road purposes implied a dedication for a landing, or that the right to use the road for landing purposes was included in the right to use the dedicated strip for a road. Evidence alone of an intention to dedicate to a particular use cannot be considered as implying an intention to dedicate to another and entirely different use.

Instances are numerous where highways are laid out along the shores of rivers, lakes, bays, and the ocean, both for pleasure and for general utility, as highways. We know of no principle of law that would justify us in holding that the owner of the soil over which any such highway is laid out is to be deemed to have dedicated the banks or shores to the common use of the public for landing purposes by dedicating a strip of land as a highway. In the case of Chambers v. Furry, 1 Yeates, 167, the question arose under an alleged right of fishery to land on the Susquehanna river at a point where a public highway approached the river. The action was trespass, and the defendant justified on the ground, among others, that there was a highway laid out to the river at the point in question. The evidence showed that the highway terminated some perches distant from where the boats landed and received their freight. The court said: "But, had it been a highway, would it have been a justification? The public would in that case have been entitled to a right of passage, but the title to the soil, the stones, the wood, or the grass growing thereon would have still continued in the owner of the lands. The use of the ground would be dedicated to the public for particular purposes only. The books lay it down that in England the right to a bed of a navigable river is presumed to belong to the crown, and, of course, in such case here to the commonwealth, 'usque ad filum aquæ'; but the right to the adjoining lands rests in the owner of the soil. No one can use them without making compensation to the respective proprietors." The rule as held in that early case has been often since approved, and, we think, is the correct rule, except as it seems to have been modified in relation to streets in towns and cities. See Cooper v. Smith, 9 Serg. & R. 26; Chess v. Manon, 3 Watts, 219. The question was more fully considered and was elaborately discussed in the case of Pearsall v. Post, 20 Wend. 111, and later, on appeal to the court of errors, in Post v. Pearsall, 22 Wend. 425. The action was trespass for entering upon the land of plaintiff and depositing thereon a quantity of manure. The case had very full consideration both in the supreme court and in the court of errors. After reviewing the cases, including those above cited, Mr. Justice Cowen, speaking upon the point before us, said: "The amount of these cases is that roads are made to be traveled on, and not to be occupied, much less to be blocked up, by sloops and scows. If the contrary were allowed, the ferryman might derive a profit from his toll, which belongs to the owner, under a pretense of free passage. The intention of laying out a public highway is to make a free passage, not a profit of water craft. The easement is for land, not water, carriage, and therefore not to be touched by the latter without the permission of the owner." Again, he remarked: "Independent of what I take to have been the plain intent of the legislature, a landing, even though for the purpose of direct transit, is more than a highway. The relative rights, both of owner and passenger, in a highway, are perfectly understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master."

Respondent contends that the cases to which reference has been made have been practically overruled by the cases cited in its brief. The case of Barney v. City of Keokuk, 94 U. S. 336, is cited, among others, as adverse to appellant's contention. Reference is made in that case to Haight v. City of Keokuk, 4 Iowa, 199, from which the supreme court quoted approvingly, as was done in several other of the cases cited: "The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily in their transit to the storehouse; and so of other things, and so it is of the wharf." It will be observed that the court expressly distinguished the conditions existing in a town or city as to streets from those existing in the country in suburban regions, for the court said: "The streets of a town are fairly subject to many purposes to which a highway in the country would not be." This distinction is expressly recognized in Barney v. City of Keokuk, supra, and by Mr. Dillon, where he states the rule in his work on Municipal Corporations (section 633), and also in the leading case of City of Cincinnati v. White, 6 Pet. 431. I do not find any case, and none is cited by respondent, where the doctrine is laid down as universally applicable that the dedication of a highway along the shore of navigable waters outside of towns and cities carries with it a right to land vessels indiscriminately on such highway, and use it as a public landing place to discharge and receive freight and passengers.

Conceding that there may be a dedication of land for wharves or landing places on the banks of navigable waters, we are brought to consider whether the evidence shows such dedication here. First, it should be determined in what manner may dedication be made, and by what evidence may it be proved. We have seen that it cannot follow from proof of dedication as a highway. The authorities hold that: "To constitute a dedication, there must be an abandonment by the owner to the use of the public exclusively, and not a mere use by the public in connection with a user by the owners in such measure as they may desire. Nor can the public acquire a right by prescription or custom to land on the shore of a navigable stream, to unload freight, and thus incumber the land." Washb. Easem. pp. 205, 555; Talbot v. Grace, 30 Ind. 390; City of Cincinnati v. White, 6 Pet. 431, at page 438; Pearsall v. Post, 20 Wend. 111; Post v. Pearsall, 22 Wend. 425; Curtis v. Keesler, 14 Barb. 511; Chambers v. Furry, 1 Yeates, 167; and other cases. In City of Cincinnati v. White the court shows that rights of this description do not rest upon length of possession. We think the rule in a case such as this one, where not controlled by statute, is correctly stated in Post v. Pearsall, supra, as follows: "Dedication cannot be presumed as a mere legal inference from a prescriptive user, but should be proved to have been made by writing, or by public and unequivocal declarations or acts; and the evidence of user is good only to show that such dedication was accepted and enjoyed, and to corroborate or explain other evidence or probabilities." Mr. Dillon says: "Upon the adjudged cases there exists some doubt whether the public can prescribe for or claim, by way of implied or common-law dedication, land for landing purposes." But he adds: "There may be an express dedication for this purpose, and, on principle, within the limits of a municipality bordering on navigable waters, it would seem to be going too far to say that in no case can a common-law dedication of land for a public wharf or landing be shown by user, and the proprietor be estopped from denying the right of the public to such use." 2 Dill. Mun. Corp. § 649. The dedication must be made by the owner of the land, and an intention on the part of the owner to dedicate is absolutely essential, and, unless such intention can be found in the facts and circumstances of the particular case, no dedication exists. Id. §§ 635, 636.

Apart from evidence tending to show that the public used the landing in question for a period of years with the consent of the agent of the owner, Mr. Ferris, the evidence is slight, and inconclusive. The land was owned until quite recently by a corporation whose principal place of business was in San Francisco. There is no evidence that any stockholder or director or officer of the corporation ever visited Roberts Island, or took any part in the establishment of Wakefield Landing, or directly authorized or ratified its establishment. Mr. Ferris was the land company's engineer and agent at the island, but there is no evidence as to how far his authority extended, and not the slightest direct evidence that he had authority to dedicate any of the land to the public for wharves or landings. He testified for defendant: "I have known Roberts Island for twenty-one years. I have been an agent of the people owning it for the greater part of that time, and engaged in carrying out its reclamation and management. I am no longer engaged with the people who own it. I have some interests of my own there, but the people by whom I was employed the greater part of the time have no further interest there. I ceased to be their agent in 1892." This is the extent of the evidence as to his power, and it does not seem to us that his agency to carry out the reclamation of the land implied any authority to dedicate any portion of it to the public for landings. There is an entire lack of evidence from which it can be inferred that Mr. Ferris had authority to dedicate this land to the public for a landing. Taking his evidence in its entirety, it shows that, so far as he assumed to express what the intention of the owners of the land was, there never was any intention to yield control of the land to the public, without which there could be no dedication. Respondent contends that, when Ferris testified that "it was the intention of the owners to have this landing for the use of the tenants and for the use of the public," he testified to what the owners did; that he stated their intention as a fact. We do not think it was competent for Ferris to deprive the owners of their property by testifying to their intention, unsupported by any facts tending to show that he knew what their intention was, and unaccompanied by any acts or declarations of the owners. Besides, his evidence clearly showed that the intention of the owners to which he testified was to retain in themselves the control of the landing, and this introduced an element wholly inconsistent with legal dedication. The evidence does not justify the finding that the premises in question were, prior to the commencement of the action, a public landing which had been dedicated to the public.

We do not feel called upon to indicate the particular facts and circumstances which should be made to appear before an equity court will interpose to restrain a trespass, such as is here intended to be set forth. Attention is invited to the decision in the case between the same parties reported in 122 Cal.

641, 55 Pac. 591, which was decided on a general demurrer to the complaint since this present action was tried. The facts proven in the case now here are no stronger than as admitted by the demurrer in the case cited. The complaint in this case is substantially the same as in the case cited, and must have shared the same fate had a general demurrer been interposed to it. The findings, however, do not support the judgment, and it should therefore be reversed, and we so advise.

We concur: BRITT, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

126 Cal. 369

LEONIS v. LEFFINGWELL. (L. A. 641.)

LEONIS' ESTATE v. SAME. (L. A. 642.)

(Supreme Court of California. Oct. 21, 1899.)

APPEAL AND ERROR—COSTS—JUDGMENT AGAINST ADMINISTRATOR.

Since the act of a clerk in erroneously entering a judgment for costs against an administrator personally instead of against the estate is not a mere clerical error, it cannot be corrected on motion, but can only be taken advantage of by appeal.

Department 2. Appeal from superior court, Los Angeles county.

Action by Michael Leonis, executor of Jean Leonis, deceased, against Anna G. Leffingwell. Judgment against the administrator for costs. From orders denying motions to amend the judgment, and rejecting the judgment as a claim against decedent's estate, she appeals. Affirmed.

Wells & Lee, for appellant. H. H. Appel, R. Dunnigan, and Reymert & Orfila, for respondents.

McFARLAND, J. These two appeals were argued and submitted, and will be considered, together. No. 641 is an appeal by defendant Leffingwell from an order denying her motion to have a judgment in her favor amended; and No. 642 is an appeal by said Leffingwell from an order in probate rejecting said judgment as a claim against the estate of said Jean Leonis, deceased. If the order refusing to amend the judgment in No. 641 was right, as we think it was, then the order in No. 642, rejecting the judgment as a claim against the estate, was also right, and both orders should be affirmed. The facts in No. 641 are these: The action was ejectment, and was brought by Jean Leonis, since deceased, on the 16th day of October, 1886, against Anna G. Leffingwell, who answered, denying the averments of the complaint. Afterwards, and before the action was tried, Jean Leonis died, and his executor, Michael Leonis, was substituted as plaintiff. The case was afterwards tried with a jury, and on the 15th day of June, 1888, the jury returned a verdict in favor of the defendant. On June 16, 1888, a judgment was entered in which, after the usual recitals, including a recital of the verdict, it was adjudged that plaintiff took nothing by the action, "and that the said defendant, Anna G. Leffingwell, do have and recover from said plaintiff, Michael Leonis, executor of the last will and testament of Jean Leonis, deceased, her costs and disbursements incurred in this action, amounting to the sum of —— dollars." On the same day the defendant filed her cost bill, which on the 20th day of July, 1888, was, on motion, taxed in the sum of $686.55, but the costs as taxed were never entered in the judgment. The judgment stood as originally entered, without any further proceedings thereon, until the 9th day of March, 1896, which was nearly eight years after the date of the entry of the judgment. On the last-named day the defendant, Leffingwell, moved the superior court for an order requiring the clerk of the court to enter the amount of the costs as taxed in the blank space in the judgment, and to add to the judgment the following words: "And that said judgment be, and the same is hereby, payable out of the estate of Jean Leonis, deceased, in the due course of administration thereof." The court refused to grant the motion, and, from the order so refusing, the appeal in No. 641 is taken. In 1889 the executor, Michael Leonis, died; and, although several administrators of the estate were afterwards appointed, no person was ever substituted in the place of Michael Leonis as a party plaintiff.

Appellant contends that its motion to amend the judgment should have been granted because the part of the original judgment which awarded costs against the administrator personally was a mere clerical mistake or misprision, which could be amended by the record. Nearly all the cases to which we have been referred where judgments have been amended for clerical mistakes were cases where the clerk had incorrectly entered the judgment which the court had rendered. It is evidently that class of cases to which Mr. Freeman refers in the long quotation which appellant makes from his work on Judgments. He there says: "All courts have inherent power to correct clerical errors at any time, and to make the judgment entry correspond with the judgment rendered. * * * Where the record contains sufficient matter to show that the judgment entered is not the one rendered, it may be corrected," etc. And again: "In whatever respect the clerk may have erred in entering judgment, the court may, on proper evidence, nullify the error by making the judgment entry fully and correctly express the judgment rendered." Freem. Judgm. § 71. In the case at bar it does not appear that the court rendered any judgment, or that the clerk incorrectly entered any judgment, order, or instruction of the court. Neither, indeed, does it appear that the court did not direct the clerk to enter the very judgment which was entered, as the court could have done under section 1031 of the Code of Civil Procedure. The act of the clerk in entering the judgment was not a clerical misprision, within the meaning of any of the authorities to which we have been referred, nor is there any record by which it could be amended in the respect asked for. When a judgment for costs should be against an administrator, and when it should be "made chargeable only upon the estate," are questions about which sections 1031 and 1509 are somewhat conflicting. See Reay v. Butler, 99 Cal. 479, 480, 33 Pac. 1134. If, therefore, in the case at bar the judgment for costs was erroneous because it was against the executor personally, and not made chargeable only upon the estate, it was, like any other erroneous judgment, reversible on appeal; but it was not the result of a mere clerical misprision which could be amended by the record. In both Burrill's and Black's Law Dictionaries "clerical error" is defined as "a mistake in copying or writing; the mistake of a clerk in writing." In Rapalje the definition is "a mistake in copying or transcribing a written instrument;" in Wharton, "a mistake in copying." There are references in these books to Villars v. Parry, 1 Ld. Raym. 182, where the distinction between a clerical mistake and an erroneous judgment is clearly pointed out. The case at bar cannot be distinguished from Morrison v. Dapman, 3 Cal. 255, except that the case at bar is stronger in favor of the respondent here than the Morrison Case was in favor of the appellant there. That also was ejectment brought by an administrator where the defendants recovered, and the judgment pronounced by the court was that "the defendants do recover their costs." There was no further direction by the court as to costs, but the clerk, when entering the judgment, put in this clause, "and it is further ordered, etc., that said judgment be levied, and paid out of the effects of said deceased in the hands of said administrator and unadministered." Six months afterwards defendant's attorney moved to amend the original judgment by striking out the clause above quoted, and the court granted the motion, and amended the judgment for costs so as to make it against the administrator personally. On appeal the order was reversed and the court said: "A court may at any time render or amend a judgment nunc pro tunc. But this power is confined to cases where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. If there is no record evidence to show that the judgment was different from the one entered, the latter must stand as the judgment until reversed."

Under the foregoing views, it is not necessary to notice the many other points made by respondent in support of the orders appealed from,—as, for instance, that no appeal will lie because there is no plaintiff to the action; that, if the amendment could have been made by the court at all, it should have been made, under section 473, Code Civ. Proc., within six months after the judgment; that the judgment could not be amended at the time of the motion to amend because it was then lifeless under the statute of limitations; and that both appeals should be dismissed for various other reasons given. Perhaps the clerk could have been compelled, by mandamus or other proceeding, to insert the amount of the costs as taxed in the blank in the judgment, if a proceeding for that purpose had been commenced in time; but that matter is of little importance here, as the main purpose of the appellant is to have the judgment for costs made chargeable against the estate. Such a proceeding would now be barred by laches. The order appealed from in L. A. No. 641 is affirmed, and the order appealed from in L. A. No. 642 is also affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(126 Cal. 418)

SECURITY LOAN & TRUST CO. OF SOUTHERN CALIFORNIA v. BOSTON & S. R. FRUIT CO. et al. (four cases. L. A. 476–479).

(Supreme Court of California. Oct. 24, 1899.)

JUDGMENT—DEFAULT — VACATION — SPECIAL APPEARANCE — GROUND OF MOTION — MORTGAGE FORECLOSURE—DECREE.

1. Defendant appeared specially for the purpose of vacating a default judgment. He claimed that the court had acquired no jurisdiction by reason of a defect in publication of the summons, and that the complaint did not state facts sufficient to constitute a cause of action, and that the notice in the summons did not conform to the relief demanded in the complaint. *Held*, that the assignment of the last two grounds for the motion constitutes a general appearance and waiver of all defects in the service of the summons.

2. Under Code Civ. Proc. § 580, which provides that in actions where there is no answer the relief granted shall not exceed that which plaintiff demanded in his complaint, an allegation, in a complaint in an action to foreclose a mortgage on real estate and certain shares of stock, that the trustee should be directed to deliver to the clerk of the court the shares of stock, so as to be subject to the further order of the court, warrants a decree directing the trustee to deliver such stock into court, though the prayer of the complaint said nothing about the stock, but prayed such relief as the court might deem plaintiff entitled to, and no answer was filed.

Department 2. Appeal from superior court, Riverside county.

Actions by the Security Loan & Trust Company of Southern California against the Boston & South Riverside Fruit Company and others. From default judgments in favor of plaintiff, the Boston & South Riverside Fruit Company and the United States Trust Company appeal. Affirmed.

Luke D. Bechtel, for appellants in Nos. 476, 477. Wm. Peck and Wm. J. Hunsaker, for appellants in Nos. 478, 479. R. H. F. Variel and J. G. North, for respondent.

McFARLAND, J. All these appeals involve exactly the same questions. They were argued and submitted together, and will be so decided. The references in the briefs and arguments of counsel are to the transcript in appeal No. 478, and we will consider and determine the case presented in that transcript; the other appeals involving exactly the same questions, although in one set of appeals the United States Trust Company is the appellant, and in the other the Boston & South Riverside Fruit Company is the appellant, both appellants being foreign corporations. The case upon which the appeal in No. 478 arises is an action to foreclose the lien of a mortgage made by E. W. Skinner to the plaintiff's assignor upon certain real property, and also to foreclose a lien upon 14 shares of the capital stock of the Temescal Water Company, which at the time of the mortgage, and as part of the same transaction, were deposited with one George L. Joy to hold as trustee as additional security for the promissory note to secure which the mortgage on the real property was given. The appellant herein the Boston & South Riverside Fruit Company, a corporation, was made a party defendant upon the averment that it claimed an interest in the land mortgaged and in the said shares of stock. Service by publication was made upon the appellant, or was attempted to be made by publication; and, the appellant not having appeared within the statutory time, default was entered against it, and final judgment was afterwards rendered foreclosing all its right, etc., in and to the said property. Judgment was entered on the 19th day of December, 1896. Afterwards, on the 9th day of July, 1897, the appellant served a notice on plaintiff that on July 19, 1897, or as soon thereafter as counsel could be heard, the appellant, "appearing specially for the purpose of making the motions hereinafter mentioned, and not otherwise, will move the said court to make an order or orders in said cause: (1) Vacating and setting aside the order for publication of summons; (2) vacating and setting aside the entry of the default of said defendant Boston & South Riverside Fruit Company; (3) vacating and setting aside the judgment entered therein against said defendant; (4) vacating and setting aside the sale made under said judgment; (5) vacating and setting aside all proceedings taken against said defendant in said action subsequent to the making of said order for publication of summons. Said motion will be made and based on the following grounds: (1) That the affidavit of R. H. F. Variel, Esq., upon which said order for publication of summons was based, is insufficient to authorize the court, or the judge thereof, to make said order, in that it does not appear therefrom that said defendant had no managing or business agent, cashier, or secretary within the state of California." The motion then sets forth a number of grounds upon which it is based, referring to the insufficiency of the order for publication and the insufficiency of the affidavit upon which it was based, and then the following are stated as grounds for the motion, to wit: "(10) That the decree of foreclosure and sale entered in said action exceeds the relief demanded in plaintiff's complaint, in that (a) said decree and judgment directs and requires the sale of fourteen shares of the capital stock of the Temescal Water Company, referred to in the said complaint; (b) said decree requires the delivery of said capital stock to the clerk of said court." "(14) That the complaint in said action does not state facts sufficient to constitute a cause of action against this defendant. (15) That the notice in the summons does not conform to the relief demanded in the complaint, in that the complaint does not pray judgment authorizing the sale of the shares of the capital stock of the Temescal Water Company, referred to in said summons." It is contended by respondent that these last-quoted grounds for the motion constitute a general appearance, and a waiver of all defects in the service of the summons; and we think that this contention must be sustained. When a party moves to set aside a default and judgment upon the ground that the court had no jurisdiction over his person because there had been no valid service of summons, he must carefully occupy that ground exclusively, and must keep out of court for all other purposes. The law upon the point, gathered from a long list of authorities cited, is correctly stated in 2 Enc. Pl. & Prac. § 625, as follows: "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one is that, where the defendant appears, and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance, by its terms, be limited to a special appearance or not,"—citing a number of authorities. In Lowe v. Stringham, 14 Wis. 225, the court states the rule tersely as follows: "If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection." In Land Co. v. O'Hare, 93 Wis. 194, 67 N. W. 38, the court say: "The settled rule is that if a party desires to take advantage of want of service of process sufficient to give the court jurisdiction of his person by moving to set aside the proceedings on that ground, he must appear specially for that purpose, and keep out of court for all others. Alderson v. White, 32 Wis. 308. If the motion be made to set aside the judgment on a ground inconsistent with the claim that it is void for want of jurisdiction of the person,—as, for instance, for irregularity in entering the judgment, or because costs are excessive, or not warranted by the pleadings, or because of some fact or facts constituting a defense,—as is said in Alderson v. White, supra, in effect such motion carries with it all objections to the jurisdiction of the court growing out of defective service or want of service of process on the persons of the defendants making the motion. It constitutes a submission on their part to the jurisdiction of the court, because the relief granted would be inconsistent with any other reasonable hypothesis." In Burdette v. Corgan, 26 Kan. 102, the court say: "The motion to vacate the judgment recited that the parties specially appeared, and moved to set aside the judgment as void for several reasons; among them that the petition of the plaintiff did not state facts sufficient to uphold the judgment. * * * In the first place, we remark that this appearance by the motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment, not merely on jurisdictional, but also on nonjurisdictional, grounds; and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion." Numerous other decisions declaring the law as above stated could be cited from foreign jurisdictions, but this will be unnecessary, because the same principle was declared by this court in Re Clarke, 58 Pac. 22. In that case Temple, J., delivering the opinion of the court, discussed the subject at some length, and, among other things, said: "On general principles a statement that a defendant or party makes a special appearance is of no consequence whatever. If he appears and objects only to the consideration of the case, or to any procedure in it, because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect in the notice or motion is required or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance, no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material. See 2 Enc. Pl. & Prac. 625, notes, and cases cited." In the case at bar the motion of appellant was based upon grounds other than a want of jurisdiction of the person, —as, for instance, "that the complaint in said action does not state facts sufficient to constitute a cause of action against this defendant,"—which is, in substance, a demurrer to the complaint, and that the complaint does not pray for a judgment authorizing the sale of the shares of stock, that the summons does not conform to the complaint, etc. Therefore, upon the principles and authorities above stated and cited, the court did not err in denying appellant's motion to vacate the judgment, etc.

Upon the appeal from the judgment the only point to be considered is whether the court erred in the disposition which it made of the shares of stock, upon the ground that the relief granted as to the stock was beyond that asked for in the complaint. We do not think that the contention of the appellant on this point can be maintained. It is true that in the formal prayer at the end of the complaint there is nothing said about the stock, although it is prayed that the plaintiff "have such other and further relief as to the court may seem lawful and proper." But section 580, Code Civ. Proc., does not refer to any formal part of the complaint. It merely provides that, where there has been no answer, the relief granted shall not exceed that which the plaintiff "shall have demanded in his complaint." In the complaint all the facts about the giving of the shares of stock as additional security, and constituting, with the mortgage of the land, a part of the same transaction, are fully set out; and paragraph 12 of the complaint, in which all these facts are specifically stated, contains this clause: "That the said administratrix of the estate of George L. Joy, deceased, should be, by an order and decree of this court, directed to transfer and deliver up to this court, or to the clerk thereof, the said fourteen shares of stock of the said Temescal Water Company, so as to be subject to the further order of this court, and to disposition or sale under any decree made and entered herein." We think that this is a substantial and sufficient compliance with said section 580 of the Code. The judgments and orders appealed from in all the above-entitled cases are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

the complaint. The complaint states facts showing that the injuries to plaintiff were caused by defendants' negligence.

The court did not err in refusing instructions 1 and 2 requested by defendants, and instruction No. 2 given by the court of its own motion is not erroneous in the respect contended for by appellant. We advise that the judgment and order denying a new trial be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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126 Cal. 557

McKEE STAIR-BUILDING CO. v. MARTIN, Sheriff. (S. F. 1,908.)

(Supreme Court of California. Nov. 6, 1899.)

FRAUDULENT SALE—CONVEYANCE TO CORPORATION—CHANGE OF POSSESSION.

Where the owner of personal property, which he had theretofore used in the carrying on of his business, gave a bill of sale thereof to a corporation formed by himself and children, and the business was carried on therewith by the corporation practically as it was before,—the former owner's name being obliterated from a sign on the premises, but none other being substituted,—the sale is void as to creditors, under Civ. Code, § 3440, which provides that sales of personalty, not accompanied by an immediate delivery and followed by an actual and continued change of possession, shall be void as to creditors of the vendor.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the McKee Stair-Building Company against Henry S. Martin, as sheriff. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Alexander & Gardner, for appellant. J. W. Carter, for respondent.

GRAY, C. This action was brought to enjoin the defendant from selling, as sheriff, certain personal property, alleged to belong to plaintiff, under an execution issued against the property of one John McKee. The defendant justified under said execution, and alleged that the property in question belonged to said John McKee at the time it was seized by defendant. The case was tried without a jury, plaintiff had judgment, and the defendant appeals from the same, and from an order denying his motion for a new trial.

It is admitted that John McKee was the owner of the property for years, but respondent contends that it owns the property by virtue of a sale of the same by John McKee to it, which sale is evidenced by a bill of sale dated April 27, 1898, and introduced in evidence by plaintiff at the trial of the case. Appellant contends that such sale was void as to creditors of John McKee, under the provisions of section 3440 of the Civil Code, because such sale was not accompanied by an immediate or any delivery, nor followed by an actual and continued change of possession. This is the only question discussed on this appeal. The evidence on this question is as follows: For at least nine years prior to the sale John McKee had carried on the business of stair builder at a certain place in San Francisco, and had at that place been in possession of and using said personal property in carrying on said business. He also had in his employ in said business his three sons. His son Thomas W. had been his foreman during said nine years. Annie McKee, the daughter of John McKee, held a chattel mortgage against the property, which she had acquired by purchase from Blythe & Trott, to whom John McKee had previously executed it to secure the payment of $500. In reference to this mortgage, Annie consulted a lawyer, and he advised her to incorporate a company and purchase the property from her father, as she might in that way be able to get her money out of it. She then had the plaintiff corporation formed; the stockholders in said corporation consisting exclusively of herself, her father, her sister, and her said three brothers. After the alleged sale to the corporation the father and the three brothers continued, down to the time of the levy of the execution, to carry on the business with this same property, at the same place, and in the same way as before such sale, the son Thomas still acting as foreman, the only difference being that before such sale the "father went out and figured upon work, and made bids for it, and told the foreman what to do," but after the sale the father was under the orders of the foreman, receiving as his compensation from the corporation $50 per month as wages, and the foreman did the figuring and bidding, and looked after the work, and also acted as manager. Prior to the sale there was a sign on the building, where the property was located and the business carried on, in the following language: "John McKee, Stair Builder." After the transfer John McKee removed his name from the sign, leaving it simply "Stair Builder." It would seem from this evidence that there was no delivery of the property to the vendee, and that the possession of the personal property here in controversy, leaving out of consideration the business of the concern, remained after the sale in the same persons that it had previously rested in. A person familiar with the business and the use of the premises and personal property thereon, prior to the sale, on visiting it subsequently could have seen nothing evidencing a change of ownership, or a change of possession. Even the change in the sign, unexplained, would have been meaningless to him. It has been held a great many times in this state that to make a sale of personal property good as against the creditors of the vendor, and to avoid the presumption of fraud denounced in section 3440 of the Civil Code, there must be a visible and apparent change of the custody of the property, such as to give evidence to the world of the claims of the new owner. We cite one case: Hesthal v. Myles, 53 Cal. 623. We advise that the judgment and order be reversed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

126 Cal. 553

CENTRAL PAC. R. CO. v. McCANN. (Sac. 545.)

(Supreme Court of California. Nov. 6, 1899.)

PUBLIC LANDS—GRANT IN AID OF RAILROAD—RESERVATION—PRE-EMPTION CLAIM.

A qualified pre-emptor settled upon land in 1859, and performed all the acts required, until after plaintiff's line of railroad was fixed. Before it was fixed he applied at the proper land office to make a pre-emption filing, and was refused permission so to do, but did not appeal; and in 1867, after the line was fixed, he moved off the land, without having filed any claim. *Held*, that the pre-emption claim did not "attach" to the land, within the meaning of the act of congress of July 1, 1862, § 3, excepting from the alternate sections granted thereby lands to which a homestead or pre-emption claim had attached before the line of the railroad was fixed.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

Action of ejectment by the Central Pacific Railroad Company against Henry McCann. From a judgment for defendant, plaintiff appeals. Reversed.

Wm. Singer, Jr., and H. V. Reardan, for appellant. F. P. Tuttle, for respondent.

COOPER, C. Defendant's demurrer to the third amended complaint having been sustained, judgment was entered in his favor. This appeal is by plaintiff from the judgment, and for the purpose of reviewing the order sustaining the demurrer. The complaint, which is in ejectment, shows that the lands described therein vested in plaintiff under an act of congress of July 1, 1862, unless a pre-emption claim of one Daniel Shay had attached thereto at the time the line of plaintiff's road was definitely fixed, which was prior to November 15, 1867, but the date is not given. Section 3 of the act is as follows: "That there be, and is hereby, granted to the said company, * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." The sixth allegation of plaintiff's amended complaint is as follows: "(6) The plaintiff is informed and believes that one Daniel Shay, a qualified pre-emptor, settled upon the said land during the year 1859, and continued to reside upon it, performing all the acts required of a pre-emptor, until after the said railroad was definitely fixed; and, prior to the time the said road was definitely fixed, he applied at the proper land office to make a pre-emption filing therefor, and was refused permission so to do by the register thereof, but did not appeal from such refusal, and during the year 1867, after the said road had been definitely fixed, he moved off the said land, without having filed any claim for it." The defendant does not claim under Shay, and there is no privity shown in any manner between defendant and said Shay. The sole and only question discussed in the briefs is as to whether or not the paragraph of the complaint here quoted shows that the pre-emption claim of Shay had attached to the lands at the time the line of plaintiff's road was definitely fixed. If it had attached then, the lands were not vested in plaintiff under the said act. The court below held that the said paragraph of the complaint showed that the pre-emption claim had attached, and that plaintiff did not become the owner of the lands under said act. In this we think the learned judge of the court below was in error. The rule is well settled that no pre-emption or homestead claim attaches to a tract of land until an entry in the local land office. Lansdale v. Daniels, 100 U. S. 116; Whitney v. Taylor, 158 U. S. 94, 15 Sup. Ct. 796; Railroad v. Colburn, 164 U. S. 386, 17 Sup. Ct. 98; Weaver v. Fairchild, 50 Cal. 362. The main purpose of the exception of lands to which a homestead or pre-emption had attached was to prevent the grant from having a retroactive effect, so as to convey lands to which a valid claim had taken effect prior to the date of the passage of the statute. Railway Co. v. Dunmeyer, 113 U. S. 635, 5 Sup. Ct. 573. In the latter case it is said by the court: "Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation." The pre-emption claim could not and did not attach or fasten itself to the land in this case, because it was never filed or placed on record. Whitney v. Taylor, 158 U. S. 94, 15 Sup. Ct. 796; Lansdale v. Daniels, 100 U. S. 116.

It is said that the allegation that Shay applied at the proper land office to make a pre-emption filing, and was refused permission to do so by the register thereof, is the equivalent in law to the actual filing, and shows that the pre-emption claim attached to the lands. We do not think so. The register refused to file the declaratory statement, and Shay did not appeal from the order. We must presume, in the absence of any showing to the contrary, that the register correctly performed his official duty. Code Civ. Proc. § 1963, subd. 15; Upham v. Hosking, 62 Cal. 259; Weaver v. Fairchild, 50 Cal. 360. In the latter case the question was as to whether it was proved that the line of the railroad was definitely fixed before the declaratory statement of the defendant as pre-emptor was offered for filing. The defendant claimed that the line of the railroad had not been definitely fixed, and hence the land had not been withdrawn from sale at the time the declaratory statement was filed. The only evidence of such withdrawal was a letter from the commissioner of the general land office, addressed to the local land officers, withdrawing the land from sale and pre-emption. In the opinion it is said: "The act being within the scope of the commissioner's powers as a subordinate officer, it will be assumed that the withdrawal was made by the direction of the secretary of the interior, and the withdrawal is itself a recognition of the fact that the map was filed in the office of the secretary. We must presume that the proper evidence was before him on which to base his official action." If it be conceded in this case that the offering to file the declaratory statement was equivalent to filing, it certainly would have to be alleged that the declaratory statement complied with the law, and that the necessary fees were tendered. In the case of Railroad Co. v. Purcell, 77 Cal. 70, 18 Pac. 886, the defendant contended that the lands in controversy were excepted from the grant, and made proof of his qualifications as a homestead claimant, residence, and compliance with the law at the time and prior to the time the line of the road was definitely fixed; that he went to the land office, and asked the register to be allowed to file a homestead entry for the land,—but the offer was rejected. The court in the opinion says: "This did not bring him within the exception. Nothing is said about his paying or offering to pay the register's fees, or about his making or tendering the necessary affidavit. It may be that the register refused to allow his entry because these conditions were not fulfilled. If such was not the fact, the defendant should have proved it, as the burden in this regard was clearly upon him. So far as is shown, he appears not to have taken any further step. He did not show that a homestead claim had attached to the land, and therefore did not bring himself within the terms of the exception. So far as is shown by the record, he was a mere occupant of the land. And it is well settled that mere occupancy of public land does not, of itself, give the occupant any right to the land, or prevent the government from disposing of it as it pleases." It appears from the complaint that Shay moved off the land during the year 1867, and it does not appear that he ever appealed from the order of the register rejecting his filing, or that he has ever since claimed the land. It further appears that in 1885 the defendant applied to plaintiff to purchase the land, and was by plaintiff let into possession as its tenant under a contract to purchase; that, after occupying the land for some six years under said contract with plaintiff, the plaintiff, at defendant's request, transferred the contract and right to purchase to his wife, Julia McCann, and defendant let his said wife into the possession of the land as the tenant of plaintiff. Afterwards the defendant re-entered the land, and ousted the plaintiff and its said tenant, Julia McCann, from the same, and has ever since wrongfully held possession of the same. We advise that the judgment be reversed, with directions to the court below to overrule the demurrer to the complaint, and allow the defendant a reasonable time to answer.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer to the complaint, and allow the defendant a reasonable time to answer.

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126 Cal. 571

BOYD v. SOUTHERN CALIFORNIA RY. CO. (L. A. 544.)

(Supreme Court of California. Nov. 6, 1899.)

APPEAL—RECORD—PRESUMPTION — QUESTION OF TITLE TO REAL PROPERTY—RAILROADS—ACTION FOR KILLING COLT—INSTRUCTIONS—WEIGHT OF EVIDENCE.

1. Where all the record shows regarding a trial in justice court is that the complaint is entitled in such court, and was filed in both the justice and superior courts, and the answer is an amended answer filed in the superior court, it will not be presumed that the case was tried in justice court without raising a question of title to real property, notwithstanding briefs on both sides assumed so.

2. Where the complaint in an action under Civ. Code, § 485, imposing on railroads a liability to adjoining landowners for killing stock avers ownership of adjoining land, as required, title to land is involved in the action so as to give the supreme court jurisdiction of an appeal from the judgment therein.

3. In an action against a railroad company for killing a colt, instructions that, if it was killed where defendant failed to fence or keep a sufficient fence, the jury might presume that it entered on defendant's track at that place, and that, if it was found on the right of way, near the track, with its entrails protruding, they might find that it was killed by defendant's train, were erroneous, as they were plainly on the weight of evidence.

Department 2. Appeal from superior court, Riverside county.

Action by James Boyle against the Southern California Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

C. N. Sterry and H. J. Stevens, for appellant. Parrington & Adair, for respondent.

TEMPLE, J. This action was brought in Riverside county to recover $100 damages for killing a colt. Objection is made to the jurisdiction of this court, and it is stated in the briefs on both sides that the case was originally brought in a justice's court, was there tried, and, after judgment in favor of plaintiff, was appealed to the superior court upon both law and fact. The action was tried in the superior court, and plaintiff recovered judgment for the full amount of his claim, and the defendant appeals to this court from the judgment and from an order refusing a new trial.

All that the record shows in regard to the justice court is that the complaint is entitled "In the Justice Court of Riverside Township, County of Riverside," and is indorsed: "Filed July 17, 1897. James Mills, Justice of the Peace;" under which last is: "Filed Sep. 18, 1897. A. J. Condee, Clerk, by J. W. Roberts, Deputy." The answer is entitled in the superior court. It may well be doubted whether, from this record, this court would be justified in saying that the case had ever been in the justice court; but certainly we cannot conclude that it was tried in the justice's court without raising a question of title to the court by a verified answer, or that the case went to the superior court by appeal upon questions of law and fact. The main contention upon this matter is that the defendant did not raise any issue as to title in the justice court, and that on appeal the superior court has no further jurisdiction than the justice had; that as to such case its jurisdiction is purely appellate, and it can only retry what was tried in the lower court. But the answer is an amended answer, filed in the superior court, and if we assume, from the title to the complaint, that the case was once in the justice court, we cannot say what the issues there were, nor how they were made. Briefs on both sides assume such facts, but we are not called upon to decide moot questions because attorneys are pleased to make them.

The amount sued for was less than $300, but the first count of the complaint is based upon the liability of the defendant under section 485, Civ. Code, which requires railroad corporations to maintain good and sufficient fences on both sides of their track, and provides that, in case they do not, and their engine or cars should maim or kill any cattle on their "line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same." In this count of the complaint plaintiff avers title in himself to a described tract of land, that it adjoins defendant's railroad, the insufficiency of the fence, and that without his fault his colt strayed upon the railroad, and was killed by defendant's locomotive and cars. No negligence other than a neglect to keep the fence in repair is charged. In Enright v. Railroad Co., 33 Cal. 235, it was held that this statute was designed to protect the adjoining landowners. This seems quite obvious from the language of the statute itself. That being so, when plaintiff based his right on that statute, averring his ownership of the land, as he did, and was required to do, title to the land was necessarily involved, whether his ownership was denied or not. Holman v. Taylor, 31 Cal. 338. Though not in issue, it was involved in the action. Therefore it is a case of which this court has jurisdiction.

This consideration would be conclusive of the question discussed by counsel if it were properly presented in the record. Section 838, Code Civ. Proc., provides for the case where the plaintiff's cause of action is not based upon title, or the right to the possession of real estate, and such claim of title is made an issue in the case by the answer, or a subject of controversy in the course of the trial. If the complaint itself shows that the question is necessarily involved, as determined in Holman v. Taylor, there would be no propriety in requiring a verified answer before the case could be transferred to the superior court. It is conceivable that the author of section 838 was of the opinion that title or the right to the possession of the real property was not involved unless an issue to be tried was raised, but, in view of the decisions of this court, that view cannot be maintained. It seems that the defendant could not make such an issue save by a verified pleading. Holman v. Taylor was affirmed in Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256, and in Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196. See, also, Pollock v. Cummings, 38 Cal. 684.

Upon the conclusion of the testimony for plaintiff, defendant moved for a nonsuit, which was denied. Many points are made with reference to this ruling, but, as the case must be reversed upon other grounds, these points need not be considered. Upon a new trial the evidence will probably be different.

Defendant attempted to show—principally upon cross-examination of plaintiff's witnesses—that the animal probably passed from plaintiff's property into a neighboring field, which was not the property of plaintiff, and from thence got upon the railroad track, and therefore did not get through the fence of the railroad from plaintiff's land. Considerable evidence favoring this view was produced. The evidence was all circumstantial, there being no direct evidence as to where it entered upon the right of way. Upon this subject the court instructed the jury as follows, and the defendant duly excepted: "If you find that the plaintiff's colt was killed at a point on defendant's railway where the railroad was insufficiently fenced, and if you further find that at that point it was defendant's duty to make and maintain a good and sufficient fence, then I charge you that these facts, unexplained, raise a prima facie case of negligence against the defendant, and it is not necessary for plaintiff to show the exact point where his colt escaped onto defendant's track. In other words, if you find that plaintiff's colt was killed at a place where defendant had failed to fence, or to maintain a sufficient fence, you are justified in presuming, and you are authorized to find, that it entered upon the defendant's track at that place." This was a plain interference with the right of the jury to determine the value and weight of the evidence. This was not a question of law, but of fact. If it was a fact that the colt was found killed at a point where the fence was insufficient, it was a circumstance for the jury to consider. The court also erred in the same manner in giving the following instruction: "And you are further instructed that, should you find from the evidence that the animal referred to in the complaint was found on the right of way and near the track of defendant, and that it was so injured that its entrails protruded, you are authorized, on the proof of such facts alone, to find that said animal was killed by a train of defendant. But you are not obliged to accept such evidence or conclusion, and if, to your mind, this is not sufficient, you are at liberty to reject it as insufficient to establish negligence, or that the animal was killed by defendant's train." It does not appear that any evidence was offered which tended to establish the second cause of action, in which the defendant was charged with killing plaintiff's horse by negligently running and managing its trains. It does not even appear that defendant had any cars, or that a train was ever run over the road. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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126 Cal. 549

PHELPS v. MAYERS. (Sac. 649.)

(Supreme Court of California. Nov. 6, 1899.)

MORTGAGES—FORECLOSURE FOR DEFAULT IN INTEREST—JUDGMENT—OBJECTIONS ON APPEAL.

1. Under Civ. Code, § 1642, providing that several contracts relating to the same matter, and between the same parties, and made as parts of substantially one contract, must be taken together, a note and a mortgage given to secure the same should be construed together.

2. A mortgage contained a clause providing: "In case default be made in the payment of the said principal or interest," the mortgagee is "empowered to sell the said premises," etc. *Held*, that a suit to foreclose the mortgage, commenced when interest was overdue, but before the principal was due, was not prematurely brought.

3. Where a judgment on foreclosure for a specified amount was rendered as "costs, percentage, and necessary disbursements," and it does not appear in the record what was meant by the word "percentage," it will be presumed on appeal that the whole sum awarded was made up of proper costs in the suit.

4. Where an objection by appellant is raised for the first time in his closing brief, it will be overruled.

Commissioners' decision. Department 2. Appeal from superior court, Shasta county.

Action by John R. Phelps against Henry Mayers to foreclose a mortgage. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. A. Procter, for appellant. J. O. Stephens and Reid & Bartlett, for respondent.

BRITT, C. On October 18, 1895, Mayers, the defendant, made and delivered to Phelps, the plaintiff, a mortgage of certain land in the county of Shasta to secure the payment of a promissory note of the same date, by the terms of which note Mayers promised to pay to Phelps, on or before November 1, 1898, the sum of $1,500, with interest at the rate of 9 per cent. per annum, interest payable semiannually in advance from date of the note. The mortgage recited said note at length, and proceeded: "And these presents shall be void if payment be made according to the tenor and effect thereof. But, in case default be made in the payment of the said principal or interest as herein provided, then" the mortgagee is "hereby empowered to sell the said premises, * * * or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges * * * of suit for foreclosure, including counsel fees at the rate of fifteen per cent. upon the amount which may be found to be due," etc. This action for the foreclosure of said mortgage was begun on May 27, 1897. It is alleged in the complaint that defendant has paid nothing on the note except the interest thereon to October 18, 1896, and that the principal thereof, with interest from said last-mentioned date, is due and unpaid. The court rendered judgment for the foreclosure of the mortgage to pay both the principal of the note and the interest due. The judgment contains also a recital that there is due from defendant to plaintiff the sum of $184.40 "costs, percentage, and necessary disbursements," and a direction that plaintiff be paid that sum from the proceeds of sale as "cost of this suit." The defense is that the action was prematurely brought. Defendant maintains that the instruments in suit do not provide that the principal of the debt shall become due on default in payment of interest, and hence that a foreclosure for both principal and interest was unwarranted. The note and mortgage, however, must be construed together. Civ. Code, § 1642. Interest on the note is payable semiannually, and the mortgage is clear that upon default in the payment of the interest, equally with default in the payment of the principal, the mortgagee may cause the premises to be sold, and retain from the proceeds "the said principal and the interest." There is scarcely room for interpretation in these provisions. They support the action for the amount of the note, both principal and accrued interest. Brickell v. Batchelder, 62 Cal. 623; Maddox v. Wyman, 92 Cal. 674, 28 Pac. 838. The case of Brodribb v. Tibbets, 58 Cal. 6, on which plaintiff relies mainly, decided nothing to the contrary. The contract in that case, as the court considered, contained no provision for the foreclosure of the mortgage on default of interest. In the present instance such provision is express. Besides, Brodribb v. Tibbets is of doubtful authority upon the point which it did decide. It has been disapproved in later cases. Yoakam v. White, 97 Cal. 286, 32 Pac. 238; Van Loo v. Van Aken, 104 Cal. 269, 37 Pac. 925.

In the closing brief of appellant the point is made that the court erroneously allowed to the plaintiff an undefined sum as "percentage." It does not appear what was meant by this word in the judgment. Possibly it denotes the court's allowance of counsel fees provided for in the mortgage. But, admitting that it has no reference to such fees, yet, as the evidence on which the court acted is not in the record, it should be presumed, in view of both provisions of the judgment which refer to the matter, that the whole sum of $184.40 was made up of proper costs of the suit. It is another and sufficient reason for overruling this point that it is first raised in the closing brief for appellant, when respondent has no opportunity to reply. Webber v. Clarke, 74 Cal. 11, 15 Pac. 431. The judgment should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed

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126 Cal. 541

LOS ANGELES HOLINESS BAND v. SPIRES et al. (LOS ANGELES HOLINESS BAND, Intervener. L. A. 502).

(Supreme Court of California. Nov. 6, 1899.)

DE FACTO CORPORATION—DEPRIVATION OF FRANCHISE OR PROPERTY.

A de facto corporation can be deprived of its franchise or property only in a direct proceeding by the state.

Department 1. Appeal from superior court, Los Angeles county.

Action by the Los Angeles Holiness Band, a corporation, against J. H. Spires and others and the Los Angeles Holiness Band, a corporation, intervener. From a judgment for defendants and intervener, and orders refusing to strike out a portion of the cost bill and denying a new trial, plaintiff appeals. Affirmed.

W. D. Gould, for appellant. Geo. S. Hupp and C. McFarland, for respondents.

VAN DYKE, J. This is an action to quiet title. The court below found the following facts: Prior to April, 1881, an association of persons were in the habit of meeting together for religious services in the city and county of Los Angeles, calling themselves the Los Angeles Holiness Band, and in April, 1881, six of the members of said Holiness Band signed and acknowledged articles of incorporation under the name of the Los Angeles Holiness Band, incorporating for religious and benevolent purposes; and in such articles of incorporation the six members who thus signed and acknowledged the same were chosen trustees of the corporation. These articles were filed in the office of the county clerk of the county of Los Angeles on the 8th day of April, 1881. A copy of the same was filed in the office of the secretary of state, and a certified copy of the articles of incorporation, certified to by the secretary of state, was afterwards filed in the office of the said county clerk. On the 20th day of April, 1881, the secretary of state issued a charter certificate to said band, and certified that said Los Angeles Holiness Band had been incorporated for religious and benevolent purposes. Said Los Angeles Holiness Band then organized, and elected trustees or directors, and adopted rules and by-laws for their government. After the articles had been filed and the charter thus issued, the said Los Angeles Holiness Band purchased the property described in the pleadings, and which is the property in controversy, from S. C. Hubbell, for $400, and received a deed from said Hubbell in the name of the Los Angeles Holiness Band, a corporation. Said deed recited the receipt of said $400 as the purchase price, and that at that time Hubbell had good title to the said premises. The Los Angeles Holiness Band, its trustees and members, erected a house of worship upon said property about the year 1881, and thereafter continuously and uninterruptedly from that time up to April, 1896, held regularly religious services upon said premises at least upon two different days in each week; and from that time the said Los Angeles Holiness Band elected trustees, as required by law, to act as trustees of said corporation, and such trustees took charge and control of said property from 1881 up to the bringing of this action, for the purposes for which said organization was formed; and said Los Angeles Holiness Band held itself out as a corporation, and in good faith claimed to act and did act as a corporation in all its various transactions. That on December 30, 1896, it elected as trustees to serve as such for one year thence ensuing the seven persons who were trustees at the time of the bringing of the suit, who were in control and possession of said property up to the time said band was dispossessed by persons pretending to be trustees of the plaintiff corporation, in the month of April, 1897. In the month of April, 1897, C. F. McKee, D. C. Roberts, M. Whisler, G. W. Morgan, and L. R. Gay attempted to incorporate under the name Los Angeles Holiness Band, and did prepare and file articles of incorporation in which it was shown that they were elected trustees or directors of the Los Angeles Holiness Band for the coming year; and said articles of incorporation were filed with the county clerk of said county of Los Angeles, and a copy thereof filed with the secretary of state, and thereafter a copy of said articles was filed in the office of the said county clerk, and the certificate or charter from the secretary of state was afterwards issued to said corporation in said month of April; and said Los Angeles Holiness Band, as incorporated in 1897, thereupon during said month obtained a deed to the property hereinbefore mentioned and referred to from S. C. Hubbell and his wife in the name of the Los Angeles Holiness Band. In said month of April, while the regular members of the Los Angeles Holiness Band, as organized in 1881, were holding their regular and accustomed religious services upon said premises, D. C. Roberts and G. W. Morgan, and the other persons pretending to be trustees and members of the Los Angeles Holiness Band, as organized in 1897, entered upon said premises, interrupted the meeting then in progress, and announced that they took possession of said premises in the name of the Los Angeles Holiness Band, and then and there pretended to elect trustees for the succeeding year, and then elected a janitor, with instructions to take charge of said premises, and to prevent persons other than members of the plaintiff corporation from entering upon the same, and from that time up to the time of the trial claimed and asserted title and sole ownership to said property and to said corporate name of Los Angeles Holiness Band, and held forcible possession of said premises, and prevented the members and officers of the intervener corporation from entering such premises or holding meetings therein. And as a conclusion of law the court found that the Los Angeles Holiness Band, intervener herein, is and has been a corporation since the time of the filing of its articles of incorporation in April, 1881, and that such corporation, its officers and trustees, have been carrying on the object and purpose of such corporation since that time; that in 1881 it acquired title in fee simple to the property in controversy, by the conveyance from S. C. Hubbell of that date, and is the owner of such premises in controversy, and that the attempted incorporation of the Los Angeles Holiness Band by the parties mentioned, in April, 1897, was and is an unlawful attempt by such persons and such corporation to usurp the franchises and take possession of the property of said intervener corporation and its corporate name; and that such articles of incorporation of plaintiff corporation, as well as its charter, and the election or selection of such persons as trustees of said pretended corporation, are all fraudulent and void, and plaintiff corporation was formed solely for the purpose of defrauding the intervener corporation of its corporate name and property. Judgment was entered accordingly in favor of the intervener corporation and against the plaintiff for the premises in controversy and for costs.

The main point made by the appellants—in fact, the only point necessary to be considered—is that the intervener was not a corporation, and never had any legal existence, and therefore that the first conveyance of Hubbell of the premises in question was void for the reason that there was no one in being as a grantee competent to take the property. From the findings of fact, however, which are abundantly supported by the testimony, the position of the appellant in this regard is entirely untenable. If it be admitted, as contended by the appellant, that there were defects in the first incorporation proceedings, still it became a corporation de facto at least, and in good faith carried on the business for which it was organized or attempted to be organized as a corporation for the period of some 16 years prior to the ouster by the plaintiff. The authorities relied upon by the appellant do not support its contention. In McCallion v. Society, 70 Cal. 167, 168, 12 Pac. 116, it is stated by the court: "But as articles of incorporation the certificate was legally defective, for want of conformity to the statutory requirements under which it purported to have been made; but, aside from the defects which rendered it inept, Conlan and Dolan, and those acting with them in the movement, did not attempt to exercise corporate functions under it in connection with or as division No. 1 of the Ancient Order of Hibernians. Therefore the certificate was not proof of a corporation in esse,"—citing Mining Co. v. Woodbury, 14 Cal. 425; Harris v. McGregor, 29 Cal. 127; People v. Selfridge, 52 Cal. 331. The cases thus cited are also cited in appellant's brief, and are to the same effect as McCallion v. Society. Baker v. Ducker, 79 Cal. 365, 21 Pac. 764, cited by appellant, was a case where some of the members of the society, by organizing another society under a different name, got possession of the property belonging to the old society, to wit, the First Reformed Church of the City of Stockton. The action was by some of the members of the old society, for the benefit of all, to recover the property, and the trial court found that the change of name was with the intent and for the purpose of depriving the said old congregation of the benefit of their corporate franchise and property. In affirming the judgment this court said: "It is thus made clear that the property in question was held by the Reformed Church in trust for its members, and the defendants, even though they constituted a majority of the members, had no right and no power to divert it to the use of another and different church organization." The later case of Wheelock v. Presbyterian Church, 119 Cal. 477, 51 Pac. 841, is in the same line. People v. Water Co., 97 Cal. 276, 32 Pac. 236, cited by the appellant, was a proceeding by the state in the nature of a quo warranto, and not, as in this case, a collateral attack in litigation between private parties. These cases do not touch the question whether defects in the formation of a corporation can be inquired into in a collateral proceeding, as attempted in this case. On this point the Code itself, it would seem, is decisive. "The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party." Civ. Code, § 358. It has been frequently held that, although many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed or entirely omitted, yet such irregularities and defects will not defeat the incorporation where the questions are raised collaterally. Rondell v. Fay, 32 Cal. 361; Stockton & L. G. R. Co. v. Stockton & C. R. Co., 45 Cal. 680; Association v. Chester, 55 Cal. 101; People v. La Rue, 67 Cal. 530, 8 Pac. 84; Golden Gate Mill. & Min. Co. v. Joshua Hendy Mach. Works, 82 Cal. 186, 23 Pac. 45; Ditch Co. v. Crane, 80 Cal. 185, 22 Pac. 76. It requires a direct proceeding on behalf of the state to deprive a corporation de facto of a franchise or property. The judgment and orders refusing to strike out portion of cost bill, and denying motion for a new trial, are affirmed.

We concur: BEATTY, C.J.; HARRISON, J.

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126 Cal. 521

HORTON v. JACK. (L. A. 572.)

(Supreme Court of California. Oct. 31, 1899.)

CONVERSION—WHAT CONSTITUTES—MANUAL TAKING—NECESSITY—PROPERTY OF ESTATE.

1. Where defendant, through an agent, took possession of property, and sold it, and used the proceeds to pay an account against a third person in favor of a bank of which he was president, it is sufficient.

2. Where one took property of an estate, by an unauthorized bill of sale from the executrix, in payment of an account against her individually, he is not relieved from liability to the estate for conversion by the fact that the account included a prior debt of her testator.

Department 1. Appeal from superior court, San Luis Obispo county.

Action by Joseph Horton, as administrator of the estate of James A. Brown, deceased, against R. E. Jack, for conversion. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed.

M. C. Hester and Graves & Graves, for appellant. Wilcoxon & Bouldin and R. B. Carpenter, for respondent.

VAN DYKE, J. This is the third appeal in this case. On the first appeal the nonsuit as to the defendant corporation was affirmed, but the judgment in favor of defendant Jack was reversed, and the cause remanded for a new trial between the plaintiff and said defendant. 37 Pac. 652. The second trial resulted in a verdict and judgment for the defendant, and on appeal from said judgment and order denying a new trial they were reversed, and the cause again remanded. The last trial was also by a jury, and a verdict was rendered for the defendant. From the judgment entered on said verdict and from the order denying the plaintiff's motion for a new trial, this appeal is taken.

The action is for a conversion of certain personal property belonging to the estate of James A. Brown, deceased. In the opinion on the first trial the facts in the case are stated as follows: "It seems that Mrs. Brown was indebted to the bank of which Jack was president; that it was agreed between Jack and Mrs. Brown that the property should be conveyed to Jack as security, and immediately sold, and the proceeds paid on Mrs. Brown's personal indebtedness to the bank. In pursuance of this agreement, an absolute bill of sale was executed, and Sandercock was selected to sell the property, with the consent of Mrs. Brown. Having delivered the bill of sale to Jack, and agreed upon Sandercock as a proper person to conduct the sale, Mrs. Brown prepared a letter to be handed by Sandercock to Bailey, her agent, and which was so delivered. It was as follows: 'Mr. S. P. Bailey—Dear Sir: I have made a bill of sale to Mr. Jack of the whole outfit. Mr. Sandercock, the bearer of the note, will consult you about the disposition of the outfit. If Mr. Sandercock cannot manage the disposition of the same without your help, then you will please go with him. Mr. Sandercock acts as Mr. Jack's agent, and the entire disposition must be under Mr. Sandercock's control. C. J. Brown.' Mr. Sandercock also at the same time handed Bailey a letter from Mr. Jack, as follows: 'Mr. Bailey—Dear Sir: This will introduce to you my friend, Mr. John G. Sandercock. I have bought of Mrs. J. A. Brown the whole grading outfit which belonged to the late J. A. Brown, and I send him down to represent me in the premises, and to sell according to the general plan that you have arranged. You will therefore please deliver the whole business to my representative, Mr. Sandercock. I should be pleased to have you accompany Mr. Sandercock, and assist him all in your power. Mrs. Brown's desire also is that you shall accompany Mr. S. and aid with your counsel and co-operation. Yours, truly, R. E. Jack.' Bailey, acting for Mrs. Brown, had already arranged to ship the goods to Modesto for sale. They were then turned over to Sandercock, who shipped them to Modesto. Bailey accompanied him, but acted in entire subordination to Sandercock. The property was sold, and the proceeds sent by Sandercock to Jack, who applied them to the payment of Mrs. Brown's individual debt to the bank." Accompanying the bill of sale of the property, Jack executed the following: "This indenture witnesseth that whereas, Catharine J. Brown has this day, by a bill of sale of even date herewith, sold, transferred, and set over and delivered to R. E. Jack certain personal property in said bill of sale described, said bill of sale being hereby referred to and made a part hereof, now it is mutually understood and agreed that said R. E. Jack shall appoint a good and competent agent to take said property in charge, and dispose of the same on the best terms possible, within a reasonable time, not to exceed four months in all from the date hereof; and that said R. E. Jack will, as soon as said property is disposed of, account to said Catharine J. Brown for the proceeds of said personal property within the four months aforesaid, and as soon as received apply said proceeds to the payment of the indebtedness of G. W. Kenney, of the First National Bank of San Luis Obispo, for which indebtedness Catharine J. Brown has given written guaranty. Dated San Luis Obispo, April 15, 1890. R. E. Jack."

The judgment on the first appeal was reversed on the ground that the findings were not sustained by the evidence. The court, in its opinion, says: "Among such findings are the following: (1) That the personal property was never delivered to Jack, although it is admitted that a bill of sale of the property was made and delivered to him; (2) that Sandercock, who took the property, and sold it, was the agent of the executrix, and not the agent of Jack; and (3) that the proceeds of the property were paid to the executrix." Continuing further, in the opinion it is said: "The court also found that Jack had not converted the property to his own use. That he took the property, by the consent of Mrs. Brown, to sell, and to apply the proceeds to the payment of her individual debt to the bank cannot be denied. Did it amount, under the circumstances, to a conversion? Of course, when Mrs. Brown conveyed the property to Jack in payment of her individual debt, she misappropriated it. She put it out of her power to hold the property as executrix for the estate, and subject to the orders of the court. It was a clear violation of her duty. It was a wasting of the estate, which would constitute a devastavit. Ordinarily, no doubt, one who receives property under such circumstances in payment of an individual debt of the executrix to him may be treated by the successor of such executrix, after a demand and a refusal to deliver the property, as a wrongdoer." On the second appeal (46 Pac. 920), the respondent claimed that the evidence on the second trial was substantially different from that on the first, and that the debt to pay which the property was sold was the debt of the deceased, Brown, instead of that of Mrs. Catharine J. Brown. But it was held by this court: "The facts as to the debt in question, as proved on the second trial, did not differ from those disclosed on the first trial. It appeared then, as it does now, that the deceased, in his lifetime, guarantied the payment by Kenney of such sums as should be advanced to him by the bank of which the defendant, Jack, was president; that some such advances were made during the lifetime of the deceased; that after his death his widow, Catharine J., made a new guaranty, in her own name, of the like character; and that all the subsequent advances were made under the latter guaranty." After further noticing the testimony and the pleadings, the court say: "We are therefore unable to perceive that the facts on the second trial differ at all from those on which our former opinion was predicated, and the propositions of law there decided are therefore decisive of the case on this appeal. Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147."

On the last trial the answer was amended by eliminating therefrom all affirmative matter as a defense. As thus amended, the answer simply denied that the defendant took and carried away the personal property described in the complaint, or that he converted the same to his own use, and denied that said property was of the value of $7,000, or of any other sum exceeding the value of $4,529.65. On the trial, the bill of sale, with the stipulation on the part of the defendant, and letters from Mrs. Brown and defendant to Bailey, were introduced in evidence as on the former trials; also the testimony of the lawyer who prepared the papers to the effect as before, and the testimony of Bailey given at the former trial was read, he having died in the meantime; also the testimony of Sandercock, the man appointed by defendant to take charge of the property and dispose of the same as indicated in his letter, and according to his stipulation, already referred to. He says he made out a list of the property; that a part of it had already been disposed of by Bailey, but that Bailey turned over the proceeds of that which he had sold to him. "I turned the money I got from the sales of that property over to the president of the First National Bank. I think Mr. Jack was president at that time. I made the report of the sales to Jack as president of the bank." The testimony on the last trial was substantially that produced on the former trials. At any rate, it was equally strong in favor of the plaintiff. It goes for nothing that defendant says in his testimony that he never saw the property, and did not handle it, and did not have anything to do with the sales thereof, or the proceeds. This means simply, in the light of the other testimony, that he did not personally handle the property or the proceeds; but there is no testimony on his part tending to contradict the documentary and other testimony to the effect that the property was sold, and the proceeds appropriated, according to his stipulation accompanying the bill of sale, and the letter of directions by the defendant to Bailey to turn over the property to his agent, Sandercock; and in law what one does by another he does himself. "It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion." Liptrot v. Holmes, 1 Kelly, 381, quoted in the opinion on the first appeal. The answer in this case did not deny that the property belonged to the estate of plaintiff's intestate, James A. Brown, and the testimony clearly shows that defendant, through his agent, converted this property into money, and appropriated it to the account of Mrs. Brown, according to his written agreement; and it does not alter the case at all if that account of Mrs. Brown's included some prior indebtedness of her deceased husband, as held by this court on the first appeal. The testimony on the last trial being substantially the same as on the two former, under the previous decisions of this court in the case the lower court should have directed the jury, as requested, to bring in a verdict for the plaintiff for the amount admitted by defendant to be the value of the property converted. The evidence does not support the verdict for the defendant, and a new trial should, therefore, have been granted. The judgment and order denying a new trial are reversed.

We concur: BEATTY, C. J.; HARRISON, J.

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126 Cal. 498

LA MARCHE v. NEW YORK LIFE INS. CO.

(Sac. 489.)

(Supreme Court of California. Oct. 30, 1899.)

INSURANCE—APPLICATION—FRAUD OF AGENT—RESCISSION OF CONTRACT—INTEREST OF INSURED'S WIFE IN POLICY.

1. Where insured, a foreigner, imperfectly acquainted with the English language, and unacquainted with the terminology of insurance, signed a blank application for insurance, and delivered it to an agent of the company on the latter's agreement to fill it in in accordance with an oral agreement with him, the agent acted for the company, and fraud on his part in filling in the application will be attributed to the company.

2. Though the blank application contained a provision that the company should not be affected by statements or promises of the agent unless embodied in the application, and the agent filled the application in so as to call for a policy different from that called for by the oral agreement, the insured may rescind the contract, and recover the premium paid at the time he signed the application.

3. Where the company issued a policy payable to insured's wife, which was not in accordance with the oral agreement, though in accordance with the application as filled in by the agent, the wife acquired no such interest in the policy as required her joinder in an offer to surrender the policy as a condition precedent to a rescission and recovery of a premium paid at the time insured signed the application.

4. Under the circumstances the insured was not guilty of negligence in not reading the application, either before or after it was filled in by the agent.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county.

Action by Joseph La Marche against the New York Life Insurance Company. From a judgment of nonsuit, plaintiff appealed. Reversed.

E. W. Holland and F. L. Alford, for appellant. Page, McCutchen & Eells, for respondent.

BRITT, C. Action for damages sustained by plaintiff because of fraud alleged to have been practiced on him by defendant, a life insurance company, through the instrumentality of one Eaton, its agent, whereby defendant obtained from plaintiff his negotiable promissory note for the sum of $430.50, ostensibly in payment of the first annual premium on a policy of insurance to be issued on his life; which note plaintiff was subsequently compelled to pay to a third person holding the same. At the trial defendant moved for judgment of nonsuit on the evidence produced by plaintiff, and the court granted the motion.

It is not contended in this court by the defendant that the evidence was insufficient to show fraud in the representations by which Eaton, the agent, obtained plaintiff's note, but it is urged that for certain reasons, to be presently noticed, the plaintiff is in no position to hold defendant responsible on that account. Among the facts which the evidence tended to establish were the following: Plaintiff is a farmer by occupation, a foreigner by birth, unacquainted with the technical terms of life insurance, and accustomed to rely on other persons for the conduct of transactions of moment requiring some proficiency in the English language. Eaton visited him at his farm, and represented to him, in substance, that in consideration of his note aforesaid, and his agreement to pay an annual premium of the same amount for the term of 15 years, the defendant would issue to him its policy on his life in the sum of $10,000, payable to the beneficiary to be named therein in case of plaintiff's death during said term, and, if he survived said period, then the policy would be paid up, and, if he chose, he "would draw ten thousand dollars." Plaintiff agreed to the terms proposed, and executed the note aforesaid. Eaton produced a blank form of application to the defendant for a policy, and requested plaintiff to sign his name thereto, saying that he (Eaton) would fill the same afterwards. Plaintiff complied without reading the paper. Eaton departed with the form thus signed, and subsequently completed it, and forwarded it to the company. Among the provisions of such application was one to the effect that the insured reserved the right to change the beneficiary of the insurance at any time; and another was that "no statements, promises, or information made or given by or to the person soliciting this application shall be binding on the company, or in any manner affect its rights, unless such statements, promises, or information be reduced to writing, and presented to the officers of the company at the home office in this application." As completed by Eaton, it called for a policy materially different from that he had described to the plaintiff. The company issued a policy accordingly, whereby it engaged to pay the sum of $10,000 to the wife of plaintiff in case of his death within 15 years; but the cash surrender value of the policy at the end of that time was therein stated to be $3,070 (together with a "dividend" of undefined amount), instead of $10,000, as orally promised by Eaton; and instead of becoming then a paid-up policy, its further continuance was conditioned upon the payment of premium at the rate of $367 per year. The policy was sent to plaintiff by mail. He returned it to defendant, accompanied by a letter, which he caused to be written, stating the particulars wherein the policy differed from the representations of Eaton, and demanding the return of the note he had given for the first premium. Such demand was refused, and plaintiff, after payment of the note, brought this suit.

1. Defendant contends that by signing the blank application and delivering it to Eaton plaintiff made Eaton his agent to complete the same, and thus assented to the terms which Eaton saw fit to insert. We do not understand this to be the law in cases such as the present. The blank form was such as could be intelligently filled only by one possessing some skill in the technology of life insurance. For example, it required an answer to the question whether the insured desired "an accumulation policy, with guarantied cash values, as set forth in the policy form of the company." Plaintiff neither knew nor assumed to know the meaning of these terms. Presumptively Eaton possessed the requisite knowledge, and there is no doubt that the preparing of the application was within the scope of his authority as agent for the company. Insurance Co. v. Chamberlain, 132 U. S. 304, 311, 10 Sup. Ct. 87; Insurance Co. v. Olmstead, 21 Mich. 246; Donnelly v. Insurance Co., 70 Iowa, 693, 28 N. W. 607. His act in filling the instrument over the signature of plaintiff was, therefore, the act of the company, and fraud by him in the performance of that act, to the injury of plaintiff, must be treated as the fraud of the company. This conclusion, which, as will appear, is virtually decisive of the case, is fully supported by the decisions on the subject. Wheaton v. Insurance Co., 76 Cal. 415, 18 Pac. 758; Hingston v. Insurance Co., 42 Iowa, 46; Fitchner v. Association, 103 Iowa, 276, 279, 72 N. W. 530; Swan v. Insurance Co., 96 Pa. St. 37; Dowling v. Insurance Co., 168 Pa. St. 234, 31 Atl. 1087; Rowley v. Insurance Co., 36 N. Y. 550; O'Brien v. Society, 117 N. Y. 310, 22 N. E. 954; Insurance Co. v. Eshelman, 30 Ohio St. 647; Insurance Co. v. Williams, 39 Ohio St. 584; Kausal v. Association, 31 Minn. 17, 16 N. W. 430; Bowlus v. Insurance Co., 133 Ind. 106, 32 N. E. 319.

2. The provision of the application that the company should not be affected by statements or promises made by or to the agent unless the same were reduced to writing, and presented in the application, can be of no avail to defendant on the facts which the evidence for plaintiff tended to show. For present purposes it is sufficient to say of such provision that plaintiff had no knowledge of it, and did not assent to it. Although such knowledge might be imputed to him if his signature to the application had been honestly obtained, yet, since the instrument as completed by the agent was fraudulent as to plaintiff, it must follow that defendant can derive no advantage from any stipulation thus fraudulently procured. McKay v. Insurance Co. (Cal.) 56 Pac. 1112, and cases cited; Insurance Co. v. Woodworth, 83 Pa. St. 223; 1 Joyce, Ins. §§ 508, 509.

3. Defendant seems to place most reliance on the circumstance that the plaintiff's wife, who was named as beneficiary of the insurance, did not join in his offer to surrender the policy. It is claimed that her failure to do so is fatal to plaintiff's action, and that Jurgens v. Insurance Co., 114 Cal. 161, 45 Pac. 1054, and 46 Pac. 386, settles the question in defendant's favor. The ground taken in that case was that, since the beneficiary (there, as here, the wife of the plaintiff in the action) had a vested interest in the policy, the husband could not, without her concurrence, rescind the contract evidenced by that instrument. The case before us differs from that in some essential particulars. The wife of La Marche never acquired an interest in the policy defendant issued to her husband. Aside from any consideration of fraud in the procurement of the application, it seems to us doubtful whether, in view of the provision that the right to change the beneficiary of the insurance at any time was reserved to La Marche, the beneficiary first named could be said to have a vested interest in the policy in any sense that would prevent her husband from disposing of it as he pleased. See Splawn v. Chew, 60 Tex. 532; Block v. Association, 52 Ark. 201, 12 S. W. 477; 2 Joyce, Ins. § 730. We do not, however, venture an opinion on that question, for this case is for other reasons without the rule held in Jurgens v. Insurance Co. There the court said, "The policy issued to him [Jurgens] was precisely such a policy as he had applied for in writing;" and the opinion of the court was influenced throughout by the fact that Jurgens really assented to the contract which he subsequently assailed, although his assent was induced by fraudulent representations of the company's agent concerning its meaning. Necessarily, in that view, the contract was good until rescinded. Civ. Code, § 1566. But here, when the blank form left the hand of La Marche, it was not an application for a policy. It was meaningless until completed by Eaton; and the only ground on which La Marche can be said to be bound by it is that by delivering the paper with his signature at-

tached he constituted Eaton his agent to fill the blanks, and so became responsible for what the latter did in that behalf. Bish. Cont. § 1174, and cases cited; Trust Co. v. Brown, 59 Mo. App. 461. It has been held that if the party so made the agent of the other fills the blanks with terms different from those which have been orally agreed upon he exceeds his implied authority, and the instrument is not the contract of the party who has signed it. Rounsavell v. Pease, 45 Wis. 506; Green v. Sneed, 101 Ala. 205, 13 South. 277. However this may be in general, it is plain that the rule to which we have adverted—that one who has signed a contract in blank, and delivered it to the other contracting party, thereby makes the latter an agent to fill the blanks—has no effect in the case at bar, for, as shown above, the agent of an insurance company who thus deals with the blank application of a customer for a policy acts yet as the agent of the company, not of the applicant, and can have no authority from the latter to insert in the form any proposal different from the oral agreement. We may also observe that upon the facts appearing La Marche is not chargeable with negligence in failing to read the application either before or after Eaton filled the blanks. Fitchner v. Association, 103 Iowa, 279, 72 N. W. 530; Insurance Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; 1 Joyce, Ins. §§ 489, 490. See Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732; McKay v. Insurance Co. (Cal.) 56 Pac. 1112. It follows that plaintiff never applied for the policy which defendant assumed to issue, and of course his wife could have no vested or other interest in a policy which he did not accept nor agree to accept. It was error to grant the nonsuit, and the judgment and order denying a new trial should be reversed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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126 Cal. 516

BAKER et al. v. SOUTHERN CALIFORNIA RY. CO. (L. A. 483.)

(Supreme Court of California. Oct. 31, 1899.)

ACTION AGAINST RAILROAD—INJURY TO CATTLE—UNCERTAIN COMPLAINT.

A complaint alleged that cattle were grazing on land occupied and controlled by plaintiffs, adjoining defendant's railway, and, without plaintiffs' fault, casually strayed on the ground and track of the railway; that defendant so negligently managed its trains that they ran over the cattle and killed them, to plaintiffs' damage; and that, at the point where they were killed, defendant's railway was not fenced. *Held* uncertain, in that it could not be ascertained therefrom whether plaintiffs relied on negligence in managing the train, or on possession and control of the premises through which the road passed, and that the same were not fenced.

Department 1. Appeal from superior court, San Diego county.

Action by Amelia B. Baker and others against the Southern California Railway Company, a corporation. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed.

C. N. Sterry and H. J. Stevens, for appellant. Withington & Carter, for respondents.

VAN DYKE, J. This action was brought in the justice's court to recover the sum of $130, the value of a cow and steer alleged to have been killed by a train on defendant's road. An answer was filed in which it was alleged, among other things, that the determination of the action necessarily involved the question of title to, or possession of, real property; and the cause was accordingly certified to the superior court, under the provisions of section 838 of the Code of Civil Procedure. On the appeal from the first trial a motion was made to dismiss the appeal on the ground that the court had no jurisdiction. This court held that the transfer of the cause to the superior court was proper, and that that court had jurisdiction thereafter to try the cause, and the motion to dismiss the appeal was denied. See Baker v. Railway Co., 110 Cal. 455, 42 Pac. 975. On the merits of the appeal in that case, among the questions considered was the alleged error in overruling the demurrer to the complaint as amended after the transfer to the superior court; and it was held that said complaint was uncertain as to whether the plaintiff's cause of action was founded upon negligent acts of the defendant in the management of its train, or upon the failure of the defendant to fence its track or right of way. Id., 114 Cal. 501, 46 Pac. 604. After the cause was remanded the complaint was again amended. In said last amended complaint it is alleged that the cattle were grazing "upon land occupied and controlled by plaintiffs adjoining said defendant's railway, and the said cattle then and there, without the fault of the plaintiffs, or either of them, casually strayed upon the ground and track occupied by the defendant's railway, in the county of San Diego, state of California; that defendant then and there, by its agents and servants, and not regarding its duty in that behalf, so carelessly and negligently managed its cars and locomotives that the same ran upon and against the said cattle, and killed and destroyed the same, to the plaintiffs' damage and injury in the sum of one hundred and thirty dollars; that, at the point where said cattle were killed as aforesaid, defendant's railway was not on the last-mentioned date, nor is the same now, fenced on either side thereof." It is very evident that this complaint is subject to the same uncertainty as the one considered by this court on the former appeal. It cannot be ascertained therefrom whether the plaintiff relies upon the allegation of negligence in the management of the train, or upon the allegation of possession and control of the premises through which the railroad passes, and that the same was not fenced.

It appears from the transcript that upon the trial of the cause the plaintiff relied upon the allegation of occupation and control by the plaintiff of the premises adjoining the said defendant's railway, and that the same was not fenced. The law creating a duty on the part of the railroad company to fence is contained in section 485 of the Civil Code, and reads as follows: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same; unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence, with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents or employees." It would seem from the reading of this section that it provides a penalty for killing or maiming cattle or domestic animals on the line of the road which passes through or along the property of the owner thereof, without regard to the manner in which the train may be operated (provided it be without neglect or fault of the owner of said animals), unless the company fence in its line of road. If the railroad company pay the owner of the land through which the railroad runs the price or cost of making or maintaining a fence as therein provided, then the company is relieved and exonerated from all claim for such damages; and, on the other hand, the owners of such animals are responsible for any damage or loss which may accrue to the company from such animals being on the railroad track, resulting from want of such fence. The whole provision seems to be in the interest of the owner of the land through or along which the railroad runs. But, if it be conceded that a tenant or licensee of the owner may avail himself of the benefits of such law in like manner as the owner, the evidence here fails to show that the plaintiff was such tenant or licensee of the owner of the land. On the trial, against an objection from the defendant, the plaintiff introduced in evidence the record of a deed from the Combination Land Company to W. F. Carter, purporting to convey the interest of said company to said W. F. Carter, upon the statement of plaintiff's counsel that he proposed to connect the deed with lot 20, and also the title of the Combination Land Company with that lot, and also offered in evidence, over the objection of the defendant, the record of a deed from Bryant Howard, as trustee, to the Combination Land Company, a corporation, of certain real property situated in Soledad Valley, San Diego county; being lot 20, according to the map of the Sorrento lands and town site. But the court stated the deed would be admitted as a link in a chain of evidence, if connected, and the title traced to the plaintiffs. There is no evidence, however, appearing in the transcript, connecting this link in the chain of evidence with the source of title, or with any title. It was not shown that Bryant Howard, as trustee or otherwise, had title or was ever in possession of the premises, or that his grantee, the Combination Land Company, went into possession of said premises under its deed, or that the said W. F. Carter, who purchased from said Combination Land Company, went into possession under his deed, or in fact was ever in possession. William G. Baker, one of the plaintiffs, testified, "I occupied this lot 20 as agent of my wife,"—the wife claiming to be owner of the stock that was killed; and the right to occupy or pasture said lot was obtained by parol from W. F. Carter's brother, and as his agent, two or three years prior. The result is an utter failure of evidence to show that the plaintiffs were tenants or licensees of the owners of the land along or through which the railroad ran. The judgment and order denying a new trial are reversed, and the cause remanded.

I concur: HARRISON, J.

BEATTY, C. J. I concur in the judgment of reversal, but I do not think the third amended complaint is uncertain as to the particular negligence upon which plaintiffs count. They charge that the defendant failed to fence its track, and that it ran down and killed cattle of plaintiffs that had strayed upon the track. The charge of carelessness and negligence in running over the cattle, though unnecessary, does not make the pleading any less certain as to the grounds of the action. There is, however, what I deem a more substantial fault in the complaint. To maintain an action under the statute, the land which the railway company neglects to fence must be the property of the owner of the cattle. The plaintiffs here do not allege that the land was their property, or the property of either of them, but only that it was occupied and controlled by them. Instead of alleging the material and essential fact, they merely alleged that which is inconclusive evidence of such fact. Their complaint is also defective in failing to show that the cattle strayed upon the track at a point where the same passes through or along the property occupied by them. As to the right of a lessee to maintain an action under the statute, I have no doubt that his estate is sufficient for the purpose, though he would be bound, no doubt, by any waiver on the part of his landlord of the right to have the land fenced. There is in this case, however, not only a failure to allege that the land in question was the property of plaintiffs, but also a failure to prove tenancy under any person having title to the premises.

(126 Cal. 486)

VINELAND IRR. DIST. v. AZUSA IRR. CO. et al. (L. A. 565.)[1]

(Supreme Court of California. Oct. 28, 1899.)

APPROPRIATION OF SUBSURFACE WATERS OF STREAM—RIGHTS OF PARTIES.

1. One may, by appropriate works, develop and secure to useful purposes the subsurface flow of a stream, and become, with due regard to the rights of others in the stream, a legal appropriator of the waters thereby.

2. Where a person constructs a tunnel to collect the subsurface flow of a stream, and thereby weakens the natural bank and bed of the stream, and creates an artificial draft on the surface waters, causing them to flow more freely into the tunnel, and thus decreases the surface flow, one who has a right to all the surface flow, which is diverted at a point further down the stream, will be entitled to an injunction restraining such person from asserting any right to the water so taken.

Department 2. Appeal from superior court, Los Angeles county.

Action by the Vineland irrigation district against the Azusa Irrigating Company and others to restrain defendants from changing their place and manner of diverting the waters of a stream to plaintiff's injury. Decree for defendants, and plaintiff appeals. Affirmed.

Works & Lee, for appellant. Silent & Campbell, Anderson & Anderson, and A. M. Stephens, for respondents.

HENSHAW, J. Plaintiff sued, as an appropriator of a part of the subterranean flow of the San Gabriel river, to restrain the defendants, who are also appropriators of the waters of the same stream, from changing their place and manner of diversion to the plaintiff's injury. The defendants, who are very numerous, made answer, and, without particularizing their pleadings, it will be sufficient, speaking of them collectively, to say that they asserted a right to all of the waters of the stream prior and superior to that of plaintiff, both as appropriators and as owners of riparian lands. By cross complaint they sought also to restrain plaintiff from further taking the waters of the river, upon the ground that it materially interfered with their own prior and superior rights thereto.

The following facts are necessary to an understanding of the litigation: The San Gabriel river flows through the San Gabriel canyon over government land, whence it passes out into San Gabriel valley. The channel of the river is well defined, both in the canyon and after it passes into the valley. In the canyon the stream is tortuous, and of varying width; in places narrow, in others broadening out into flats and bars. The rocky walls of the canyon are the natural banks of the stream. The space between these rocky walls is filled with a loose formation of sand, gravel, and bowlders. This forms the bed of the stream. In the summer season the channel is changeable along and across this gravel bed, moving from one side of the canyon to the other. In places the waters of the stream divide, forming small islands. The gravelly bed of the stream is of varying depth, being shallow where the canyon narrows, and deeper in its broader parts. The water from the surface flow of the stream saturates this gravelly bed at times and in places from canyon wall to canyon wall. This water saturating the gravelly bed is a part of the waters of the San Gabriel river flowing in its channel between its natural banks in contact with the surface flow, and forms the subsurface flow of the river. It is found by the court that this subsurface flow protects and supports, and is necessary for the protection and support of, the surface flow. At a time prior to the acquisition by plaintiff of any of its asserted rights, it is admitted that the defendants other than the defendant the Azusa Water Development & Irrigation Company had appropriated all of the waters constituting the surface flow of the river, diverting them at a point below plaintiff's point of later diversion. These defendants actually took the surface waters of the stream, and no others. Owing to the nature and character of the bed of the stream, it appears, as it would be natural to expect, that a large volume of water is carried by the subsurface flow. It is possible and practicable to impound this water, and make it available for useful purposes, in some instances by a dam called a "bedrock dam," which is built from the natural country rock up and through the gravelly bed to and above the surface. Such a dam, as a matter of course, if extended across the channel of the stream, arrests and impounds the subsurface flow. Another method of securing these subterranean waters is by tunneling. Under this system a tunnel is driven from a point below in a general direction up the stream through, under and along this gravelly bed. The subsurface flow naturally drains into this tunnel, and is thus carried down to the mouth of the tunnel, and there diverted. Another of these defendants, the Azusa Water Development & Irrigation Company, still at a time prior to the acquisition by plaintiff of any of its rights, posted at places upon the stream above the point of diversion of the other defendants its notices of intention to appropriate all of the unappropriated waters of the stream. Under this notice the work actually done by this defendant was of the following character: Beginning at a point near the stream, and above the point of diversion of the other defendants, it drove a tunnel such as has been described up the bed of the stream, and therein collected from the subsurface flow some hundred or more miners' inches of water, which, flowing to the mouth of the tunnel, was there turned into the stream, and permitted to run with the surface flow to the point of diversion of the other defendants, where the waters were segregated and carried by their appropriate distributing systems to the consumers. Difficulties, however, arose between this defendant and the other defendants in this action, and litigation followed. In the end a so-called "compromise agreement" was entered into between all of the defendants. By this their various claims and contentions were settled and determined between themselves, and, as the court finds, "their rights were united and consolidated," and the water of the river to which they were entitled was divided and apportioned among them. There was appointed a committee of nine, which should thereafter, under certain restrictions, have full charge of the further works of development to be constructed. The notice of appropriation of the defendant the Azusa Water Development & Irrigation Company was posted upon the 27th day of August, 1883; and, as the court finds, it prosecuted its work of construction diligently and uninterruptedly until the 26th day of January, 1889. Upon this date the compromise agreement above mentioned was consummated; and, as the court still further finds, the committee of nine immediately after took charge of the development tunnel of the Azusa Water Development & Irrigation Company, and at once let contracts for continuing the work in the development of the tunnel, and prosecuted the work diligently and uninterruptedly until the completion thereof, in 1896. After the date of the compromise agreement the plaintiff was organized as an irrigation district. In March, 1890, it commenced the construction of its tunnel, completing the work in October, 1893. This tunnel began upon the opposite side of the river from the tunnels of defendants, upon the lands in the private ownership of the plaintiff, and was driven towards and into the gravelly bed of the river. By this tunnel, as by the tunnel of the Azusa Water Development & Irrigation Company, the subterranean flow of the stream was gathered and diverted to the amount of about 60 miners' inches of water. The place where the tunnel entered the river bed, from which the major portion of its waters was gathered, was above the point where the defendants for years past and at that time were diverting the surface flow, and at a point below where the defendant the Azusa Water Development & Irrigation Company turned into the stream the subsurface waters developed by its tunnels. Plaintiff continued for several years to draw from its tunnel an amount of water varying with the amount carried by the surface flow of the stream, while, upon the other hand, the committee of nine, acting under the compromise agreement and the notice of appropriation by the defendant Azusa Water Development & Irrigation Company, continued work upon the latter's tunnel, driving it still further up the stream, constructing galleries, and finally sinking shafts from the surface to the tunnel to catch and drain all the surface flow. They designed thus to collect all of the surface flow at a point several thousand feet above the mouth of the tunnel, and all the subterranean flow which could there be gathered, and to carry the same through their tunnel, but they proposed no longer to turn these waters into the natural bed of the stream, thus to flow past the head of plaintiff's tunnel, as had formerly been done, but to divert them at the mouth of this tunnel. The effect of this would be and was that the surface flow of the stream ceased, and with its cessation the water no longer entered plaintiff's tunnel, and it dried up. Plaintiff then commenced this action. It asserted that the San Gabriel river, a short distance above its place of diversion, divided into two streams with well-defined channels,—the one a surface stream, the other a subterranean stream, from which it drew its water. Then it was an appropriator of the waters of this subterranean stream, and that the effect of the change in the place and manner of defendants' diversion was to send this stream dry. The court found against plaintiff's allegations of a separate and well-defined subterranean stream, but this finding, in view of the others which it actually did make, it is unnecessary to consider further than to say that it draws support from the evidence.

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[1] Rehearing denied November 27, 1899.

From the foregoing it is apparent that plaintiff's cause of action rests upon its asserted right as a subsequent appropriator of the waters of the stream, and the consequent injury to its rights following the change by the defendants of their place of diversion. Defendants, by cross complaint, themselves averred that plaintiff was taking the waters of the river, to which extent, then, it was an appropriator; but they insisted that this taking was in violation of and injurious to their earlier rights. Plaintiff complains—and with some justice—that upon this important question as to whether or not it was an appropriator of the waters of the stream the court has failed to find. The findings are somewhat discursive. They are not limited to declarations upon the ultimate facts in issue, but contain many probative facts, and leave something too much to inference and deduction. When it is come to consider whether, from these findings, it can be determined whether the court did or did not hold the plaintiff to be an appropriator, some difficulty will be experienced. The court finds that years before the plaintiff corporation came into existence the defendants had appropriated "all of the water of said river flowing in the natural bed thereof." The correctness of this finding must be conceded only if it be held to apply to the surface flow, for these defendants other than the Azusa Water Development & Irrigation Company had done nothing to develop the subsurface flow. It is found that the separate and independent subterranean branch of the stream, from which plaintiff insisted that it was drawing its water, did not in fact exist, but that the water which entered plaintiff's tunnel "is the percolation from the surface stream, and is withdrawn from the surface stream, which defendants had appropriated prior to the organization of plaintiff as an irrigation district." Again, it is found that "the water from the surface flow of the stream percolates through this gravelly bed of the river, and fills the voids, until in portions of the canyon the whole bed becomes saturated from wall to wall. This lower or percolating water is directly connected with the surface flow, and protects and supports, and is necessary for the protection and support of, the surface flow in its course in the natural bed of the stream." Also the court finds that the plaintiff's tunnel is constructed into the gravelly bed of the stream, through which water from the surface can and does percolate; that it is constructed into the "saturated mass" of gravel in the river bed. Still further, that the plaintiff's tunnel creates an artificial draft upon the surface flow of the stream, and draws down a part of the same, and weakens and injures the natural bed of the stream, and tends to interrupt and carry away from defendants the surface flow, and deprive defendants thereof. These findings are unhappy in using the phrase "percolating waters," a phrase of well-defined meaning within the law, in a manner apparently not justified by the facts. Percolating waters are a part of the soil, and belong to the owner of the soil. He may impound them at will, and the proprietor of lower lands injuriously affected cannot be heard to complain. Hanson v. McCue, 42 Cal. 303; Cross v. Kitts, 69 Cal. 217, 10 Pac. 409; Painter v. Water Co., 91 Cal. 74, 27 Pac. 539. It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream. They may either be rain waters, which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream, which have so far left the bed and the other waters as to have lost their character as part of the flow. If these waters which the court describes were in fact percolating waters, then plaintiff had the unquestioned right to take them by its tunnel; and, even if injury resulted to other appropriators or riparian owners upon the stream, they could not be heard to complain. Yet the court grants these defendants an injunction against plaintiff to restrain it from taking such waters. The findings, therefore, must be construed—and they are fairly susceptible of this construction—to mean that plaintiff was drawing its waters from within the bed and channel of the stream, and from its subsurface flow. That one may be a lawful appropriator of such waters there can be no question. To hold otherwise would be to deprive vast tracts of arid land of waters thus obtained, and now beneficially used and employed upon them, and limit the legal taking of waters to the surface flow alone. The existence of a well-defined subsurface flow within the bed and banks of streams such as this is well recognized. Says Kin. Irr. § 44: "At certain periods of the year water flows on the surface in a well-defined course, and there is at all times what is known as the 'underflow.' This is the broad and deep subterranean volume of water which slowly flows through the sand and gravel underlying the most, if not all, the streams which traverse the country adjacent to the mountain systems of the arid region. These underground streams are probably much greater in volume in some cases than the water upon the surface, and are, as far as rights of appropriation or riparian rights are concerned, but a valuable portion of the well-defined surface stream." Indeed, illustration of the fact that the trial court itself must of necessity have considered that the taking of subterranean waters from the stream by means of such as those employed by plaintiff was a legitimate mode of appropriation is furnished by the finding that the defendant the Azusa Water Development & Irrigation Company gave notice of appropriation as required by the Code, and proceeded by its tunnel to develop and secure this underflow in manner precisely that employed by plaintiff, and the court distinctly finds that it was a legal appropriator of waters from this same stream. We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works, develop and secure to useful purposes the subsurface flow of our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of waters by so doing. That plaintiff thus was, at the time of the institution of its action, an appropriator, permits of no doubt, but its appropriation was legal only so far as its taking did not imperil or impair the rights of others superior to its own. One may not, of course, tunnel into the bed of such a stream, or dam its underground flow, and by such means draw away either subterranean or surface waters the rightful use to which has been secured by others. If, upon the other hand, one can, by development, obtain subterranean waters without injury to the superior rights of others, clearly he should be permitted to do so.

This having been said, the legal rights of the respective parties to this controversy are not difficult of definition. As against this plaintiff, the compromise agreement could not give these defendants collectively any greater rights than before they had separately enjoyed. So far as concerns those defendants who had appropriated all of the surface flow, and were diverting it at a point below the intake of plaintiff's tunnel, plaintiff, as a subsequent appropriator, had the clear right to insist that their place of diversion should not be changed to its injury. If the surface flow which had been permitted to pass the head of its tunnel fed the subterranean flow, and if the waters which the plaintiff thus took could be and were taken without impairment of the rights of the defendants to the surface flow, then plaintiff is justified in insisting that the surface flow should continue to pass the head of its tunnel, and feed the underflow. If, upon the other hand, the taking of this water by plaintiff, as the court finds, creates an artificial draft upon the surface flow of the stream, draws down a part of it, and weakens and injures the natural bed of the stream, and tends to interrupt and carry away from the defendants the surface flow, and to deprive them of it, since plaintiff's use of the water has not ripened into a prescriptive right, defendants are entitled to an injunction to restrain this illegal interference. Again, as the Azusa Water Development & Irrigation District is an appropriator prior in time and right to the plaintiff, if its notice of appropriation be valid, as the court finds, and if its work has been properly prosecuted, it would have the unquestioned right to develop and take the subsurface flow to the extent of 5,000 miners' inches, and to divert the water at a point above the head of plaintiff's tunnel, and of this plaintiff could not be heard to complain. But in the fact that this defendant had compromised its differences and consolidated its rights with the other defendants will be found no legal justification for the diversion at a point above of all of the surface flow which had been accustomed to pass beyond plaintiff's point of diversion. The appropriators of this surface flow, as has been said, would not be warranted in so changing the place of diversion, and the mere fact that they had consolidated their rights with one who claimed the right to develop a subterranean flow in subordination to their rights would not justify the ignoring of the intervening rights of the plaintiff.

But into an examination of all these questions, as affected by the evidence in the case, it will not be necessary to enter; for, as has been said, the court at the instance of the defendants under their cross complaint granted an injunction against the plaintiff restraining it from asserting any right to the waters which it had been taking, and further restraining it from developing or extending its tunnel. This injunction was based upon the findings above adverted to, that the water which plaintiff was taking was drawn from and decreased the surface flow of defendants, and that the tunnel weakened the natural bank and bed of the stream, and created an artificial draft upon the surface waters, causing them to flow more freely into the tunnel, and thus lessening the amount which the defendants otherwise would have received. These findings, if supported, are determinative of the case, for, if plaintiff's attempted appropriation is so violative of the superior rights of the defendant appropriators as to justify an injunction restraining them from asserting any right to the water, it cannot matter to plaintiff what place the defendants may, in the future, select as their point of diversion. It would unduly extend this opinion to set forth the evidence at length, but we are satisfied that the findings are abundantly supported by the evidence of the engineers Wright, Purnell, and Koebig, who testified with unanimity to the matters found by the court. The right of the defendants to an injunction under the facts found is very clear, but, if it needs support, it may be found in the well-considered cases of City of Emporia v. Soden, 25 Kan. 425; Etna Mills v. Inhabitants of Brookline, 127 Mass. 69; and McClellan v. Hurdle (Colo. App.) 33 Pac. 280. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; HARRISON, J.

126 Cal. 452

SPRINGER v. SPRINGER et al. (L. A. 756.)

(Supreme Court of California. Oct. 25, 1899.)

APPEAL—BOND—WAIVER OF OBJECTIONS.

Where the respondent signed a certificate to the transcript on appeal that an undertaking in due form was filed in said cause within the time allowed by law, he cannot, after the expiration of the time within which another undertaking might have been filed, object to the sufficiency of the appeal bond.

In bank. Appeal from superior court, Los Angeles county.

Action by one Springer against one Springer and others. There was a judgment in favor of defendants, and plaintiff appealed. Defendants moved to dismiss the appeal for insufficiency of the appeal bond. Motion denied.

W. W. Holcomb and W. T. Williams, for appellant. G. P. Adams, for respondents.

PER CURIAM. Motion to dismiss the appeal for want of a sufficient undertaking. Judgment herein was entered in the superior court in favor of the defendants October 31, 1898, and on April 24, 1899, the plaintiff's motion for a new trial was denied, and on the same day an order was made denying a motion made by the plaintiff to amend her statement. April 29th the plaintiff served and filed upon the defendants a notice of appeal from the judgment, and also from the orders denying a new trial and denying her motion to amend the statement. June 10th the attorney for the respondents signed a certificate to the transcript on appeal, in which he certified that "an undertaking on appeal in due form was filed in said cause within the time allowed by law," and on the same day the transcript was filed in this court. The appellant's brief was filed June 29th, and on July 29th the respondents filed their brief in reply thereto, in which no objection was made to the sufficiency of the undertaking, or the right to have the appeal heard in this court. September 29th the respondents gave notice to the appellant of a motion to dismiss the appeals upon the ground that the undertaking on appeal is insufficient, and on October 9th this motion was submitted for decision. In Re Marshall's Estate, 118 Cal. 380, 50 Pac. 540, a similar motion was made where the counsel for respondents had signed a stipulation "that an undertaking in due form was properly made and filed within five days after the service and filing of the notice of appeal." The motion was denied upon the ground that after the expiration of the time within which another undertaking might have been filed counsel could not be relieved of the effect of such a stipulation upon the showing made therein. See, also, Carey v. Brown, 58 Cal. 185; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; Id., 99 Cal. 173, 33 Pac. 887. The facts of the present case are within the principles there determined, and upon the authority of that case the motion is denied.

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126 Cal. 565

JORDAN v. MYRES et al. (Sac. 523.)

(Supreme Court of California. Nov. 6, 1899.)

MECHANICS' LIENS—KNOWLEDGE OF OWNER OF LAND—NOTICE—MINER'S LIEN —LEASED MACHINERY.

1. A person who has leased machinery to persons in possession of land, under a contract to purchase the same, and which the latter have affixed to the soil, is not such an owner or person as is contemplated by Code Civ. Proc. § 1192,—which provides that where work is done on land with the knowledge of the owner, which work would entitle the person performing it to a mechanic's lien, the work will be deemed to have been performed at the instance of the owner, unless such owner within three days give notice, by posting, that he will not be responsible,—and need not give such notice to prevent a miner's lien attaching to the machinery.

2. Under Code Civ. Proc. § 1183, which provides that any person who performs labor in any mining claim has a lien on the same, and the works used in connection therewith, for his work and labor, a person who has performed work for one in possession of a mining claim under a contract for the purchase thereof, which contract provided that, if the purchasers failed to complete the contract, they could remove any machinery affixed by them, has no claim on machinery leased by the latter from a third person, with a privilege of purchasing, and permanently attached to the claim, though the lessor gave no notice of his ownership, and the lessees of the machinery never completed the contract for purchase of the claim.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

Action by L. E. C. Jordan against B. F. Myres and others to foreclose laborers' and material men's liens on a mining claim. From a judgment in favor of plaintiff, defendant Joshua Hendy Machine Works appealed. Modified.

John M. Fulweiler and F. P. Tuttle, for appellant. Jo & George W. Hamilton, for respondent.

CHIPMAN, C. Foreclosure of laborers' and material men's liens. Plaintiff brings the action for himself and as assignee of 13 other lienholders. The court gave judgment for plaintiff, from which defendant Joshua Hendy Machine Works appeals on the judgment roll alone.

From the findings it appears that defendant Myres was and now is the owner of the mining property commonly called the "Calf Pasture Quartz Mine." On February 8, 1896, he entered into a contract of sale and purchase of the property with defendant Berry, who, before any work was begun upon said mine or any material furnished therefor, assigned to defendants Walter, Johnson, Ray, and Ward each an undivided one-fifth interest in said contract, and they then entered into possession of the property. It was agreed in their contract, among other things, that, in case Berry failed to purchase the mine as agreed, he should leave the mine properly timbered, and turn the same over to Myres in good mine order, free from any incumbrances, "but may remove any engine or other hoisting machinery he may have placed on the mine above ground." On March 24, 1896, defendant the Joshua Hendy Machine Works, a corporation, entered into a written contract of lease with defendants Walter, Johnson, and Berry, which was recorded in the office of the county recorder of Placer county on April 4, 1896, whereby the corporation defendant leased to them a certain engine and certain other machinery, and the latter agreed to pay as rental therefor certain stipulated sums, on payment of which they were to have the right of purchase upon further payment of one dollar. About March 29, 1896, these five defendants took possession of said machinery from defendant corporation, and placed the same on said mine, and "the same was permanently affixed and attached thereto by means of bolts and screws; that said machinery was necessary, and was thereafter, during the times in the complaint alleged, actually used, in the working and operating of said mine." On July 30, 1896, defendant corporation served notice on defendants Berry, Walter, and Johnson that, unless within five days they paid the balance due on said contract, it would declare the same rescinded, and take possession of the property. This demanded payment was not made. The work done and the materials furnished, for which liens are claimed, occurred before July 30, 1896. The liens were filed on the mine and the machinery in question, and the actions were commenced, about the last-named date.

Appellant contends that the personal property leased by it retained its identity as personal chattels, and was not subject to the liens, notwithstanding it had become fixed to the realty by the lessees. It was held, under a similar lease, in Hendy v. Dinkerhoff, 57 Cal. 3, that, as between Hendy and his lessee, Lampson, and also as between Hendy and defendants, who had entered into a contract of sale and purchase as to the mine with Lampson much the same as in this case, the property must be treated as personal property. The case is authority for holding that as to all the defendants in the present case, including the owner of the mine, the machinery should be treated as personal property. In Hamilton v. Mining Co., 118 Cal. 148, 50 Pac. 378, the trial court enforced a laborer's lien against certain leased machinery which had become affixed to the realty, but denied the lien as to certain other of the leased machinery not yet affixed. Plaintiffs appealed from the judgment, which raised the question only as to the unaffixed machinery. No question arose as to the correctness of the judgment concerning the personal property that had become affixed to the realty. The case, therefore, does not directly decide the question here, nor does it, for that matter, even impliedly do so. The case of Williams v. Mining Co., 102 Cal. 134, 34 Pac. 702, and 36 Pac. 388, also cited by respondent, decides, upon the point in question, nothing more than that the lien should be taken against the mining claim, and not against the specific structure upon the mine. The only notice which respondent had of the lease under which appellant claims was by virtue of its being recorded in Placer county. But, as the statute makes no provision for thus giving notice of such instruments, we must deal with the case as though respondent had no notice. Respondent claims that appellant should have protected itself by posting the notice required of the owner of the lands, or the person having or claiming an interest therein, as directed by section 1192, Code Civ. Proc. Appellant was not the owner of the mine, neither had he any interest in it. We do not think appellant was such owner or person as is contemplated by that section. Appellant might have posted notice as a means of giving actual notice of its claim upon the personal property, but we do not think it was required to do so; nor would the mere posting of the prescribed notice have been conclusive of actual notice, the same as in the case of the owner, of a person claiming an interest in the mine itself. It is settled law that this personal property cannot be treated as part of the realty, so far as the owner of the mine and the defendants are concerned. Hendy v. Dinkerhoff, supra. The question is, must it be so treated as to respondent? Section 1183, Code Civ. Proc., provides as follows: "* * * And any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing ores from such mining claim or claims, for the work or labor done, or materials furnished by each respectively," etc. This section contemplates that the lien shall attach to the property of the owner, and not to the property of some other person. But it is said that, if another person allows his personal property to become affixed to the realty as part of it without giving notice of his claim, the lien will attach to it as the property of the owner of the mine; that in this case plaintiff had a right to believe and act upon appearances, and, if he or appellant is to suffer, it should be the latter, through whose neglect the respondent was misled. Hill v. Sewald, 53 Pa. St. 271, was a case where Hill brought trover against Sewald for the value of two boilers and appurtenances. Sewald had conveyed a piece of land to one Snodgrass on which was a steam mill, and took from him a mortgage to secure part of the purchase money. The boilers having worn out, Snodgrass made an agreement with Hill, the plaintiff, by which Snodgrass hired two boilers at a stipulated rental per month, and placed them in the mill, reserving the right to remove them whenever he desired to do so. Four years after the boilers were placed in the mill Sewald purchased the premises at foreclosure sale. Hill gave notice at the sale of his claim to the boilers, and after the sale demanded their return, which was refused. The question was whether the boilers had, in legal contemplation, as they had in fact, been incorporated into the realty and passed to the purchaser. The court said: "It is not the character of the physical connection with the realty which constitutes the criterion of annexation, as the authorities hereinafter abundantly show. * * * When these boilers and their connections were built into the mill of Snodgrass it is clear it was with no intention on his part, or those who acted for him, to affix them to the realty as his property, or with an intention to make them his own by a wrongful conversion. They were placed there as the personal chattels of Hill, under a valid contract of hiring for their temporary use, the right of removal being expressly reserved. How, then, can it be said that a chattel is converted into realty, when it was neither the intention of the owner of the chattel nor that of the owner of the freehold to annex it?" In Stell v. Paschal, 41 Tex. 640, mortgages had been given upon a "steam mill, cotton gin and press, * * * and in all other machinery and improvements that may be hereafter placed therein or attached thereto." A press had been temporarily put upon the mortgaged premises, for exhibition as a sample press, to enable one Smith, who put it up, to sell the patent rights as agent of said press. Afterwards it was purchased by Douglass, one of the mortgagors. The court held that if the press had been placed on the premises for the purpose of supplying such as had been worn out or destroyed, or to enlarge the business, it came within the terms of the instruments, and the lien attached. "But if it was not placed on said premises by the mortgagors, but by some other person, who was the owner of it, and it was not done for the purpose of or in connection with the business carried on by them on said premises, but merely to exhibit such press to the public, and to test its utility, this undoubtedly did not subject it to the mortgage. And though it was afterwards purchased by Douglass, one of the mortgagors, if it was not bought with the intent of and was not in fact applied in any way to the uses and purposes of the business, but remained thereon solely as a place of deposit and safe-keeping, then it is equally clear it did not thereby come within the terms and stipulations of the contracts by virtue of which appellant asserts a lien upon it." The case of Hendy v. Dinkerhoff, supra, clearly recognizes the principle that it is the intention of the parties which determines whether personalty is to retain its character as such. See, also, Fratt v. Whittier, 58 Cal. 126; Lavenson v. Soap Co., 80 Cal. 245, 22 Pac. 184; Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750; 1 Jones, Mortg. § 429.

The general rule is, as to sales upon execution, that the purchaser acquires thereby only such title and interest as the judgment debtor had, and the rule is the same whether the sale follows the lien of attachment or is upon execution without such lien; and the rule also applies at sales under foreclosure of mortgages upon real estate,—the purchaser ordinarily takes the risk of title. Boggs v. Fowler, 16 Cal. 559. We cannot see in what way the sale upon foreclosure of a mechanic's lien can be said to carry any greater interest than the owner of the property had at the time the lien attached, whatever may be the rule as to a bona fide purchaser or mortgagee of the land without notice. In the case before us the owner of the mine never had any interest in the personal property, and he acquired no interest in it, as against appellant, by its being affixed to the realty (Hendy v. Dinkerhoff, supra); and appellant's lessees expressly reserved the right to remove this machinery. It must result that respondent secured no lien upon this personal property by virtue of the statute, for he could only have a lien upon the property of the owner of the mine. Any other view of the matter would, we think, greatly retard development, especially of mining property, where it often becomes necessary for the owner or his lessee to borrow or hire the use of machinery, which, for the time being, in order to utilize it, must be affixed to the realty. No one would have the temerity to loan or hire machinery to another person for such purposes if he had to take the risk of losing his property through the liens of laborers or material men working in, or supplying material to, the mine. The courts find no difficulty in upholding the rights of a vendor under a conditional sale of personal property as against the creditors of the vendee, for the reason that the title remains in the vendor; and we can see no reason why the rule should not be the same where the owner of the personal property hires or leases it. The fallacy of respondent's position is in assuming that the situation of the personal property in its relation to the realty is the sole criterion by which to judge of its character; whereas, "the intention with which an article of personal property is attached to the realty, whether for temporary or permanent improvement, has, within certain limits, quite as much to do with the determination of the question whether it has thereby become a permanent fixture as has the way and manner in which it is attached." 1 Jones, Mortg. § 429, supra. In contemplation of law, the character of the machinery belonging to appellant did not change its character as personal property by the use to which the lessees put it, and it was error to include it in plaintiff's liens. The judgment should be modified by excluding this machinery from its operation, and otherwise the judgment should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by excluding the engine and machinery claimed by appellant from its operation, and otherwise the judgment is affirmed.

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126 Cal. 527

REID et ux. v. ENGLEHART-DAVIDSON MERCANTILE CO. et al. (L. A. 706.)

(Supreme Court of California. Nov. 1, 1899.)

HOMESTEAD—DECLARATION OF CLAIMANT—REQUISITES OF.

1. The right of a claimant to select a homestead under Civ. Code, tit. 5, § 1237 et seq., providing for the reservation of homesteads to be exempt from execution at forced sale, must appear upon the face of his declaration, and the omission to show such right cannot be supplied by extraneous evidence.

2. A declaration claiming homestead allowed to head of family, which does not state, in express terms, that the claimant is the head of a family, as required by Civ. Code, § 1263, is void.

3. The use of the pronoun "he" in the certificate of acknowledgment attached to a declaration claiming a homestead merely shows that the declarant is a male person, and is insufficient to show that he is head of a family.

McFarland, J., dissenting.

In bank. Appeal from superior court, San Bernardino county.

Suit to quite title by R. M. Reid and wife against the Englehart-Davidson Mercantile Company, a corporation, and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Leonard & Morris, E. R. Annable, and T. P. Archer, for appellants. Otis & Gregg, for respondents.

HARRISON, J. Suit to quiet title. July 12, 1897, the respondent R. M. Reid filed for record with the county recorder for the county of San Bernardino a declaration of homestead upon certain real property, and on October 1, 1898, filed another declaration of homestead upon the same property. The Englehart-Davidson Mercantile Company, one of the appellants herein, recovered a judgment in the justice's court for the township of Redlands against the said respondent, and an abstract of this judgment was filed in the office of the county recorder September 28, 1898. November 2, 1898, the interest which R. M. Reid had in the above-named real property was sold by the sheriff under an execution issued upon this judgment on October 5th, and the certificate of sale issued thereon was transferred to this appellant. October 13, 1897, a judgment was entered and docketed in the superior court of said county against Reid and in favor of one Archer, for the sum of $375, together with interest and costs, and was afterwards assigned by Archer to the other appellants herein. November 17, 1898, Reid and wife brought the present action to quiet their title to said property. Judgment was rendered in their favor, and the present appeal is from this judgment.

The sole question involved upon the appeal is the sufficiency of the selection of homestead in July, 1897. The declaration is as follows: "I hereby declare that I am married, and that I do now actually reside, with my family, on that certain land and premises situate in the city of Redlands, county of San Bernardino, state of California, bounded and described as follows, to wit [giving description]. I claim said premises as a homestead. The actual cash value of said premises I estimate to be three thousand dollars. Dated this 12th day of July, A. D. 1897. R. M. Reid." Section 1237, Civ. Code, defines the homestead to be the dwelling house in which the claimant resides, and the land on which the same is situated, "selected as in this title provided." It is only a homestead "selected" in accordance with the requirements of the statute that is exempt from execution at forced sale. Section 1260 provides that homesteads of not exceeding $5,000 in value may be selected and claimed by any "head of a family," and to the extent of $1,000 in value by any other person. By section 1262 a homestead can be "selected" only by "a declaration of homestead," which must be executed and acknowledged in the same manner as a grant of real property is acknowledged, and filed for record; and by section 1263 this declaration of homestead "must contain," in addition to other statements, "a statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." There is no statement in the above declaration that R. M. Reid is the "head of a family," nor are there any facts stated therein showing that the declaration was made by the "head of a family." Although it is stated that the claimant is married, it does not appear whether the person who made this statement is husband or wife, and the words "I am married" could with equal propriety have been used by either husband or wife. If "R. M. Reid" be the wife, the declaration is defective in not showing that her husband had not previously made a declaration. Booth v. Galt, 58 Cal. 254. If that be the name of the husband, the declaration is defective in not "showing" that he is the head of a family. The name appears only in the signature to the declaration, and it cannot be assumed that it is the name of the husband, or even of a male person; nor can any argument be drawn therefrom that the person by whom it was made was the "head of a family." The right of the claimant to select a homestead, and impress upon it an exemption from forced sale, must appear upon the face of the declaration, and its omission can no more be supplied by extraneous evidence than can an omission to state the value of the property claimed. The legislature has prescribed certain formalities and conditions which are essential to the "selection" of a homestead, and these formalities and conditions cannot be disregarded by courts. When a selection is made by virtue of the claimant being the "head of a family," that fact is as necessary to be shown in the declaration as is the fact of occupancy or of value. We are not at liberty to disregard one of these requisites any more than another. If either is wanting, the declaration is unavailing to create the exemption. See Ashley v. Olmstead, 54 Cal. 616.

It is urged by the respondents that this defect in the declaration is obviated by the certificate of acknowledgment which is annexed thereto. The certificate is as follows: "State of California, County of San Bernardino—ss.: On this twelfth day of July, in the year one thousand eight hundred and ninety-seven, before me, Charles E. Truesdell, a notary public in and for the county of San Bernardino, state of California, personally appeared R. M. Reid, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same. Witness my hand and seal. Charles E. Truesdell, Notary Public," etc. It is claimed that from the use therein of the masculine pronoun "he" it must be assumed that the declaration was made by a male person, and that such person was the husband, and therefore the head of a family. The acknowledgment is, however, not a part of the declaration, but it is to be made after the declaration is completed; and the certificate of acknowledgment is not made by the claimant, but is only the statement of the officer before whom the acknowledgment was made. Moreover, as was said in Berniaud v. Beecher, 71 Cal. 42, 11 Pac. 802: "The use of the pronoun 'he' in the note, mortgage, and certificate of sale can have little, if any, greater effect than to raise a suspicion that the person referred to was a male and not a female." The declaration of October, 1898, created no rights in the plaintiffs as against the claims of defendants, for the reason that at that date the defendants had existing liens upon the property. Civ. Code, § 1241 (1). The judgment is reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; GAROUTTE, J.; TEMPLE, J.

I dissent: McFARLAND, J.

McDONALD v. PETERS et al. (S. F. 904.)

(Supreme Court of California. Sept. 20, 1899.)

In bank. On rehearing. Affirmed.

For opinion in department, see 55 Pac. 1099.

PER CURIAM. Upon the authority of Ede v. Cuneo (S. F. 905; recently decided) 58 Pac. 538, the judgment appealed from is affirmed.

MEMORANDUM DECISIONS.

CITY AND COUNTY OF SAN FRANCISCO v. DUNHAM. (S. F. 1,295.) (Supreme Court of California. Aug. 7, 1899.) Department 2. Appeal from superior court, city and county of San Francisco. Action to quiet title by John H. Dunham against the city and county of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed. W. B. Sharp, for appellant. H. T. Cresswell, for respondent.

PER CURIAM. The question for decision in this case is the same as in City and County of San Francisco v. Sharp (S. F. 1,208) 58 Pac. 173, and, for the reasons stated in the opinion this day filed in that case, the judgment here appealed from is affirmed.

CITY AND COUNTY OF SAN FRANCISCO v. SHARP et al. (S. F. 1,734.) (Supreme Court of California. Aug. 7, 1899.) Department 2. Appeal from superior court, city and county of San Francisco. Action to quiet title by Eliza M. Sharp and others against the city and county of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed. E. G. Knapp, for appellant. Jas. L. Gallagher and H. T. Cresswell, for respondent.

PER CURIAM. The same question is involved in this case as in City and County of San Francisco v. Sharp (S. F. 1,208) 58 Pac. 173. For the reasons stated in the decision of that case, this day filed, the judgment here appealed from is affirmed.

CURTIN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 2,040.) (Supreme Court of California. Sept. 22, 1899.) In bank. Petition by D. A. Curtin against the superior court of the city and county of San Francisco and J. C. B. Hebbard, the judge of said court, for a writ of review to declare a judgment void. Granted. Cannon & Freeman, for petitioner.

PER CURIAM. The said D. A. Curtin, on the 4th day of August, 1899, having made application to this court for a writ of review to be issued to said respondent, desiring to have reviewed and declared void a certain judgment rendered by said court on the 29th day of July, 1899, which said judgment is particularly described in said petition, and was in an action pending in court on appeal from the justice's court of San Francisco, wherein said Curtin was plaintiff and Marie Cassou and Joseph Cassou were defendants; and whereas, in said petition for the writ of review, said Curtin set out at large what he claimed to be the record which he desired to have certified to this court for review; and whereas, the respondent now appearing in this court assents to said statement as true; and whereas, it appears therefrom that said judgment is void because said court had no jurisdiction or power to render said judgment, and respondent assenting thereto, it is therefore considered and decreed that said judgment be, and the same is, set aside, vacated, and declared void, and the said court is directed to proceed to hear and determine said appeal as though no such judgment had been entered.

HARVEY v. QUEVAS et al. (L. A. 489.) (Supreme Court of California. Oct. 4, 1899.) In bank. Action by J. Downey Harvey against Jose Quevas and others. From a judgment for plaintiff, defendants appeal. Affirmed.

PER CURIAM. This case and Harvey v. Barker (L. A. 490; just decided) 58 Pac. 692, involve similar propositions, and were argued and submitted together. Upon the authority of that case the judgment herein is affirmed.

126 Cal. 197

SHEEHAN v. SULLIVAN et al. (S. F. 918.) (Supreme Court of California. Sept. 23, 1899.) In bank. Action by Ellen Sheehan against Margaret Sullivan and others. From a judgment for plaintiff, and from an order denying a new trial, defendant Margaret Sullivan appeals separately. Reversed.

PER CURIAM. This is the appeal of defendant Margaret Sullivan on a transcript identical with the transcript in S. F. 917. She appealed separately from the other defendants. Precisely the same questions arise in both appeals. Upon the authority of the decision in S. F. 917 (this day filed) 58 Pac. 543, the judgment and order are reversed.

SOUTHERN PAC. R. CO. v. BELL. (S. F. 1,720.) (Supreme Court of California. Aug. 2, 1899.) In bank. Appeal from superior court, Fresno county. Action by the Southern Pacific Railroad Company against Isaac T. Bell. Judgment for defendant, and plaintiff appeals. Affirmed. Wm. Singer, Jr., and H. V. Reardon, for appellant. W. B. Wallace, for respondent.

PER CURIAM. On the authority of Railroad Co. v. Wood (Cal.) 57 Pac. 388, the judgment in this case is affirmed.

WILLIAMS et al. v. CASEBEER. (L. A. 514.) (Supreme Court of California. Sept. 14, 1899.) Department 2. Appeal from superior court, Santa Barbara county. Action by Kate Sonoma Williams and her husband, Isaac B. Williams, against J. W. Casebeer, for malicious prosecution. From a judgment in favor of plaintiffs, defendant appeals. Affirmed. B. F. Thomas and J. W. Taggart, for appellant. S. E. Crew and Wm. J. Hunsaker, for respondents.

PER CURIAM. For the reasons given in the opinion filed this day in L. A. 611 (same title; 58 Pac. 380), the judgment is affirmed.

CALIFORNIA REPORTER

59 PACIFIC REPORTER

(126 Cal. 536)

SUSSMAN v. COUNTY OF SAN LUIS OBISPO et al. (L. A. 533.)[1]

(Supreme Court of California. Nov. 6, 1899.)

QUIETING TITLE—DEED—ADMISSIBILITY—DEDICATION BY CORPORATION—NECESSITY OF FORMAL ACT OF DEDICATION PASSED BY CORPORATION — FACTS AND DECLARATIONS SHOWING DEDICATION—PREJUDICIAL FINDING.

1. In an action against a county to quiet plaintiff's title to a certain road and bridge thereon, a deed conveying to said county a strip of land leading up to plaintiff's line at a point in said bridge, so that the end of the bridge rests on the right of way so conveyed to the county, is not inadmissible on the ground that the grantor in said deed had agreed to see that plaintiff's predecessor got a deed for that part of the road, where there is no showing that such grantor ever carried out his agreement with plaintiff's predecessor, or that he was bound to carry it out, or that there was any legal impediment in the way of his conveying to the county.

2. As a dedication is a conclusion of fact to be drawn from the circumstances of each case,

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[1] Rehearing denied December 6, 1899.

a corporation as well as an individual may be bound by its acts so as to be estopped from disputing or denying the fact of dedication, and no formal act of dedication passed by its proper officers is necessary.

3. Where a corporation told purchasers of its lots in a certain town and others that it would construct a bridge and open a public highway, and then subsequently constructed the bridge and opened the road, the court is justified in finding that there was a dedication of such bridge and road.

4. Where, in an action against a county to quiet plaintiff's title to a certain road and bridge thereon, there is a correct finding that there was a dedication of said road and bridge, a further finding in favor of defendant on the plea of the statute of limitations is not prejudicial to plaintiff, as it may be rejected as surplusage, and still the judgment is supported by the finding of dedication.

Department 1. Appeal from superior court, San Luis Obispo county.

Action by Samuel Sussman against the county of San Luis Obispo and others to quiet title to a certain road and bridge resting thereon. From a judgment in favor of defendants, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

G. W. Kemp and Graves & Graves, for appellant. F. A. Dorn, for respondents.

VAN DYKE, J. Plaintiff brings this action against the defendants to quiet his title to a certain wagon road and bridge resting thereon. Defendants county of San Luis Obispo and board of supervisors of said county in their answer deny the material allegations in the complaint, and set up as a defense the dedication by the plaintiff and his predecessors in interest of said road and bridge to the public as a public road, thoroughfare, and highway, and also plead the statute of limitations. The supervisors, as individuals, disclaim any interest in said property. Upon the issues thus raised the court found in favor of the defendant upon the question of dedication and the plea of the statute of limitations, and ordered judgment accordingly. This appeal is from the judgment and order denying plaintiff's motion for a new trial.

The Eureka Improvement Company, predecessor of plaintiff, then the owner of the Eureka rancho, in December, 1888, had said rancho surveyed, and a map thereof made and filed. A portion of said rancho, as surveyed, was laid out into lots and blocks, and called the "Town of Vasa." This map, so filed by said company, is called the "original map," and was introduced in evidence by plaintiff. Said map, or the portion thereof showing the town of Vasa, was lithographed on a large scale, with the streets of said town, including the road and bridge in controversy, delineated thereon as an open thoroughfare connecting the Templeton and Vasa road on the easterly side of the Salinas river with the Templeton and Santa Margarita road on the westerly side of said river, and leading to and past the railroad depot. This map was recorded in the office of the county recorder of San Luis Obispo county at the request of Briggs, Ferguson & Co., the agents of said Eureka Improvement Company, on the 4th day of November, 1889. The Eureka Improvement Company and Briggs, Ferguson & Co., its agents, in September, 1888, brought a great number of people to the town of Vasa by excursions for the purpose of selling lands and town lots. Lands were then sold to buyers by the Eureka Improvement Company, and representations were made publicly to said buyers and to prospective purchasers that the proposed bridge and road across the Salinas river connecting the Eureka Improvement Company's lands with the road across the river would be of a public character, and for the benefit of the public. Among the parties that made such representations were several directors and officers of said company, and in November, 1889, another excursion was run by said companies for the purpose of bringing buyers of property to the town of Vasa and the Rancho Eureka, at which time an auction sale of lots was had, there being present of the Eureka Company the president, secretary, and treasurer, and the president of Briggs, Ferguson & Co. At this time representations were made by said officers to the people gathered at said auction that said bridge and road were built for the benefit of the public. It is true that some of the officers of said company on the trial denied that any statements of the kind were made, but, there having been a conflict in the evidence upon this point, it is to be presumed that credit was given to the statements of the witnesses on behalf of defendant by the trial court, and under the well-established rule the findings will not be disturbed. There is further evidence going to show the intention and offer to dedicate on the part of the Eureka Improvement Company by said company placing signs at each end of the road stating that said road was open to the Eureka rancho and town of Vasa. The testimony quite clearly shows that the bridge and road in question were thrown open to public travel and used as a public highway by the public with the knowledge and acquiescence of the plaintiff's predecessors in interest, and continued to be so used for more than five years without objection on the part of the owner. In September, 1894, James T. Murphy conveyed by deed to the county of San Luis Obispo a strip of land on the west side of the river for a public highway, said strip leading up to the plaintiff's line at a point in the bridge. The west end of the bridge rests on this land or right of way so conveyed by Murphy to the defendant county. The plaintiff objected to the admission of this deed in evidence, on the ground, as claimed, that Murphy had agreed to see that the Eureka Improvement Company got a deed for that part of the road, but there is no showing that Murphy ever carried out his agreement with said company, or that he was bound to carry it out, or that there was any legal impediment in the way of his conveying to the county. The court therefore did not err in admitting the deed.

On the petition of parties along the line of road in question, the supervisors formally accepted the road as a public highway and thoroughfare in 1895. The contention on the part of the appellant that the Eureka Improvement Company could only be bound by a formal act of dedication passed by its board of directors and entered on its minutes is untenable. Dedication is a conclusion of fact to be drawn from the circumstances of each case, and a corporation, as well as an individual, may be bound by its acts so as to estop it from disputing or denying the fact of dedication. In Smith v. City of San Luis Obispo, 95 Cal. 470, 30 Pac. 593, it is said: "We think the use of the street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action of the municipal authorities either by resolution or by repair or improvements. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large." In People v. Railroad Co., 98 Cal. 670, 33 Pac. 729, the court say: "Upon the issue whether the road that it constructed was intended to be a private or public road evidence that at the time it purchased the land declarations were made on its behalf that it intended to construct a public highway would be relevant and pertinent. If such an agreement had been made, there would be an inference that its subsequent act in constructing the road was in pursuance thereof, and would corroborate the testimony of those who declared that at the time of its construction it was intended for a public highway." In this case it was shown that the Eureka Company, by itself and agents, held out to the purchasers of lots in the town of Vasa and others that it would construct a bridge and open a public highway across the same, leading to said town. The bridge was subsequently constructed, and the road opened. These facts, in connection with said declarations, would justify the court in finding that the dedication was made. Common-law dedications are, for convenience of description, frequently divided by law writers into two classes,—express dedications and implied dedications. The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner, while in the latter it is shown by such acts and conduct, not directly manifesting the intention, but from which the law will imply the intent. If the donor's acts are such as indicate an intention to appropriate the land to public use, then, upon acceptance by the public, the dedication becomes complete. The authorities show that dedications have been established in every conceivable way in which the intention of the parties could have been manifested. People v. County of Marin, 103 Cal. 223, 37 Pac. 203; Elliott, Roads & S. 92; Abbott v. Water Co., 87 Cal. 328, 25 Pac. 693; Helm v. McClure, 107 Cal. 199, 40 Pac. 437.

We think the evidence on the question of dedication is sufficient to justify the finding of the trial court. The appellant contends, however, that there are inconsistent findings, in this: That the court finds dedication, and also finds in favor of the defendant on the plea of the statute of limitations, whereas dedication rests upon intention and consent of the owner, and the answer pleading the statute of limitations alleges that the road has been used and occupied for over five years by the public adversely to the plaintiff and to all others. Prescription or adverse possession, however, was based in theory upon an assumed grant beyond legal memory, and which had been lost, and this law of limitation was to furnish the defendant with a defense in lieu of said original grant, which it was supposed he could not produce. However, this finding, if the other be correct, cannot prejudice the plaintiff, and, if rejected as unnecessary or surplusage, still the judgment in favor of the defendant would be supported by the finding of dedication. We see no errors in the transcript which would justify a reversal. Judgment and order denying a new trial affirmed.

I concur: HARRISON, J.

BEATTY, C. J. I concur in the judgment. In my opinion, there is no inconsistency between the findings of dedication and of a prescriptive right in the public, and I think the evidence fully sustains the latter finding.

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126 Cal. 546

CONDEE v. GYGER et al. (L. A. 471.)

(Supreme Court of California. Nov. 6, 1899.)

NEW TRIAL—GROUND—APPEAL—CONFLICTING EVIDENCE—DUTY OF TRIAL COURT.

1. Where an order granting a new trial is silent as to the ground on which it was made, and the record shows the existence of a valid ground, the supreme court will, on appeal, presume that the order was made on that ground.

2. Where, after making a finding of facts in favor of plaintiff on conflicting evidence, the court made an order for a new trial, it will be presumed that the judge changed his mind as to the effect of the evidence, and the order granting a new trial will be affirmed.

Department 2. Appeal from superior court, Riverside county.

Action by A. J. Condee, as assignee, against C. E. Gyger and others. There was a finding in favor of plaintiff, and defendants moved for a new trial. From an order granting the motion, plaintiff appealed. Affirmed.

Caldwell & Duncan, for appellant. John T. Crowe and John G. North, for respondents.

PER CURIAM. This is an appeal by plaintiff from an order granting defendants' motion for a new trial. The motion was upon the grounds of newly-discovered evidence and the other statutory grounds. At the hearing the court made the following minute order: "The motion heretofore made for a new trial of this cause is this day granted by the court."

Appellant contends that as the court assigns no reason for its order, and as the court must have given careful consideration to all the facts at the trial, the motion presumably was granted alone on the affidavits showing newly-discovered evidence. No such presumption can be indulged. It must rather be presumed that the court reconsidered and passed upon the sufficiency of all the evidence in the case in granting the motion, for it was its duty to do so; and in this appeal, the court having granted a new trial, "the presumption is against the findings, and not in their favor." Hass v. Association, 118 Cal. 6, 49 Pac. 1056. Where the order granting the new trial is silent as to the ground on which it was made, and the record shows the existence of a valid ground, this court will presume that the order was made upon that ground. Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806. It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court (Id.); and he is not bound by the rule as to conflicting evidence, as is this court (Id., and cases cited; Bjorman v. Redwood Co., 92 Cal. 500, 28 Pac. 591).

The action is by the assignee in insolvency of one J. W. Nance, upon a promissory note which the court found was executed by defendant for the sum of $5,000 to Los Angeles National Bank, on which Nance made the following indorsement: "I guaranty the payment of this note at maturity, and waive demand, presentment for payment, protest, and notice of protest." The note became due February 25, 1892, and the court found that on April 11, 1892, Nance paid the bank $5,150.27, the balance then due, principal and interest, and the bank surrendered the note to Nance, who was its owner when he became insolvent; that defendants deposited with the bank, at the execution of the note, certain 11 bonds of the Perris Irrigation District, of the par value of $500 each, as collateral security, which were delivered to Nance with the note, and that on March 30, 1893, he sold the bonds for the highest market value, to wit, for $4,125; that except $165 paid to the bank on account of interest, by the irrigation district, no payments were made on said note by defendants, and that there was due at the date of the judgment from defendants the sum of $1,899.37 upon said note, and the further sum of $189.93 as attorney's fees provided for therein. Judgment was accordingly entered for plaintiff. The defense to the action was that the note was signed by defendants at the instance of Nance, and upon an express agreement that they were to be held harmless from the obligation thereof. They denied that they either delivered the note or the bonds to the bank, and alleged that they received no part of the borrowed money; that Nance obtained the money himself for the benefit of the said irrigation district, of which he was president and general manager, and that the bonds were part of a lot of bonds which he had purchased from the district or had agreed to purchase, and were his when pledged and when sold by him; also that when Nance paid the note and received back the bonds the note was canceled and marked "Paid" by the bank, and the transaction was at an end, and the note became functus officio. Defendants also pleaded the statute of limitations. The complaint was filed February 24, 1896, nearly four years after Nance paid the note, and nearly three years after he sold the bonds.

The evidence is conflicting upon the principal question of fact,—whether the note was in fact made at the instance of Nance, and to raise money for the irrigation district, and that he agreed himself to pay the note, and hold defendants harmless by reason of their having signed it. There is evidence tending to show this to be the fact, and, had the court found for defendants, we think the evidence would have justified such finding. In support of the order, we must presume that the court changed its opinion as to the effect of the evidence, and reached a conclusion, upon the hearing of the motion, favorable to defendants' contention. Upon this assumption the court was justified in granting the motion; indeed, it was its plain duty to do so. In this view of the matter, it becomes unnecessary to enter upon a discussion of the many interesting questions presented by counsel. They may not arise at the second trial, and some of them cannot arise should the defendants prevail. The order is affirmed, and the cause remanded.

126 Cal. 576

McGUIRE et al. v. LYNCH. (Sac. 524.)

(Supreme Court of California. Nov. 6, 1899.)

COURTS—DEEDS—EFFECT—MORTGAGES — POSSESSION BY MORTGAGEE—EJECTMENT—ADVERSE POSSESSION—LIMITATIONS—ESTATES —SETTLEMENT — WIDOW'S AND CHILDREN'S RIGHTS.

1. A court may determine whether a deed is a mortgage, so far as such determination is material to the issues, though the grantor be not a party.

2. Where a mortgagee goes into possession under a permission to pay his debt from the rents, the possession is not adverse, and limitations do not run.

3. Code Civ. Proc. § 1469, required the court to assign, for the "use of the widow and minor children," the whole of a decedent's estate, if it was less than $1,500. Section 1468, in the same chapter, provides that, when property is set apart to the use of the family under provisions of the chapter, one-half shall belong to the surviving spouse, and the remainder in equal shares to the children. *Held* that, where property is assigned under section 1469, the children take an undivided one-half.

4. Where, in ejectment, defendant is found to be a mere trespasser, plaintiffs are entitled to possession of the entire property, though they own only an undivided one-half.

5. They are entitled, however, to only one-half the rents and profits accruing during the detention; defendant being liable for the remaining half to the owner of the other undivided one-half of the estate.

Department 2. Appeal from superior court, Solano county.

Ejectment by Annie McGuire and others against P. C. Lynch. From a judgment for plaintiffs, defendant appeals. Modified.

H. H. McPike, for appellant. Frank R. Devlin, for respondents.

TEMPLE, J. Annie McGuire and four of her children sue in ejectment to recover the demanded premises, with damages for withholding the same. A demurrer was sustained to the complaint of Annie McGuire, and she failed to amend, but the suit was continued by the other plaintiffs. Defendant denied all the material allegations of the complaint, and pleads the statute of limitations.

The court finds, in substance, that in 1880 the property belonged to one Patrick McGuire, who was the father of the plaintiffs and the husband of the said Annie McGuire. He died in that year intestate, and the probate court duly set aside and assigned all the property of the estate to the widow and minor children for their support, under section 1469, Code Civ. Proc. That section then provided that if the value of the estate be found to be less than $1,500 the court shall assign, for the use and support of the minor children, the whole estate, after certain payments, and there shall be no further proceedings in the administration unless further estate be found. It was further found that, on the 16th day of April, Annie McGuire executed and delivered to defendant an instrument in writing, purporting to be a deed, but in fact a mortgage, which has never been foreclosed. On the 28th day of September, 1890, defendant ousted plaintiffs, and has since unlawfully withheld said premises from plaintiffs. The value of the use and occupation is found to be $780, for which amount judgment was rendered, after deducting $249 for the care and preservation of the property and for taxes. Whether there was error in making the deductions is not a question here, for the plaintiffs have not appealed.

In effect, although not expressly, the court finds that the defendant is a naked trespasser, without right or title to any extent in the demanded premises. The evidence was ample to support the finding that the deed to Lynch was a mortgage. It is contended that the court had no jurisdiction to determine that the deed from Mrs. McGuire was a mortgage, rather than a conveyance, because Mrs. McGuire had ceased to be a party to the action. If the question was material to the issues made between plaintiffs and defendant, so far the court was bound to determine the matter. As to the statute of limitations, the court did not find that issue in favor of defendant, nor did the court find that the right of Annie McGuire was barred by defendant's adverse possession. Nor, indeed, does the evidence show that her right was barred by the statute. She testified that when defendant demanded possession of the premises she told him she would give him possession, that he might pay the debt due him from the rents. That being so, his possession was not adverse, and the statute did not begin to run.

The bill of exceptions is a mere skeleton statement. Many documents are referred to as introduced, and it is said, "Here insert plaintiffs' exhibit," etc., but the documents do not appear in the bill of exceptions. We can only conclude, therefore, that they are exactly as stated in the findings. It is found that the whole of the estate of Patrick McGuire was by the probate court "assigned to said widow and minor children for their use and support, and declared to be the property of said widow and minor children under and by virtue of the provisions of section 1469 of the Code of Civil Procedure of California." That section, as it then read, does not expressly state to whom the estate shall be assigned, but simply that it shall be assigned for the use and support of the widow and minor children. The preceding section, however, which is in the same chapter, provides that "when property is set apart to the use of the family under the provisions of this chapter, * * * if the decedent also left a minor child, or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children if there be more than one." In the absence of special provision in section 1469, this must control.

The children, therefore, were properly held to be entitled to an undivided one-half of the demanded property. The deed to defendant, being a mortgage, conveyed to defendant no interest in the property and no right of possession. Annie McGuire testified, in substance, that defendant was in possession as her tenant, but defendant denied this, and claimed to hold adversely. If he had admitted the tenancy, plaintiffs could only have recovered an undivided one-half. But the court found, according to his own testimony, that he was a mere trespasser. Plaintiffs, therefore, properly recovered possession of the entire property.

I see no plausibility, however, in the theory adopted by the court as to the rents. The widow was the owner of an undivided one-half, and was entitled to the use of one-half for her support. Indeed, there is much more force in the contention that, being bound for the support of her minor children, she can claim all of it, than that the children can do so. The defendant is still liable to a suit by her for her portion. The cause is therefore remanded, with directions to the superior court to modify the judgment by deducting one-half of the sum recovered for rents and profits, and as modified the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

126 Cal. 579

COMPTON, Road Com'r, v. CARR et al.

(L. A. 557.)

(Supreme Court of California. Nov. 7, 1899.)

CONTRADICTORY FINDINGS.

In an action under Pol. Code, §§ 2731, 2734, for the obstruction of a highway, the court found that a strip of land 66 feet in width, and of a certain length, as described in the complaint, was a public highway, that said strip was dedicated to the public as a public highway by a certain person, that said highway was of the uniform width of 40 feet, and that defendants obstructed said road as charged. The court failed to locate the 40-foot strip within the 66-foot strip. *Held*, that the findings were too contradictory to support a judgment.

Department 1. Appeal from superior court, Riverside county.

Action by Ambrose Compton, road commissioner, against W. W. Carr and others, for the obstruction of a highway. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Rolfe & Rolfe, for appellants. L. Gill, for respondent.

VAN DYKE, J. The plaintiff, as one of the supervisors of Riverside county, and road commissioner of his supervisorial district, brought this action against the defendants for the obstruction of an alleged public highway within his road district. The action is brought under the provisions of the Political Code: "If any highway duly laid out or erected is encroached upon by fences, buildings or otherwise, the road overseer of the district may, orally or in writing, require the encroachment to be removed from the highway." Section 2731. "If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment refuses to remove or permit the removal thereof, the road overseer must commence, in the proper court, an action to abate the same as a nuisance; and if he recovers judgment he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after notice, also costs in said action." Section 2734. Defendants in their answer did not deny the encroachment,—that is, erecting the fence alleged to be on the highway,—but denied that the alleged highway was a public highway, or ever dedicated as such. The complaint, as amended, described by courses and distances a strip 33 feet wide on each side of the common line dividing lots 2 and 3 in the Arthur Parks tract in West Riverside (the said strip being, in all, 1 chain, or 66 feet, in width, by 22.68 chains in length), and alleges that this strip is, and for many years has been, a duly laid out, constructed, and established public highway. The court finds that the said strip (giving the same description as in the complaint) is and has been a public highway, and has been used as such without interruption for about 15 years, and has been practically the principal road in a northerly and southerly direction in the locality in which said road is situated, during all of said time; "that said strip of land was dedicated to the public as a public highway by one Arthur Parks, Sr., many years ago, who at the time of said dedication was the owner of the tract of land through which said road passes; that said highway is of the uniform width of forty feet." The court further finds that the defendants obstructed said road as charged, and, as a conclusion of law, that the plaintiff is entitled to a judgment to have the obstruction removed, and for costs. The judgment entered upon the findings, after the preliminary recitals, reads: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the plaintiff, Ambrose Compton, as road commissioner of the First supervisorial road district of the county of Riverside, do have and recover judgment as follows: First. That that certain highway in the county of Riverside described as follows is, and for many years has been, a public highway. [Then follows the same description, by courses and distances, contained in the amended complaint and in the findings; being the strip 1 chain, or 66 feet, in width.] Second. That said highway is of the uniform width of forty (40) feet," and that the obstructions were placed across the same as charged, and that the same be removed, together with plaintiff's costs. Defendants moved for a new trial, which was denied, and this appeal is from the judgment, and from an order denying a new trial.

It is contended on behalf of the appellants: First, that the findings are contradictory and inconsistent with each other in material matters; second, that the evidence does not support the finding that there was or is a public highway.

The court found, as shown, that there was a public highway 1 chain, or 66 feet, in width; describing the same by metes and bounds. Owing to the nature of the testimony, or for some other reason, the court also finds that the dedicated road is only 40 feet wide; being the minimum width, fixed by law, of all public highways. Pol. Code, § 2620. The court, however, failed to locate the dedicated strip limited to 40 feet, and that remains, as it were, afloat. It may be located in the center of the wider strip (that is, 20 feet on each side of the line dividing the lots of the defendants), or all on one side of said exterior strip, to wit, 33 feet on one side of the dividing line and 7 feet on the other. It is quite impossible to reconcile these contradictory and conflicting findings so as to support the judgment, and for that reason, without considering the other point raised by the appellants, the cause will have to be remanded. The judgment and order denying a new trial are reversed.

We concur: BEATTY, C. J.; HARRISON, J.

(126 Cal. 531)

CALKINS et ux. v. EQUITABLE BUILDING & LOAN ASS'N OF THE UNITED STATES (YEOMANS, Intervener. L. A. 628).[1]

(Supreme Court of California. Nov. 2, 1899.)

GIFTS INTER VIVOS—CORPORATE STOCK—INDORSEMENT OF CERTIFICATES.

An indorsement transferring stock was made on the certificates, reserving dividends during the life of the donor. The certificates were placed in an envelope, and delivered to the donee, with instruction not to open it until the death of the donor, the intention being to make a gift. *Held*, that there was an executed gift, in the lifetime of the donor, of the stock, except the dividends reserved, within Civ. Code, § 324, making stock personalty, and providing for its transfer, by indorsement and delivery of the certificates, between the parties thereto.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Suit by F. G. Calkins and wife against the Equitable Building & Loan Association of the United States. Robert Yeomans, as executor of the will of Daniel Calkins, deceased, intervened. There was a decree for plaintiffs, and defendant and intervener appeal. Affirmed.

Flint & Barker, for appellants. F. M. Porter and J. W. Swanwick, for respondents.

GRAY, C. This action was brought for the purpose of obtaining the mandatory decree of the superior court directing the defendant corporation to transfer certain certificates of stock on its books, and issue new certificates to plaintiffs in place of those which the complaint alleges had been heretofore issued to one Daniel Calkins, and by him assigned to these plaintiffs. Daniel Calkins having died subsequently to the said assignment, Robert Yeomans intervened as the executor of the last will of said Daniel Calkins, and claimed that the said assignment was void, and that the said shares of stock were a part of the estate of said deceased. The plaintiffs had judgment in accordance with the prayer of their complaint, and from this judgment and an order denying a new trial the defendant and the intervener appealed. The cause was tried without a jury, and the court found on the question of the transfer as follows: "That the transfer of said stock from Daniel Calkins to plaintiffs was voluntarily made by said Daniel Calkins, upon the consideration of love and affection which said Daniel Calkins bore to them, and not otherwise; that said Daniel Calkins did not intend to make a testamentary disposition of said stock to plaintiffs; that said Daniel Calkins did intend to transfer and deliver the same to plaintiffs upon the 30th day of December, 1896; * * * that thereupon, upon said date, said Daniel Calkins delivered said certificates of stock to plaintiff F. G. Calkins; that said certificates have been in the possession of plaintiffs ever since said date in their own right, and not as custodians of the papers of said Daniel Calkins."

It is contended by appellants that the evidence does not support the findings, and that the findings do not sustain the judgment of the court. The only question presented in the briefs of counsel relates to the validity of the assignment of the said certificates of stock. The testimony of the plaintiff F. G. Calkins, as it appears in the transcript, is as follows: "I am one of the plaintiffs in the case, and a nephew of Daniel Calkins, deceased. On the 30th day of December, 1896, said Daniel Calkins called at my office, in the city of Los Angeles, and, stating to me that he thought a great deal of my wife and myself, and desired in some way to remember us, produced the two certificates of stock mentioned and described in the complaint of plaintiffs herein. He said that he desired to have the stock transferred to us in such a way as to enable him to retain the dividends thereon while he lived. As this condition in the transfer of stock was unusual, he suggested that I have the assignment drawn up by an attorney. Accordingly I took the certificates of stock which he handed me to the office of Mr. F. M. Porter, an attorney, and explained the matter to him, whereupon the following indorsement was written upon the certificates, and each of them, to wit: 'For value received, I hereby sell, assign, transfer, and set over to F. G. Calkins and Rosamond A. Calkins the shares of stock within mentioned, reserving to myself the dividends declared upon the same during my life, and authorize the secretary of said association to enter such transfer on the books of said association. Witness my hand and seal this 30th day of December, 1896.' I returned with the certificates of stock to my office, the assignment as indorsed on the certificates was read over to Daniel Calkins, and was satisfactory to him. (He had not accompanied me to the office of the attorney.) He thereupon signed his name to the said indorsement, and his signature was witnessed by the two witnesses whose names are indorsed on the certificates as witnesses. He then placed the certificates of stock in an envelope, and handed the same to me. I suggested it,—that we put it in an envelope. After handing the stock to me, he suggested that, if it was agreeable to us, he would like part of the money to go to give my son Fred an education, or something to that effect. He also said that he did not want his people to know that he made the gift. Thereupon, partly at his dictation, I wrote upon the envelope containing the stock the following indorsement: 'Los Angeles, Cal., Dec. 30, 1896. Dear Fred and Rose: In handing you this envelope I wish to make the following requests: That the envelope shall not be opened for one month after my death, and that you give to your son Fred one-third of the value therein, for his exclusive use. It is my desire that nobody but myself shall know the contents hereof.' He then signed his name to said writing. This envelope containing the stock was then left in my possession, and was by me placed in the safe in my office. Daniel Calkins had previously intrusted to me for safe-keeping certain valuable papers, which I kept in the same safe, but in a different compartment from that in which I placed the envelope containing the stock." On cross-examination the witness testified, in substance: "At the time the envelope was handed to me, and the indorsement written thereon, I did not notice that the envelope was unsealed. The day after the death of Daniel Calkins I noticed that fact, and thereupon sealed the envelope. This I did because Daniel Calkins really intended that it should be sealed, and I intended that it should. It was simply an oversight of mine that it was not sealed. It was agreed between us that it should be sealed. Within a week after the death of Daniel Calkins I opened the envelope, took the stock to the office of the Equitable Building and Loan Association, and asked to have it transferred on the books of the association to my name, and new certificates issued, which was refused. I never presented the stock for transfer during the lifetime of Daniel Calkins. There was no consideration paid for the stock. It was not a sale; it was a gift."

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[1] Rehearing denied December 2, 1899.

This testimony of plaintiff Calkins was corroborated in several particulars, and was not contradicted at all, and the court finds the several facts to which it relates in exact accord with said testimony. The question is, do the evidence and findings show a complete and executed gift of the stock in question by deceased, in his lifetime, to the plaintiffs? "A gift is a transfer of personal property, made voluntarily and without consideration." Civ. Code, § 1146. "Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by the signature of the proprietor, his agent, attorney or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer." Id. § 324. Everything necessary to a complete transfer of the stock, as between the parties, was found by the court to have been done by them in the lifetime of Daniel Calkins, and it is also found that these things were done with the intent to make a present transfer, and not with the intent to make a testamentary disposition. We think these findings are fully warranted by the evidence, and that the conclusion of the trial court that a valid transfer of the stock was effected is fully supported. Whether an actual gift and transfer of the stock was accomplished depended principally upon the intention of the alleged donor. The case of Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867, is similar, in the principles involved, as well as in the facts considered, to the case now under consideration. The decision in that case we regard as sound, and an examination of it we think will show that it disposes effectually of every point of importance contained in appellant's brief in this case, and that no judgment other than the one entered in this case could have been rendered herein consistently with that decision. The fact that the donor reserved to himself the right to the dividends during his life did not affect the validity of the gift. The gift and transfer of the stock were accomplished by the written assignment and delivery of the stock with the intention to make a gift thereof to plaintiffs. The donor thereby gave up to plaintiffs the title and control of the stock, and he could not thereafter revoke the gift. The donees became the owners of the stock, and might have conveyed it away to a third party in the lifetime of the donor, subject to the reservation contained in the written assignment. Of course, the donor did not give away or pass title to the dividends which he had expressly reserved, but every other interest and right in the certificates and in the stock represented thereby passed to the donees. The cases of Zeller v. Jordan, 105 Cal. 143, 38 Pac. 640, and Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931, and the other California cases relied on by appellant, differ materially as to their facts from the case now under consideration, and furnish no guide for this decision. We advise that the judgment and order be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(126 Cal. 509)

PEOPLE v. PIGGOTT. (Cr. 556.)[1]

(Supreme Court of California. Oct. 30, 1899.)

CRIMINAL LAW—LARCENY—EVIDENCE—RES GESTÆ—INSTRUCTIONS—REFUSAL OF REQUESTS.

1. Under a statute declaring that an indictment must be so framed that a person of common understanding may know what is intended, an indictment charging that accused stole money from H., being the money and property of H., sufficiently charges the ownership of the money to have been in him at the time of the larceny.

2. An allegation of ownership by recital instead of by positive declaration in an indictment

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[1] Rehearing denied November 29. 1899.

for larceny is sufficient to support a judgment of conviction.

3. Prosecuting witness was standing on the rear platform of a crowded car, when it was claimed that his pocket was picked of two purses, containing $30 and five $20 gold pieces, respectively. Such witness testified that he saw defendant's hand withdrawn from witness' pocket, and he thereupon grabbed him, and that he saw defendant pass some article to a co-defendant, whom he also grabbed. There was evidence that the co-defendant dropped the article passed to him on the car platform, where it was picked up, and found to be witness' $30 purse intact. On being searched, five $20 gold pieces were found concealed on defendant. *Held*, that the facts warranted a verdict of guilty.

4. Where prosecuting witness in a trial for larceny testified that, when defendant pulled his hand out of witness' pocket, he grabbed him, and, on seeing him pass something to a co-defendant, grabbed him also, and shouted to a friend, "They are robbing me," such statement was a part of the res gestæ, and hence admissible.

5. Where prosecuting witness, on being robbed, grabbed defendants, the testimony of a bystander to statements made by such prosecuting witness, while defendants were still in his grasp, was admissible, as spoken in the presence of defendants.

6. Where a purse claimed to have been stolen on a car was found on the car platform, it was admissible as part of the res gestæ in a prosecution for larceny.

7. Where it was shown that five $20 gold pieces were found in defendant's stockings a short time after the larceny, such coins were properly admitted in evidence, it appearing that coins of similar denomination and number had been stolen from prosecuting witness.

8. Where defendant testified that he had placed $100 in his stockings the morning of the larceny, and on cross-examination stated that he always carried his money there, it was not error for the prosecution in rebuttal to show that defendant was not in the habit of carrying money in his stockings, since defendant's evidence as to his habit of carrying money was material to the issue.

9. Where defendant testified that he had placed $100 in his stockings the morning of the larceny, and on cross-examination stated that he always carried his money there, testimony of police detectives that they had searched defendant many times, and had found money on his person but none in his stockings, though they had examined them, was proper in rebuttal, though by such evidence it incidentally appeared that defendant had been previously arrested.

10. Where defendant brought out, on cross-examination of witnesses, the fact that he had been previously arrested, the admission of other testimony, tending to show such arrests, was not prejudicial.

11. Where, in a prosecution for larceny, the state presented sufficient evidence to warrant the jury in rendering a verdict of guilty, it was not error to refuse defendant's request for an instruction that there was no evidence that defendant, and not another, either took or carried away money or other property from the person of the prosecuting witness, and without that evidence they could not find defendant guilty.

Department 1. Appeal from superior court, city and county of San Francisco.

John Piggott was convicted of grand larceny, and he appeals. Affirmed.

George D. Collins, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of grand larceny, and appeals from the judgment and order denying his motion for a new trial.

He insists the indictment is fatally defective. It alleges: "The said John Piggott and Cal Childs, on the 11th day of February, A. D. 1899, at the said city and county of San Francisco, did * * * steal, take, and carry away from the person and immediate possession of Gregoire Henrioulle one hundred and thirty dollars, gold coin of the United States, lawful money of the United States, * * * the same being the money and property of said Gregoire Henrioulle; and two money purses, of the value of fifty cents each in lawful money of the United States, said purses being the personal property of said Gregoire Henrioulle." It is now insisted that there is no allegation in the pleading alleging the money stolen to have been the property of Henrioulle at the time it was stolen. It will be observed that the indictment says, "being the money and property of said Gregoire Henrioulle." It is now claimed that the word "being" refers to the time of the filing of the indictment, and not to the time of the commission of the larceny, and therefore the allegation is that the money and property was the money and property of Henrioulle at the time of the filing of the indictment, and this would be the allegation of a fact of no materiality to the legal sufficiency of the pleading. Some ancient English authority is cited to support the contention here disclosed, but, even conceding the soundness of the reasoning upon which the conclusion is rested in those cases, still in this day, under the code procedure, we are satisfied such a holding would be sticking in the bark. Our statute says that the indictment must be so framed that a person of common understanding may know what is intended. While this pleading would have been better if the words "then and there" had been inserted before the word "being," still we are satisfied that their absence does not render it void. Any person, even of the commonest understanding, would know from the allegations here stated that he was charged with stealing the money and property of Henrioulle, and that it was Henrioulle's money and property at the time it was stolen. If he is charged with stealing Henrioulle's money and property, it certainly must have been his at the time it was stolen. This is the only reasonable and fair construction of the pleading. It is not possible that the defendant could have been misled by these allegations. He understood them perfectly well, and must have understood that it was Henrioulle's money and property that he was charged with having stolen. In the reports of this state we find many indictments and informations for larceny framed in this respect as the one at bar, and, while their legal sufficiency has been attacked upon many grounds, they have been upheld. The particular objection here presented possibly has never been raised, presumably, we think, because it has never been deemed of substantial merit. But, however that may be, we are convinced the defect in this pleading does not go to its substance, and therefore hold that the point made is not well taken.

The remaining objection to the indictment goes to the effect that the allegation of ownership is not made by positive declaration, but is a mere matter of recital. There is no great substance in this objection. Such style of pleading is not the best and is not favored. At the same time, it has been held sufficient by this court, and in various cases declared ample upon which to support a verdict and judgment.

The prosecuting witness was standing upon the rear platform of a crowded electric car, when it is claimed that his pocket was picked of two purses, containing $30 and $100, respectively. At the very moment that he claims to have been robbed he grasped the defendant Piggott, and immediately thereafter also grasped the co-defendant, Childs, they being in his immediate presence at the time. He testified at the trial that he felt a hand withdrawn from his pocket; that he saw it was Piggott's hand, and thereupon he took hold of him. He further testified that about the same time he saw Piggott pass some article to his co-defendant, Childs. There was other evidence to the effect that the co-defendant dropped the article passed to him by Piggott upon the car platform, and it, having been picked up, was found to be the purse of the prosecuting witness containing the $30. Upon being searched at the city prison, five $20 gold pieces were found concealed in the stockings of defendant. The remaining purse of the prosecuting witness contained five $20 gold pieces. The evidence is reasonably certain that both purses, with the money contained therein, were taken from the pocket of the prosecuting witness. This recital of evidence is made as indicating defendant's guilt, and we are clear that it is ample to support the verdict. It may be conceded that other evidence was offered tending to contradict, explain away, and neutralize the evidence contained in the foregoing recital; but the credibility and sufficiency of all of this evidence was essentially a matter for the jury to pass upon, and not a matter for this court.

The prosecuting witness, referring to defendant, testified: "When he pulled his hand out of my pocket, I grabbed him. That was the defendant Piggott's hand. I saw him then pass something to the other man, and I grabbed them two,—the two of them. I grabbed the other fellow, too, and I hallooed out to my friend, 'They are robbing me!'" This friend, the witness Flinn, testified that Henrioulle said: "These two men robbed him." Those statements of Henrioulle were admitted in evidence under objection, and error in such ruling is now insisted upon. The first statement is clearly part of the res gestæ. If the other statement was one different from the first, it was made in the immediate presence and hearing of the defendant, and for that reason was admissible. It is idle to contend that the record does not disclose it to have been made in his immediate presence and hearing, for the record does disclose that at the time the statement was made the prosecuting witness had the defendant in his grasp. Again, at this identical time it is testified to by defendant himself that "the prosecuting witness told me I had his pocketbook, and I replied, 'How dare you insult me?' or 'I ain't got your pocketbook.'" Again, the prosecuting witness testified at the trial that the defendant was the man who stole his money; and in the face of this testimony it is impossible to see how his statement made at the time of the larceny, to the same effect, could possibly have injured defendant's case. There is no error in the ruling of the court upon this question demanding a new trial.

It was clearly proper to admit in evidence the purse containing $30 which was found upon the car platform. There is some evidence that defendant passed it to his co-defendant, and that the co-defendant dropped it upon the platform. Under any circumstances, it was the purse of Henrioulle, declared by him to have been stolen, and therefore clearly admissible as part of the res gestæ. Again, the five $20 pieces found in defendant's stockings were admissible in evidence. One of the purses which was stolen contained five $20 pieces only, and the coincidence of finding five $20 pieces in defendant's stockings a very short time after the commission of the offense was a matter which might well be placed before the jury. Any objection made to the admission of these facts and of this money before the jury necessarily went to the weight of the evidence rather than to its competency.

Defendant testified that he placed the $100 in his stockings the morning of the larceny. Upon cross-examination, he was asked if he was in the habit of carrying his money in those places. He answered that he always did it. In rebuttal, the prosecution, under objection, introduced evidence tending to show that defendant was not in the habit of carrying money in his stockings. It is now insisted that this ruling of the trial court was erroneous, upon the ground that the cross-examination of the defendant as to this matter was collateral to the issue on trial, and that his evidence upon the point could not be attacked by other evidence. Defendant's declaration that he always carried his money in his stockings was not evidence as to a collateral matter. It was direct and material evidence upon an issue in the case. The prosecution would have been entitled to show, in the first instance, that it was not the practice of defendant to so carry his money. Such evidence would have strengthened their case. If this evidence could have been introduced in chief by the prosecution, it was not collateral to the issue of guilt or innocence.

The police detectives testified that they had searched the defendant many times, and had found money upon his person, but never had found any in his stockings, although they had examined them. This evidence tended to contradict the statements of defendant upon the foregoing point, and the fact that by such evidence it may have incidentally appeared to the jury that defendant had been previously arrested upon many occasions did not furnish ground for rejecting it. Possibly it was unfortunate for defendant that such evidence came before the jury, but it was his misfortune simply. Again, it appeared upon the cross-examination of these witnesses and others by defendant that previously to this affair he had been arrested 18 or 20 times upon criminal charges. For this reason the incidental reference to that unfortunate fact by other witnesses could not possibly have prejudiced his case.

Defendant's counsel complains of the action of the court in refusing his request to give various instructions to the jury. We see no merit in these contentions. As, for example, the following instruction was asked: "You are instructed there is no evidence in this case to justify the conclusion that defendant Piggott, and not somebody else, either took or carried away money or other property from the person of the prosecuting witness, and without that evidence you cannot find the defendant guilty." Considerable space in defendant's brief is devoted to an attempt to show that the refusal to give this instruction was error. When we consider that this instruction, in substance, told the jury to acquit the defendant, it may readily be seen why it was refused. In view of what we have already said, it certainly was properly refused. We see no substantial merit as to the claims made by defendant's counsel upon the refusal of the court to give the other instructions asked. We have carefully examined the charge given to the jury, and find no substantial error therein. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

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126 Cal. 505

PEOPLE v. MOLINA. (Cr. 496.)

(Supreme Court of California. Oct. 30, 1899.)

CRIMINAL LAW—ARGUMENT OF COUNSEL—APPEAL—INSTRUCTIONS—PRESUMPTIONS.

1. It is not error for the district attorney to state in his opening argument that, in a former prosecution against defendant for an assault to commit murder, he consented to allow him to plead guilty of assault with a deadly weapon, "owing to the fact that it is sometimes very difficult, in these little troubles between that class of people, to have them come up and prosecute," where the fact of such plea of guilty and consent was proved.

2. A district attorney's argument, stating that the county had been free from crime for 15 years subsequent to 1877, and that it was unnecessary for him to say why crime exists in the community, or why arguments are being bandied back and forth in the state as to whether the jury system is a failure, is not so prejudicially erroneous as to justify a reversal of a conviction, where the evidence was sufficient to sustain the verdict, and the jury were instructed to disregard all matters outside the record.

3. It will be presumed that the jury were instructed to disregard statements of counsel outside the record, where such statements were made, and the record on appeal does not contain the instructions.

4. Where the evidence supports the verdict, and proper instructions were given, and no exceptions were taken to the admission of evidence, error in procedure must be plainly shown to have been prejudicial, to justify a reversal of the judgment or the order denying a new trial.

Temple, J., dissenting.

In bank. Appeal from superior court, Kern county.

Ysabel Molina was convicted of murder, and he appeals from the judgment and an order denying a motion for new trial. Affirmed.

J. W. Wiley and S. M. Reed, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. The defendant was charged by the information with having on the 2d day of December, 1897, willfully, feloniously, and with malice aforethought killed and murdered one A. Ramos in the county of Kern. He pleaded not guilty, and, after trial, was convicted by the jury of the offense charged, without recommendation. He made a motion for a new trial, which was denied, and he was thereupon sentenced to be taken to the state's prison at San Quentin, and hanged by the neck until dead. This appeal is from the judgment and an order denying defendant's motion for a new trial.

Defendant has not brought here the evidence, nor the instructions given to the jury. In his brief he states that there was evidence to sustain the verdict, and that the instructions contain no error justifying a reversal. The sole and only point on which it is claimed the judgment and order should be reversed is by reason of the remarks of the district attorney in his argument to the jury before the final submission of the cause. The defendant was charged in the information with a prior conviction in the superior court of Kern county on the 3d day of September, 1896, of the crime of an assault with a deadly weapon, and to the charge he pleaded not guilty. In his opening argument to the jury the district attorney said: "No longer ago, gentlemen, than the 3d day of September, 1896, as was shown by the judgment roll in the case of the people of the state of California against Molina (No. 394) in this court, this defendant was convicted, or pleaded guilty, rather, to the crime of assault with a deadly weapon, having been informed against upon a charge of assault to commit murder; the plea having been allowed to be entered by my consent for the lesser offense, owing to the fact that it is sometimes very difficult, in these little troubles that arise between that class of people, to have them come up and prosecute when it comes into a court of justice." The defendant excepted to the remarks, but made no motion to have them corrected, or the jury instructed to disregard them. It is now claimed that the remarks were prejudicial error. As the defendant had entered his plea of not guilty to the charge of a prior conviction, it became necessary for the district attorney to introduce proof in support of such charge, or abandon it. He did accordingly introduce the judgment roll of such prior conviction, showing the facts as stated, and showing the fact that by consent of the district attorney the defendant was allowed to plead guilty of an assault with a deadly weapon, after having been informed against upon a charge of assault with intent to commit murder. The remarks of the district attorney were therefore in accordance with the evidence, and were pertinent to an issue before the jury.

In his closing argument to the jury, the district attorney said: "I will now say again, and say it for a fact: From the period of 1877, for fifteen years, nearly, in Kern county, Kern county had a cessation of crime, practically. The laws were obeyed, and the laws were enforced. But I tell you, gentlemen, it does not need me to tell you why those things exist in any portion of the community. It does not need me to tell you of arguments being bandied back and forth in the state, from one end of the state to the other, as to whether the jury system is a failure or not." The defendant excepted to these remarks, but made no motion to have them corrected, or the jury instructed to disregard them. The instructions are not in the record, and we must presume that the court correctly instructed the jury, and that they were told to disregard all matters and statements outside the record. In a case where the evidence supports the verdict, and where the court properly instructs the jury, and where no exceptions are taken to the admission of evidence, error in procedure would have to appear to us plainly to have been prejudicial, before we would feel justified in reversing the judgment or the order denying a new trial. The rule is well settled that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue, and not in evidence, or to assume in argument to the jury such facts to be in the case, when they are not. People v. Mitchell, 62 Cal. 412, and cases cited. In this case, even with no evidence in the record, where the life of a fellow creature is at stake, we would have no hesitation in reversing the case if the remarks were erroneous when measured by the above rule, but they are not. There is no statement of any fact, pertinent to the issue, not in evidence. There is no charge against the character of defendant or his good name. There is no charge that he has been guilty of any offense or offenses other than charged in the information. The district attorney may have drawn upon his imagination as to the cessation of crime in Kern county after 1877, and as to the jury system being claimed by many to be a failure, but we cannot see how the remarks could have injured the defendant. The matters spoken of were probably as well known to the jury as to the district attorney before he made the statement. It does not appear to us whether they were in the record or not. In the leading case of Tucker v. Henniker, 41 N. H. 323, it is said: "The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury, it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination." In 1 Bish. New Cr. Proc. § 975a, it is said: "Matters of common knowledge—being things not special to the case in hearing—may, like the language itself, be parcel of the woven argument which the advocate lays before the jury. Thus, historical facts may be referred to, and it was not improper for counsel to draw an illustration from the Guiteau Case. It may be stated that crime is on the increase; hence, that juries should do their duty. Well-known riots may be cited as resulting from a lax administration of justice." In accordance with the rule above laid down, it was held not to be error, where during the argument the district attorney addressed the defendant personally, advanced towards him, and pointed his finger at him, saying: "You sought this trouble with him [referring to the prosecuting witness], and made a cowardly attack upon him." People v. Wheeler, 65 Cal. 77, 2 Pac. 892. So, where in the closing argument the district attorney challenged the attorney for defendant to explain the facts and circumstances of the case upon any other hypothesis except that of guilt, and said, "There is no theory on the face of the earth, the possession of all this property, and trying to escape from these officers, that he can advance or has advanced," it was held that the remarks had reference to the testimony and inferences to be drawn therefrom, and that the remarks were proper. People v. Hall, 94 Cal. 599, 30 Pac. 7. In this case the record is entirely silent as to what action the court took in regard to the remarks, and as to any instructions to the jury in regard to them. If the remarks were objectionable, and the record fails to show whether or not the court corrected the statement, it will be presumed here that the statements were corrected, and the jury instructed to disregard them. Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305. The judgment and order are affirmed.

I dissent: TEMPLE, J.

(126 Cal. 591)

MACKENZIE v. HODGKIN. (S. F. 903.) HODGKIN v. WILLIAMS et al.[1]

(Supreme Court of California. Nov. 8, 1899.)

PLEADING—CROSS COMPLAINT—PARTIES—REVIEW—EVIDENCE—NEWSPAPER MARKET REPORTS — FACTORS — SALE — FACTORS' DILIGENCE.

1. Under Code Civ. Proc. § 442, permitting a defendant seeking affirmative relief against a party, relating to the transaction sued on, to file a cross complaint with his answer, one sued by an assignee of factors' claim for advancements exceeding the value of property consigned to them for sale by defendant was entitled to file a cross complaint against such factors for breach of their contract.

2. Where, in an action by an assignee of factors' claim for excess advancements, defendant claimed damages for breach of the factors' contract, such factors may be made parties to the suit; they being necessary to a complete determination of the controversy.

3. Code Civ. Proc. § 442, provides that a defendant's cross complaint, asking affirmative relief relating to the transaction sued on, must be served on the parties affected thereby. *Held* that, where none of the rights of one of the parties were prejudiced by defendant's omission to serve a copy of a cross complaint on him, such failure was not ground for reversal.

4. Where factors contracted to sell raisins according to a schedule of prices of a fruit-growers' association, and sold below the schedule without defendant's consent, error in admitting a newspaper report of such prices, under objection that it was not the best evidence, in an action for the factors' breach of contract, was cured by subsequent evidence, unobjected to, that such prices were the prices fixed by the association.

5. Where factors agreed to sell raisins consigned to them, and use their best ability to obtain the highest market price, and not to sell below the price fixed by a fruit-growers' association at the place where the raisins were to be delivered, without consulting their principal, evidence of the prevailing prices of raisins at such place was admissible on the question of the factors' diligence in making sales, though the raisins were in fact sold in other markets, since by the agreement the factors were not required to sell in any particular market.

6. Where defendant executed a written contract to cure and deliver all his raisins to certain factors for sale on commission, and he delivered to them all his raisins, including a lot of dipped raisins, called "Valencias," he cannot thereafter claim that such raisins were delivered under the factors' subsequent parol contract to purchase such raisins, in the absence of evidence that the factors ever paid anything on such alleged purchase, under Civ. Code, § 1698, permitting evidence of a subsequent executed parol agreement to vary a written contract, since defendant was bound by the written contract to deliver such raisins, and the subsequent oral agreement, if made, was wholly executory.

7. Where factors agreed not to sell raisins below prices fixed by a fruit-growers' association, without defendant's consent, and two months after the contract was made the association abandoned its schedule of prices, and did not fix further prices, the factors were not thereby entitled to sell for less than the association's prices at the time of the contract, without defendant's consent.

Department 2. Appeal from superior court, Fresno county.

Action by one Mackenzie against one Hodgkin, in which said Hodgkin filed a cross complaint against Williams, Brown & Co. From a judgment for defendant, Williams, Brown & Co. appeal. Reversed.

L. L. Cory, for appellants. H. H. Welsh and Frank H. Short, for respondent.

PER CURIAM. Williams and others were partners, under the firm name of Williams, Brown & Co., in the business of commission merchants at the city of Fresno, in this state. On August 31, 1893, they made a contract in writing with Hodgkin, whereby the latter agreed to pick, cure, and deliver to them at Fresno all the grapes and raisins to be produced that season on a certain vineyard in that vicinity owned by him (said Hodgkin), and Williams, Brown & Co., on their part, agreed to pack all the raisins so delivered, and sell the same for Hodgkin; they to charge specified rates of compensation for their services, and to make certain advances of cash to him on delivery of the crop at their packing house. At various times from September 29 to November 22, 1893, inclusive, Hodgkin delivered to said Williams, Brown & Co. at Fresno above 460,000 pounds of raisins. They made advances to him on account thereof to an amount which proved to be greater than the proceeds of sales of the entire crop, by the sum of $2,665.75. They assigned their demand for such balance to Mackenzie, who was a bookkeeper in their employ, and he brought this action to recover the same from Hodgkin. The complaint is virtually a count for money loaned to Hodgkin by plaintiff's assignors. The defendant answered such complaint, and also filed a cross complaint, not against Mackenzie, the plaintiff, but against said Williams, Brown & Co. In both the answer and the cross complaint he set up in various forms his transactions with Williams, Brown & Co. concerning the marketing and sale of his said crop, and alleged sundry derelictions in that behalf against them, as the result whereof he prayed in his answer that plaintiff take nothing, and in his cross complaint for judgment against Williams, Brown & Co. for the sum of $5,555.92 above the amount of their advances to him. In each count of the cross complaint, as also in the answer, it is alleged that the assignment on which plaintiff sues was made to him by his employers without consideration, and merely for the purpose of qualifying him to sue on their demand; that his cause of action arose out of the contract of defendant with Williams, Brown & Co. relating to said crop of raisins, and the delivery, sale, and disposition thereof. The cross complaint was not served on the plaintiff, nor did he answer thereto. It was, however, answered by Williams, Brown & Co. The trial was by jury, and resulted in a verdict and judgment that plaintiff take nothing, and that Hodgkin recover of Williams, Brown & Co. the sum of $100.

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[1] Rehearing denied December 8.

1. Appellants argue that the court erred in allowing the cross complaint to be filed. "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, * * * he may, in addition to his answer, file * * * a cross-complaint." Code Civ. Proc. § 442. It is said that the cross complaint here proceeds on a cause of action independent of, and not germane to, the matters alleged in the complaint of plaintiff. This objection is clearly unfounded. The plaintiff sues to recover money loaned. Defendant admits that he had the money of plaintiff's assignors, but avers, in effect, that he received it as part performance of their contract with him, and that they are liable to him for failure to perform the same fully. These averments, if proved, show that the relief sought by defendant "relates to or depends upon the contract or transaction upon which the action is brought," within the meaning of that language in the statute above quoted. The further objection that Williams, Brown & Co. could not properly be made parties defendant in the cross complaint, because they were not originally parties to the action, is also untenable. A complete determination of the controversy cannot be had without bringing in parties to the contract or transaction who have not been named as parties to the action in the original complaint. Winter v. McMillan, 87 Cal. 256, 25 Pac. 407; City of Eureka v. Gates, 120 Cal. 54, 52 Pac. 125; Water Co. v. Raynor, 57 Cal. 592, 593; Chalmers v. Trent, 11 Utah, 88, 39 Pac. 488, and cases cited. It is also contended that the omission to serve the cross complaint on Mackenzie, the plaintiff, was a fatal irregularity. It was, no doubt, negligent practice. Said section 442 provides that the cross complaint "must be served on the parties affected thereby." But in this instance no right of the plaintiff has been at all prejudiced by such omission, and the judgment cannot be reversed because of it. For all the matters of substance charged in the cross complaint were pleaded affirmatively in defendants' answer, which was served on the plaintiff, so that the latter met in the prosecution of his own action every issue which would have been tendered to him had he been served also with the cross complaint; and, further, it was proved at the trial, by his own testimony, and without conflict, that plaintiff took by the assignment no interest beneficial to himself in the demand he sued on, and that, if he had recovered, the whole proceeds of his recovery would have been paid to Williams, Brown & Co., who made full defense against the defendant's alleged cause of action.

2. In the contract of August 31, 1893, Williams, Brown & Co. promised that they would not sell the raisins "below prices named by the association," without consulting Hodgkin; and one of the breaches alleged in the cross complaint is that they did sell at prices less than those "named by the association," without consulting him or obtaining his consent. There was evidence at the trial that the prices so referred to in the contract were a list agreed upon by a number of raisin growers and packers at a meeting held by them on August 22, 1893, as the prices at which raisins were to be held for sale that season. In order to show the schedule so established, defendant offered in evidence printed matter purporting to be a copy thereof in a certain newspaper published at Fresno on August 23, 1893; and, in connection with the offer, Hodgkin testified that the parties to the contract had such published prices in mind when they signed the instrument of August 31st. Plaintiff and Williams, Brown & Co. objected that the newspaper report was not the best evidence, and the objection was overruled. If there was any error in this,—which we do not decide,—it was cured by evidence, subsequently admitted without objection and without contradiction, that the prices of raisins shown in the publication received in evidence were the said prices fixed by the association on August 22d.

3. By another clause of the contract, Williams, Brown & Co. agreed that they would endeavor, to the best of their ability, to obtain the highest market price for defendant's raisins; and in one count of the cross complaint they are charged with negligence in the performance of this covenant, whereby, it is claimed, they failed to obtain the full value of the goods. Upon the questions thus arising the defendant was permitted to introduce evidence of the market price of raisins at Fresno during the months of October and November, 1893, the period of the delivery of defendant's product to Williams, Brown & Co. Appellants contend that evidence of this nature should have been confined to the market value of the raisins at points in the Eastern states where they were actually sold by Williams, Brown & Co. They rely on the decision in Pugh v. Porter Bros. Co., 118 Cal. 628, 50 Pac. 772, to support this point. We think, however, the present case is materially different. In the case cited it appeared that the goods were delivered to the commission merchant for the purpose of shipment from the place of delivery, and to be sold in a foreign market. Accordingly it was held that the factor's duty was to obtain the value in the foreign market, and that evidence of the state of the market at the place where he received the goods was inadmissible. But here it does not appear that the raisins were necessarily to be sent away from Fresno for purposes of sale. The contract was prefaced with a recital that Williams, Brown & Co. are "engaged, among other things, in the

packing and selling of raisins in the city of Fresno." They agreed that they would "endeavor to obtain the highest market price for the grade of goods sold, and in every way endeavor to realize upon all goods sold at the earliest moment, and for the highest price." They further promised, as has been seen, that they would not sell "below prices named by the association," without consulting defendant; the association was a body local to this state, and not shown to have had any influence in determining prices at the East. From these provisions of the contract, and others not necessary to state, we think Williams, Brown & Co. were at liberty to sell defendant's raisins at Fresno or elsewhere. Consequently, on the question whether they used reasonable diligence to obtain the best market prices, it was as pertinent to show what prices prevailed at Fresno as in any other readily accessible market. Of course, this is not saying that they were negligent in not selling at Fresno. On the contrary, it may have been that the usual course of business, or other condition affecting their conduct, was such that ordinary prudence allowed or required them to ship the raisins to the East. That matter is not for decision now.

4. In the fifth count of the cross complaint, defendant alleged that he sold and delivered to Williams, Brown & Co. "eighty-six thousand eight hundred and forty-four pounds of Valencia raisins," at the price of three and one-half cents per pound, and that they yet owe him for the same a balance of $1,243.03. At the trial these allegations were strongly contested. Defendant was allowed to testify that about October 1, 1893, Williams, Brown & Co. agreed with him orally to buy the said Valencia raisins at the price alleged; appellants objecting that the effect of the evidence is to vary by parol the terms of the written contract of August 31st. At the outset of his testimony, defendant stated that "under the contract"—referring to the instrument of August 31st—he delivered to Williams, Brown & Co. all his raisins, including the Valencias; and although, when he came to testify concerning the alleged oral agreement of October 1st, he said that the "written contract referred to ordinary raisins; the oral one to dipped raisins, called 'Valencias,'"—yet it is clear that the Valencia raisins were made from the grapes which were the subject of the writing. The instrument required defendant to cure and deliver to Williams, Brown & Co., on the terms stated therein, "all grapes and raisins" grown and produced during that season on his vineyard. Defendant stated, in effect, that he made and delivered the Valencia raisins to Williams, Brown & Co. on their oral promise to pay 3½ cents per pound for five carloads of them. His counsel argue that this is "an executed parol agreement," and therefore that evidence thereof is admissible to alter the previous writing. Civ. Code, § 1698. We do not think so. We find no evidence that Williams, Brown & Co. ever paid anything as on a purchase by them of the Valencias; and, as concerns Hodgkin, so far as appears, he did nothing under the alleged oral agreement which he was not bound to do in the proper fulfillment of the written contract. There was no evidence that curing raisins by the Valencia process, and delivering the same when cured, was not the due and reasonable performance of his prior written promise to "cure and deliver" his entire crop. Obviously, the executed oral agreement, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing. See Civ. Code, §§ 1661, 1595, 1605; Pol. Cont. pp. 161, 162; Vanderbilt v. Schreyer, 91 N. Y. 392. True, the defendant here testified that he sold the Valencia raisins, but the alleged sale rests in mere spoken words, which in themselves could not be allowed to alter the writing. His acts towards the execution of any contract were only such, so far as proved, as the original agreement required him to perform. A written instrument would afford but slight protection to the parties in such cases, if it could be varied in this manner. A bailment could be converted into a sale, or a sale into a bailment, according as the interests of either party, after delivery of the goods, might lead him to the belief, real or feigned, that the delivery had not been pursuant to the original writing, but under a subsequent oral arrangement.

5. There was evidence that about October 1, 1893, the said association of growers and packers abandoned their agreed schedule of prices, the members selling thereafter at what rates they pleased; and appellants requested the court to charge the jury that if, before any sale of defendant's raisins by Williams, Brown & Co., the prices had been changed by the association, and the association had no fixed prices at the time of any of such sales, then Williams, Brown & Co. were "relieved from any obligation to sell for any association prices which were fixed at the time of the entering into the contract." The instruction was rightly refused. If the association had, in the course of the season, fixed prices different from those first agreed on, it may be that such modification should have been read into the clause of the contract referred to in the instruction. But no other prices were subsequently fixed. The members of the association simply abandoned the rates first agreed on, and we think their action in that particular did not release Williams, Brown & Co. from their promise to obtain the rates which had been fixed, or, as the alternative, to consult defendant before accepting lower prices. The collapse of the association would seem to furnish a reason why defendant should have desired to be consulted regarding prices of subsequent sales, for the natural tendency of that event was to increase the degree of caution necessary to be

exercised by individual sellers. There is in the record, moreover, evidence tending in some measure to show that Williams, Brown & Co. did not regard this clause of the contract as nullified by the failure of the association to maintain the agreed prices. Thus, on October 26, 1893, they wrote to Hodgkin, saying that up to that time they had "had no difficulty whatsoever in getting the prices fixed by the combination"; and as late as April, 1894, they wrote to him, inquiring whether they should accept a specified offer for certain of his raisins they had then in New York,—an offer apparently less than the original association price.

No material error is brought to our attention, except the admission of evidence touching the alleged sale of Valencia raisins to Williams, Brown & Co.; but because of that the judgment is reversed, and a new trial ordered.

126 Cal. 635

GRANGER v. RICHARDS et al. (Sac. 515.)

(Supreme Court of California. Nov. 10, 1899.)

APPEAL—DISMISSAL.

Appeal will be dismissed, it purporting to be from judgment entered after nonsuit as to some of the defendants, and no judgment appearing in the transcript, and the certificate to the judgment roll, which disclosed no judgment, reciting that the foregoing is a true copy of the order granting nonsuit, and that the foregoing papers constitute the judgment roll.

Department 2. Appeal from superior court, Nevada county.

Action by Samuel Granger against W. G. Richards and others. There was a nonsuit, and plaintiff appeals. Dismissed.

A. D. Mason, for appellant. C. W. Kitts, J. M. Walling, and P. F. Simonds, for respondents.

PER CURIAM. This is a purported appeal from the judgment entered after nonsuit granted in favor of certain of the defendants. The notice of appeal states that the appeal is taken from the judgment of nonsuit entered "on the first day of December, 1897, rendered on the 29th day of November, 1897," etc. But nowhere in the transcript does such or any judgment appear. Even the judgment roll as made up by the clerk discloses no judgment, although it is his duty to make up the judgment roll only after judgment entered. The clerk's certificate to the judgment roll is to the effect that he certifies "the foregoing to be a true copy of the order granting motion for a nonsuit entered in the above-entitled action, and recorded in minute and order book 10 of said court at page 340; and I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action." As this appeal can be prosecuted only from the judgment, and as it is not made to appear that any judgment has been given and entered in the action, it follows that this court is without jurisdiction to entertain the appeal, and it is therefore dismissed.

126 Cal. 621

WHITE v. HAYDEN. (L. A. 460.)

(Supreme Court of California. Nov. 9, 1899.)

COUNTY SUPERVISORS — COMPENSATION AS ROAD COMMISSIONERS—DUTY OF AUDITOR.

1. There being no requirement that the board of county supervisors should designate the particular fund out of which a claim allowed and certified by it should be paid, such a designation by it will not affect any duty of the county auditor, under County Government Act, § 121, and Pol. Code, § 4223, to so designate.

2. A member of the county board of supervisors, who, as ex officio road commissioner, performs his duties within his road district, under the direction and supervision of the board, which, as a body, has general supervision of all the roads in the county (Pol. Code, §§ 2643, 2645), is in such respect a county officer, not a road-district officer, and performs services "required of him by law" as a county officer, and his compensation is a "salary" to be paid out of the county salary fund; County Government Act

March 24, 1893 (St. 1893, p. 346) § 216, providing the salaries and fees provided by the act shall be in full compensation for all services rendered by the officers named, as officers or "ex officio" officers; section 197 providing, in counties of the thirty-fifth class, the county officers shall receive as compensation "for the services required of them by law" certain amounts, "supervisors $6 per day for each day while in service of the county, and 30 cents per mile for traveling"; and other sections providing the compensation in other counties for services rendered as road commissioner; section 220 declaring that, for the purpose of paying the "salaries" provided for by the act, all fees directed to be paid into the county treasury shall be set apart as a separate fund, to be known as the "Salary Fund," to be applied to the payment of "said salaries"; section 221 providing the salaries of such officers named in the act as are entitled to salaries shall be paid monthly out of the county treasury on the warrant of the auditor, and the treasurer shall pay the warrants out of the salary fund; section 25, subd. 12, making it the duty of the board to examine and allow all legal claims against the county, "except salaries of officers," and order warrants to be drawn on the county treasurer therefor; and section 51 providing that all claims against the county presented by members of the board of supervisors for per diem or mileage, or other services rendered by them, must be itemized, and before allowance must be presented to the district attorney, who must indorse thereon his opinion as to their legality.

Department 2. Appeal from superior court, Kern county.

Action by John W. White against B. A. Hayden. Judgment for defendant. Plaintiff appeals. Reversed.

Cannon & Freeman and J. W. Ahern, for appellant. J. E. Patton, for respondent.

PER CURIAM. This cause and L. A. 461 (59 Pac. 1113), between the same parties, present the same question. Plaintiff is a member of the board of supervisors for Kern county. He rendered services as supervisor and ex officio road commissioner, for which he was allowed by the board the sum of $1,803.50, and on July 18, 1896, payment was ordered to be made out of the salary fund of the county, and a warrant was ordered drawn on the treasury for the amount. The auditor refused to draw his warrant, whereupon this action was brought to compel him to do so. A general demurrer to the complaint was sustained, and judgment of dismissal entered. The appeal is from this judgment. Thereafter, to wit, on December 7, 1896, the board passed a resolution vacating so much of their order of allowance as required payment of the claim out of the salary fund, and ordered the same to be paid out of the road-district fund of the Fourth road district. This order was duly certified to the auditor and treasurer, and on December 8th plaintiff demanded of the auditor a warrant on the treasurer, which was refused, and thereupon the second action (L. A. No. 461) was brought to compel the auditor to draw his warrant. A general demurrer to the petition was sustained as before, and the appeal in that case is from the judgment. Respondent contends that the claim could not be paid out of the salary fund nor yet out of the road fund, and that the auditor could not designate the fund out of which it could be paid. It is hence claimed that it could not be paid at all.

Appellant contends (1) that the compensation of the road commissioner is a "salary," within the meaning of subdivision 20, § 25, of the county government acts of 1891 and 1893, and payable out of the salary fund; (2) if not, it is a charge against the road-district fund, and payable out of that fund; and, (3) if not payable out of either of these funds, it was the duty of the auditor to draw his warrant upon the proper fund. It is alleged that there was sufficient money in the treasury, and also in the designated funds, to pay the claim.

1. It is conceded that the claim was just and legal, and that it was duly allowed and certified. In all respects (leaving out of view for the moment the fact that the allowance designated the fund out of which the claim should be paid) it was a claim, coming to the auditor as it did, such as devolved upon him the duty to issue his warrant therefor. St. 1893, p. 484, § 197, subd. 16; St. 1891, p. 402; Ellis v. Tulare Co. (Cal.) 44 Pac. 575; McFarland v. McCowen, 98 Cal. 330, 33 Pac. 113; Sehorn v. Williams, 110 Cal. 621, 43 Pac. 8; Lamberson v. Jefferds, 116 Cal. 492, 48 Pac. 485.

2. It was held in Babcock v. Goodrich, 47 Cal. 509, where the order of the board did not specify the fund on which the warrant was drawn, that the statute (Pol. Code, § 4046) "did not impose on the supervisors the necessity of specifying in each order the fund on which the order is drawn. The auditor is sufficiently informed on what fund to draw when the order of the board specifies the liability for which it is drawn." The Code at present is substantially the same as when that case was decided, and there is now no requirement that the board should designate the particular fund out of which a claim is to be paid. It is not entirely clear that the law makes it the duty of the auditor to designate the fund out of which all warrants drawn by him are to be paid, or that the treasurer would be bound by the auditor's designation of the fund, although section 121 of the county government act, and section 4223, Pol. Code, would seem to imply that he should make the designation, and it is proper that he should do so. However this may be, if it be the auditor's duty to designate the fund, and as no such duty is imposed upon the board, we do not see that the auditor would be bound by the act of the board, but that it would rather be his duty to draw the warrant on the proper fund, whether the board had designated the fund or not. The board has performed its legal function when it has allowed and certified the claim, and if it has made a mistake in indicating the fund, or has gone beyond its powers to designate the fund, the duty of the auditor remains to draw his

warrant as the law in the particular case would authorize.

3. It seems to us that the claim should be paid from the salary fund. Supervisors have been ex officio road commissioners since the Codes were adopted, if not before, but, as the section stood up to a recent date, they were to receive no compensation for services as commissioners. Pol. Code, § 2641. The supervisors were empowered to appoint road overseers for each road district, and if none were appointed the road commissioners, within their respective districts, were to perform the duties of road overseers. Id. §§ 2642, 2645. The road overseer when appointed was to be paid from money in the treasury belonging to his road district, but when the road commissioner performed the duties he received no pay except his pay as a supervisor. Sections 2641, 2645. The act of March 9, 1887 (St. 1887, p. 77), provided for the election of the road overseer, who was to perform his duties under the direction of the road commissioner (Pol. Code, § 2642). That act made no provision for the pay of the road overseer, nor did it prescribe his duties, but this was done by the act of March 19, 1889 (St. 1889, p. 339); and it was there provided that he should be paid from his road-district fund (Pol. Code, § 2645). By the act of March 31, 1891 (St. 1891, p. 474), the office of road overseer was abolished from and after the Monday following the first Monday in 1893. By an amendment to section 2645, Pol. Code, the act devolved certain duties upon the road commissioner, "under the direction and pursuant to the orders of the board of supervisors," and declared what that compensation should be, as follows: "(5) When not otherwise provided by law, he shall receive for his services as such road commissioner twenty cents per mile one way, for all distances traveled by him in the performance of his duties: provided, that he shall not in any one year receive more than three hundred dollars." But the act did not provide from what fund this payment was to be made. This section was amended by act of March 9, 1893 (St. 1893, p. 113), omitting all its provisions after paragraph 3; and section 2641, Pol. Code, was amended as to the road commissioner by allowing him 20 cents per mile one way when traveling in the performance of his duties as road commissioner, not to exceed $300 in any one year. But so far as the compensation of the road commissioner is in this act provided for, the provision is superseded by the county government act of March 24, 1893 (St. 1893, p. 346). Section 216 provides: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided. * * *" Section 197 provides: "In counties of the thirty-fifth class [to which Kern county belongs] the county officers shall receive as compensation for the services required of them by law the following salaries, to wit: * * * (16) Supervisors, six dollars per day for each day while in service of the county, and thirty cents per mile for traveling from residence to county seat." Other sections of the act fix different compensation in different counties for services rendered as road commissioner, and in still others making similar provision to that for Kern county. Subdivision 20, § 25, of the act gives the board the power "to establish a salary fund, and also such other county funds as they may deem necessary for the proper transaction of the business of the county, and to transfer moneys from one fund to another, as the public interest may require." Section 220 (St. 1893, p. 509) provides: "For the purpose of paying the salaries provided for in this act, all fees directed to be paid into the county treasury shall be set apart therein as a separate fund, to be known as the salary fund, to be applied to the payment of said salaries," and provides for a transfer of funds to this fund "as may be necessary to pay said salaries as they become due." The only difficulty in giving construction to the above provisions, as to the fund from which the road commissioner is to be paid, arises from the following section 221: "The salaries of such officers named in this act as are entitled to salaries shall be paid monthly out of the county treasury; and it shall be the duty of the auditor, on the first Monday of each and every month, to draw his warrant upon the county treasurer in favor of each of said officers for the amount of salary due him under the provisions of this act for the preceding month;" and the treasurer is directed to pay the warrants out of the salary fund. Now subdivision 12, § 25 (St. 1893, p. 353), makes it the duty of the board "to examine, settle and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor"; and section 51 (St. 1893, p. 365) provides: "All claims against the county presented by members of the board of supervisors for per diem or mileage, or other service rendered by them, must be itemized, * * * and before allowance must be presented to the district attorney, who must indorse thereon, in writing, his opinion as to the legality thereof," etc. It is urged by respondent that the word "salary," as used in the act, is used in a limited sense, and refers only to officers whose compensation is a sum fixed by law, which may be paid without being allowed by the board. In section 197 the compensation is denominated a "salary," but, in the nature of the case, the amount must be ascertained by the board, for it is variable, and the act, therefore, devolves upon the board the duty of ascertaining and allowing the amount before it can be paid. The compensation, however, is none the less salary because the board must ascertain its amount. We think it was the inten-

tion of the legislature, by section 220, to provide for the payment of all county officers out of the salary fund, and to include supervisors as county officers, whose compensation must first be determined by the board, as well as those officers whose compensation is definitely fixed by the act itself. The supervisor, in acting as road commissioner, is none the less a county officer, and his duties as such commissioner are performed by virtue of his office as supervisor. The board, as a body, has general supervision of all the roads in the county (Pol. Code, § 2643); and the road commissioner, although one of the board, acts as a supervisor under the direction and supervision of the board in its collective capacity (Id. § 2645). The road commissioner is not a road-district officer. He is a supervisor charged with duties relating to the road district, but his identity as supervisor is not lost or changed. We can find no authority for making his compensation a charge upon the road-district fund, while we do find, what seems reasonably clear, that the law contemplates that he should be paid out of the salary fund.

Whether the duties are performed in his legislative or judicial capacity, while sitting with the board or whether acting ex officio as road commissioner, he is performing duties devolved upon him by law as a supervisor. As he is a county officer, and as there is a salary fund created out of which county officers are to be paid, we see no reason why he should not be paid his entire compensation allowed by law as supervisor out of that fund. "Salary" and "wages" are synonymous. Both mean a sum of money periodically paid for services rendered (And. Law Dict.), and it is immaterial how the value of the services is ascertained. Much of this ground was traveled over in the case of Ellis v. Tulare Co. (Cal.) 44 Pac. 575, and the provisions of the county government act of 1891, which are similar to those above referred to in the act of 1893, were considered. The conclusion was there reached that, in a county of a class such as Kern, the supervisor, while acting as road commissioner, is performing services "required of him by law," and is entitled to the compensation which the statute provided a supervisor should receive in such case. The question as to the fund from which he should be paid did not there arise. The judgment is reversed, and the cause remanded.

BEATTY, C. J. I concur in the judgment solely because it is a necessary conclusion from the point decided in Ellis v. Tulare Co., 44 Pac. 575. That case was decided in department, but a petition for a rehearing in bank was denied, and the decision, therefore, became the decision of the whole court. I thought at the time, and still think, the statutory provisions relating to the compensation of supervisors, when acting as road commissioners, were misconstrued in that case, but when acting as a member of a department of the court I am bound by the decision of the court in bank.

I concur: TEMPLE, J.

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126 Cal. 611

HAMMOND et al. v. BORGWARDT et al.
(L. A. 579.)

(Supreme Court of California. Nov. 9, 1899.)

ATTACHMENT—PROPERTY SUBJECT—OWNERSHIP—PARTNERSHIP.

Attachment of a stock of goods as the property of H. is good, as against his parents, though he had previously executed to his wife a conveyance of an interest therein, there being no change in possession or management thereof, and though he testified that he located a mine in the name of himself, his father, and P., and that they traded the mine for the store business, and in making the trade were equal partners therein, and that he bought the interest of P.; there being no evidence that the father had anything to do with locating the mine or trading it for the business, or that he ever took any part in the business or knew anything thereof, and application of the word "partner" being a mere legal conclusion.

Department 2. Appeal from superior court, Kern county.

Action by Edmund Hammond, Sr., and another against H. L. Borgwardt, Jr., and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. Linkenback, for appellants. Bledsoe & Bledsoe and S. N. Reed, for respondents.

PER CURIAM. This action was brought to recover possession of 200 pairs of shoes seized by the defendants, as sheriff and deputy sheriff, as the property of Edmund Hammond, Jr. The court below granted judgment for defendants, and the plaintiffs appeal from the judgment, and from an order denying a new trial.

The shoes in question were part of a stock of goods in a store in which a mercantile business was carried on under the name of Hammond & Co., and the attachment was levied on the 21st day of June, 1897; and the court found that from the 10th day of December, 1896, until the said 21st day of June, the said Hammond, Jr., was the owner of, and in possession of, the store and the stock of goods, including those described in the complaint. It is contended by appellants that this finding was not warranted by the evidence, but the contention cannot be maintained.

As to the plaintiff Winnie Hammond, who is the wife of Edmund Hammond, Jr., the court found that on the 28th day of January, 1887, Hammond, Jr., executed to the plaintiff Winnie an instrument by which he purported to sell and convey to her an undivided two-thirds of certain land upon which the store stood, together with an undivided two-thirds of the stock of goods therein, and that on the 15th day of June, 1887, he executed to her another deed, by which he conveyed the interest above stated, and also the same interest in a wagon and certain horses, and in certain book accounts owing to the firm of Hammond & Co., but that there was no change of possession of any of said property, or any change in the management thereof; and this finding is amply sustained by the evidence.

As to the plaintiff Edmund Hammond, Sr., it is contended by appellants that the court should have found that he was at least a partner in the firm, and that therefore no particular part of the goods belonging to the firm could be taken on attachment as the property of Hammond, Jr., and that all that could have been attached as the property of Hammond, Jr., was his interest in all the property of the partnership. But the court was not called upon by the evidence to find that Hammond, Sr., was a partner, and it did not err in not so finding. The only evidence of any facts tending to show the partnership is to be found in the following testimony of Hammond, Jr., who is the son of Hammond, Sr., while on the witness stand: "I was in possession of a stock of goods, wares, and merchandise in Randsburg from some time in December, 1896, to January, 1897. I located a mining claim, known as the 'Winnie,' which location was made in the name of myself, my father, and a gentleman named Prosser. We traded the mine for the store, and in making the trade for the store we were all equal partners in the same,—each owning one-third. I bought Mr. Prosser out in December, 1896." If, in this testimony, the word "store" means merely the house in which the business was conducted, it has no significance in consideration of the question of partnership in the business. But, in any event, the mere use of the word "partners" by the witness would not be sufficient in this case to compel the court to find the fact of partnership. Partnership is a relation which grows out of a contract, either express or implied; and there is no evidence in this case that Hammond, Sr., ever entered into such a contract. There is no evidence that he ever had anything to do with the locating of the mine or the trading of it for the store, or that he ever took any part in the business that was conducted in the store, or that he ever knew of any of these things or took any part in them. He was never at the store, he always lived in another state, and there is no evidence that he was ever in the state of California. No evidence was introduced of any of his acts by which he showed any consent to be a member of this partnership, or by which he participated in it in any way. He made no appearance and cuts no figure in any of the transactions. His first appearance on the scene is when his name was used as a party plaintiff to this action. The business was conducted by Hammond, Jr., down to the time of the levy of the attachment. Considering all these facts, we think the court was warranted in not finding that Hammond, Sr., was a partner, although Hammond, Jr., and one other witness applied to him the word "partner," which is, at best, a mere legal conclusion.

With respect to appellants' technical objection to the sufficiency of the certificate of the justice of the peace to the judgment roll in the case in his court against Hammond, Jr., in which the attachment was issued, and to the proof of the writ under which the defendants acted, it is enough to say that we think such certificate and proof were sufficient. The judgment and order appealed from are affirmed.

(126 Cal. 628)

BARBOUR et al. v. FLICK. (L. A. 580.)

(Supreme Court of California. Nov. 9, 1899.)

DECEIT—DAMAGES—RECOUPMENT—PAROL EVIDENCE—FINDINGS—OBJECTIONS NOT RAISED BELOW.

1. Finding that the property traded by defendant to plaintiffs would have been worth $30,000 if his representations had been true is not inconsistent with the admission of the answer that it would have been worth $48,000 if the representations alleged in the complaint had been true; one of these, that its market value was $48,000, not being found to have been made, and, if made, not being a representation of fact.

2. Plaintiffs, having tried the case on the theory that an issue as to value of property was raised, cannot for the first time on appeal contend that there was no such issue to try.

3. When, in an action for false representations as to land traded by defendant to plaintiffs, defendant seeks to recoup by showing that the land traded by plaintiffs was worth less than represented, and the court finds for both parties on their several contentions, plaintiffs are properly awarded the difference between the market value of the property traded to them and the market value of the land traded by them.

4. Where property standing in the name of the wife was traded for other property, title to which was taken in her name, it may, in an action by her and her husband for false representations in regard to the land received, be shown by parol that the wife held the legal titles for the joint use of both, and that he was an equal owner with her.

5. It is not an attempt to rescind in part a trade of land, where, in an action for false representations in regard thereto, plaintiffs ask that the note and mortgage given by them, in addition to their land, be canceled, as part of their recovery of damages.

6. Where a note given in exchange for land is decreed to be canceled for fraud, the party holding the same is not entitled to interest up to the time of cancellation.

Department 1. Appeal from superior court, San Diego county.

Action by S. A. Barbour and another against Warren J. Flick. From the judgment, both parties appeal. Affirmed.

Puterbaugh & Puterbaugh, for plaintiffs. Patterson Sprigg and McDonald & McDonald, for defendant.

VAN DYKE, J. This action is based upon fraud and deceit alleged to have been perpetrated by the defendant in effecting an exchange of his property for that of the plaintiffs. In August, 1896, the plaintiffs were residents of, and owned property in, the city of Chicago; and the defendant owned a ranch known as the "Edgehill Ranch," located near Escondido, in San Diego county. The court below found that the false and fraudulent statements were made by the defendant as alleged in the plaintiffs' complaint, and that none of the representations and statements so made, either in writing, or by his agent in that behalf, were true; that said statements and representations were made for the purpose of inducing the plaintiffs to make the exchange of the properties upon the terms and conditions set forth and admitted in the pleadings, without personally examining said property of defendant, and were not given as opinions, or expressions of opinion, but, on the contrary, were made and given as existing facts, and that plaintiffs, without having an opportunity to examine said defendant's property, accepted them as such, and believed them to be true, and thereupon made the exchange of the properties, and executed and delivered their deed to the Chicago property, and their note and mortgage on such Edgehill ranch, as set forth and admitted in the pleadings; that the net market value of plaintiffs' said Chicago property (that is, its value over and above all incumbrances) at the time the said exchange of properties was consummated was the sum of $15,000; that the defendant took said property subject to all the liens thereon, aggregating between $39,000 and $40,000, and did not loan to the plaintiffs, or either of them, the sum of $4,000, or any sum or amount whatever, as a part of the transaction of exchanging said properties, and did not give to plaintiffs any consideration whatever for their said Chicago property, save and except said Edgehill ranch and the personal property thereon situated at the time of said trade, described in the pleadings; that the only consideration for the $13,000 note and mortgage executed by the plaintiffs to the defendant at the time of said trade was the supposed difference in value between plaintiffs' said Chicago property, incumbered as above stated, and the defendant's said Edgehill ranch and the personal property thereon situated; that the defendant's said Edgehill ranch and said personal property thereon situated were at the time of the exchange of said properties of the market value of $15,000, but that, if defendant's said ranch had actually been as represented by defendant to plaintiffs, the market value at the time of said exchange of properties would have been $30,000. And as a conclusion of law the court finds that the plaintiffs are entitled to recover from the defendant the difference between the actual value of said Edgehill ranch and said personal property thereon at the time of said exchange of properties, and the value thereof if the same had been in all respects as was stated and represented to them by the defendant, but plaintiffs are entitled, as part of their recovery and remedy in this action, to have their note and mortgage to the defendant for $13,000 canceled and delivered up to the clerk to be filed as part of the record of the cause, and to have judgment against the defendant for the sum of $2,000 and their costs. The defendant moved for a new trial, which was denied, and thereupon appeals from the judgment entered upon the findings, and also from the order denying a new trial; and the plaintiffs appeal from that part of the judgment which gave them a money judgment for $2,000 and costs only.

1. The ground of plaintiffs' appeal is that the superior court has found that the value of the Edgehill ranch and personal property would have been only $30,000 if the representations of defendant had been true, contrary to the admissions of the answer that, if such representations had been true, their value would have been $48,000. They contend that this finding must be disregarded, and the admission of the answer taken as the true value if the representations had been true. The answer to this position is that the defendant denied having made the representations charged, and upon this issue the finding of the court is partially in his favor. One allegation of the complaint is that the defendant represented the Edgehill property to be of the market value of $48,000. And it was the statement of a mere truism in the complaint to say that, if this representation had been true, the property would have been worth $48,000. The defendant denies that he made this representation, and the court does not find that he personally did make it. It seems to be found that Ensign expressed an opinion to that effect at Chicago, but the court evidently did not treat this as a representation of a fact, for otherwise it could not possibly have made its finding that, if the facts had been as represented, the property would have been worth only $30,000. Indeed, such a statement cannot be regarded as giving any ground for an action for deceit. It is obviously and necessarily a mere expression of opinion, upon which the vendee has no right to rely, and so the superior court must have regarded it. This view of the matter disposes of the contention of plaintiffs in support of their appeal. If the representations alleged by plaintiffs had all been matters of fact, and had all been found to have been made, then the failure of the answer to deny that the property would have been worth $48,000, if such representations had been true, would have been conclusive. But since one of said representations, to wit, that the market value was $48,000, was not found to have been made, or, if made, was not a representation of fact, the finding that the property would have been worth only $30,000 if the representations had been true is not inconsistent with the admission of the answer. The trial court, and the parties themselves, treated the value of the Edgehill ranch as being in issue. The plaintiffs themselves put in a large amount of evidence as to the value of the Edgehill ranch, and the defendant in consequence introduced an equally large

amount of evidence bearing upon the same subject; and the court from this conflicting testimony makes a finding as already shown. The plaintiffs, having gone to trial and tried the cause on the theory that there was an issue raised in reference to the value of the Edgehill ranch, cannot in this court, for the first time, raise the question that there was no such issue to be tried. Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. 400. The defendant in this case seeks to recoup by showing that the Chicago property was worth less than represented by the plaintiffs, and the finding of the court is accordingly, and awards to the plaintiffs the difference between the market value of the San Diego property and the net market value of the Chicago property; that is, the value over the liens and incumbrances. This rule is sustained by authority. Grinnell, Deceit, p. 143, § 193; Carey v. Guillow, 105 Mass. 18.

2. On the appeal by the defendant it is claimed, as one of his grounds, that the Chicago property having stood in the name of the plaintiff Georgia Barbour, and the title to the Edgehill property having also been taken in her name, it could not be shown by parol that the wife held the titles for the joint use and benefit of herself and husband, or that they were in fact joint owners. It is admitted that the husband was a proper party to the action, but it is claimed that "it does not necessarily follow that the judgment for damages should have been rendered in their favor." The evidence, however, shows that the defendant dealt with Barbour as the owner or part owner of the Chicago property. Besides, it is competent to show by parol that the wife held the legal title to the properties in question for the joint use of herself and husband, and that her husband was in fact an equal owner with herself. It is always competent to prove such a trust in land by parol testimony (Smith v. Moynigan, 44 Cal. 54–64; Sherman v. Sandell, 106 Cal. 374, 39 Pac. 797); but, if it were otherwise, it does not appear how the defendant could be injured, whether the husband were or were not, as a fact, jointly interested with the wife in the properties in question.

The defendant devotes a considerable portion of his brief to a consideration of the proposition that one cannot rescind in part, and contends that the action by the plaintiffs is an attempt to rescind in part; but this is a mistake. The plaintiffs merely ask that the note and mortgage be canceled, as a part of their recovery of damages against the defendant. If an action had been brought by the defendant to foreclose the mortgage, the plaintiffs would have been entitled to a cancellation of the mortgage and note upon the same showing, as a defense, as appears in their favor in the present action. There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs. Code Civ. Proc. § 307. And the facts constituting the cause of action are required to be stated in ordinary and concise language. Code Civ. Proc. § 426. It was said by Lord Redesdale: "The distinction between strict law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next. Pom. Code Rem. §§ 76, 81; Spect v. Spect, 88 Cal. 442, 26 Pac. 203, 13 L. R. A. 137; Hurlbutt v. Saw Co., 93 Cal. 57, 28 Pac. 795; Johnson v. Polhemus, 99 Cal. 241, 33 Pac. 908; Watson v. Sutro, 86 Cal. 528, 24 Pac. 172, and 25 Pac. 64. The court finds that plaintiffs did not misrepresent the Chicago property, in size of lot or otherwise, and further finds that defendant, "before closing said trade, caused said property and every part thereof to be carefully examined." This furnishes a complete answer to the contention of defendant in this particular.

Exceptions of the defendant to the rulings of the trial court are very numerous, and his counsel occupy considerable space in their brief to a consideration of the same. Without noticing them separately and in detail, it is sufficient to say that, from a careful examination of the record, we find no error committed by the court in such rulings which would justify a reversal. The most that can be said in favor of the contention of the defendant that the findings are not supported by the evidence in the particulars noted is that such evidence is conflicting; but there is sufficient evidence, if believed by the trial court to be true, to support such finding, and the trial court, having the witnesses before it, and noting their demeanor, is in a much better position to give proper weight to such evidence than this court. Hence the well-established rule in such cases that the findings must be allowed to stand.

The contention of defendant that interest should have been computed on the note and mortgage from date, making $14,600, instead of $13,000, the sum to be deducted from the amount of damages found by the trial court, cannot be sustained. According to the findings, the note and mortgage were obtained by defendant through his fraud and deceit, and without consideration, and should be treated as never having been given, and consequently not entitled to draw interest.

Pending the appeals the plaintiffs and defendant, respectively, moved to dismiss the appeal taken by the adverse party. Having, however, disposed of said appeals on their merits, it is unnecessary to consider either of said motions. The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; HARRISON, J.

(126 Cal. 607)

PECK v. AGNEW et al. (S. F. 1,928.)[1]

(Supreme Court of California. Nov. 9, 1899.)

DISMISSAL—ABATEMENT—NOTICE OF APPEAL.

1. Where, in an action, no summons is served, and part of the defendants appear by demurrer, the court has no jurisdiction, under section 581, Code Civ. Proc., providing that, if appearance has been made by defendants within three years, such action may be prosecuted as if summons had been issued and served, to dismiss such action, on motion of defendants, as to those defendants who demurred.

2. While the issue whether certain lands belonged to the estate of plaintiff's intestate is pending and undetermined, the action does not abate by reason of the revocation of the special letters of administration granted to the plaintiff.

3. Where plaintiff, as special administratrix, was served with a motion to dismiss the action, she has the right to appeal from the judgment against her on such motion, although her special letters had been revoked prior to taking the appeal.

4. Service of a copy of the notice of appeal, instead of the original notice, is sufficient.

5. It is not necessary to serve a notice of appeal upon defendants, who were not served with summons and who did not appear.

Department 1. Appeal from superior court, Santa Cruz county.

Action by M. Elizabeth Peck, as special administratrix, against H. Agnew and others. From an order allowing defendants' motion to dismiss the action, plaintiff appeals. Motion to dismiss appeal denied. Modified.

J. F. Utter, J. J. Scrivner, and A. H. Cohen, for appellant. Jeter & McKinney and Chas. B. Younger, for respondents.

HARRISON, J. This action was commenced in the superior court, December 12, 1895, against a number of defendants, by the plaintiff, as special administratrix of the estate of Martina Castro Depeaux, deceased, for the purpose of having it declared that they have no interest in or title to the land described in the complaint, and that it belonged to the estate of her intestate, and that she recover possession thereof. It does not appear from the record, except inferentially, whether a summons was ever issued upon the complaint, or that it was ever served upon either of the defendants, but within 10 days after the commencement of the action a demurrer was filed on behalf of several of the defendants. It does not appear that any action has been taken by the court upon this demurrer. December 19, 1898, a motion was made on behalf of seven of the defendants named in the complaint who had not demurred thereto to set aside the summons and the service thereof, and to dismiss the action, upon the ground, among others, that the summons had not been returned within three years from the commencement of the action. At the hearing the court granted their motion and dismissed the action, and the plaintiff has appealed therefrom.

The appellant does not controvert the right of the persons who made the motion to have the action dismissed as to them, nor does she object to the action of the court, so far as it may be limited to them. At the time the motion was granted she excepted thereto "upon the ground that said court had no jurisdiction to dismiss said action, except as to the defendants who had not or who did not appear in said action by the demurrers," and she now contends that to the extent that the dismissal purports to embrace those who had appeared in the action it was erroneous, and that in this respect the judgment should be modified.

With this contention of the appellant we agree. The failure of the plaintiff to return the summons did not affect her right to continue the action against those defendants who had demurred to the complaint. It is declared in the concluding sentence of section 581, Code Civ. Proc., that "all such actions may be prosecuted if appearance has been made by the defendant or defendants within said three years, in the same manner as if summons had been issued and served." This provision does not prevent a dismissal, when some of the defendants have appeared, as to those who have not appeared, nor does it require an appearance by all of the defendants in order to deprive the court of all power of dismissal, but it is to be construed as authorizing a dismissal as to those defendants who have not appeared, and a prosecution of the action against those who have made such appearance whenever the court would be authorized to render a judgment against them in the absence of the other defendants. The defendants who demurred were entitled to have the issue presented by their demurrer passed upon by the court, and had chosen attorneys for that purpose, as well as to represent them in all proceedings that might be had in the action. It was not competent for the court to dismiss them out of the action upon the motion of other defendants, with whom they were in no wise connected. Nor did the fact that the motion was made by the same attorneys that represented them in the demurrer affect their rights. The motion was made on behalf only of defendants who had not demurred,—seven in number,—and without any notice to the demurrants.

Whether the property described in the complaint belonged to the estate of the decedent was an issue to be tried in the case, and could not be determined upon a motion to dismiss the action. While this issue was pending and undetermined, the action did not abate by reason of the revocation of the special letters that had been granted to the appellant.

A motion to dismiss the appeal was made herein upon the ground that at the time of taking the appeal the appellant had ceased to be the special administratrix of the estate, and her powers as such had been revoked, and she was therefore not authorized to take an appeal. It is a sufficient answer to this motion to say that the respondents recognized her right to represent the estate by serving their motion for a dismissal of the action upon her. The orders which they now invoke as a reason why she had no right of appeal were made long prior to such service, and no change has taken place in her relation to the estate since the action of the court upon their motion. If the superior court was authorized to entertain their motion and render judgment against her, she is authorized to seek a reversal of that judgment in this court.

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[1] Rehearing denied December 8, 1899.

The further ground urged for a dismissal of the appeal, viz. that the notice of appeal has not been served upon the respondents, is contradicted by the transcript, in which there is printed a copy of an affidavit of this service. The correctness of the affidavit, as printed in the transcript, is not disputed, and, from the nature of the act, proof of such service would not be a part of the judgment roll. The objection to the statement therein that a "copy" of the notice of appeal, rather than the original, was served upon the respondents, is without merit.

It was not necessary to serve the notice of appeal upon the defendants who had not appeared. They were not parties to the proceedings in the superior court, and their interest in the action will not be injuriously affected by a modification of the judgment as asked by the appellant. Clarke v. Mohr (Cal.) 58 Pac. 176. The motion to dismiss the appeal is denied. The superior court is directed to modify its judgment in accordance with the views herein.

We concur: GAROUTTE, J.; VAN DYKE, J.

(126 Cal. 614)

GARDNER v. JONES, Judge. (S. F. 1,764.)

(Supreme Court of California. Nov. 9, 1899.)

INSANE PERSONS—DISCHARGE FROM CUSTODY—HABEAS CORPUS—POWERS OF JUDGE.

1. Under Act March 31, 1897 (St. 1897, p. 311) art. 3, § 13, declaring that "any one in custody as an insane person" is entitled to a writ of habeas corpus on application to "the superior judge of the county in which the hospital is located," and that on return of the writ the fact of his insanity shall be inquired into; and section 14, providing that a patient committed to a hospital, under Pen. Code, pt. 2, tit. 10, c. 6, "shall, on the certificate of the superintendent that such person has recovered, approved by the superior judge of the county from which the patient was committed," be redelivered to the sheriff of such county, and dealt with as provided for by said chapter 6,—where one, pending trial for a crime, is committed to an insane asylum, under the Revised Code, and the medical superintendent refuses to act under said section 14, there can be hearing on habeas corpus, under section 13, and the judge not only can adjudge that the person has recovered his sanity, but can order his return to the sheriff.

2. Under Act March 31, 1897, art. 3, § 13, declaring that any one in custody as an insane person is entitled to a writ of habeas corpus on application to "the superior judge of the county" in which the hospital is located, and that on return of the writ the fact of his insanity shall be inquired into, the hearing may be had before a judge called in; Code Civ. Proc. § 71, providing that a judge of any superior court may hold the superior court in any county at the request of the judge thereof, and such judge "shall have the same power as a judge thereof."

3. Code Civ. Proc. § 71, providing that a judge of a superior court holding the superior court in any county at the request of the judge thereof "shall have the same power as the judge thereof," does not enlarge the powers given by, and therefore does not contravene, Const. art. 6, § 8, providing that "a judge of any superior court may hold a superior court in any county."

Commissioners' decision. Department 2.

Application by A. M. Gardner, medical superintendent of the Napa state hospital, for writ of prohibition to Joseph P. Jones, judge of the superior court of Contra Costa county. Denied.

W. H. Anderson, E. J. Livernash, and John T. York, for plaintiff. E. L. Webber and Dinkelspeil & Gesford, for defendant.

CHIPMAN, C. Application for a writ to prohibit defendant from entertaining jurisdiction in a certain habeas corpus case. One Buchanan was duly committed to the Napa state hospital for the insane by the superior court of Yuba county pending his trial upon the charge of murder. A friend of Buchanan, one Muller, presented his petition to the Honorable E. D. Ham, judge of the superior court of Napa county, setting forth, among other things, that Buchanan has recovered his sanity, and is entitled to be discharged from the state hospital, and redelivered to the sheriff of said Yuba county, to be dealt with as provided by chapter 6 of the Penal Code, and that his detention in said hospital as an insane patient has become and now is illegal. Judge Ham issued the writ, returnable "before the acting judge of said superior court," in the court room of the superior court of Napa county. At the request of Judge Ham, defendant, who was then judge of the superior court of Contra Costa county, proceeded to hold the superior court of Napa county, and while so doing assumed jurisdiction in this habeas corpus case. The petitioner in this present proceeding, the medical superintendent of the Napa state hospital, made return to the writ showing the legal commitment of Buchanan to the asylum, and alleging that he has not recovered his sanity. He claims that Buchanan cannot be delivered to the sheriff of Yuba county except upon the certificate of plaintiff that Buchanan has recovered his sanity, approved by the judge of the superior court of that county, and that the superior court of Napa county is without jurisdiction or authority to order plaintiff to so redeliver Buchanan.

1. It is contended that section 13, art. 3, of the insanity law, approved March 31, 1897 (St. 1897, p. 311), does not apply to insane persons of Buchanan's class. The question is an important one, inasmuch as it involves the right of an inmate of a state hospital, who happens at the time to be resting under a criminal charge and is committed pending trial for his crime, to have his alleged insanity made the subject of judicial inquiry by the writ of habeas corpus. It is claimed that

"the medical superintendent is the only person or tribunal vested by law with authority to determine whether or not an insane patient of this class has recovered." Section 13, art. 3, of the insanity law, provides as follows: "Any one in custody as an insane person is entitled to a writ of habeas corpus upon a proper application made by a relative or some friends in his behalf to the superior judge of the county in which the hospital is located. Upon the return of such writ the fact of his insanity shall be inquired into and determined. The medical history of the patient, as it appears in the clinical records, shall be given in evidence, and the superintendent in charge of the state hospital wherein such person is held in custody, and any other persons, shall be sworn touching the mental condition of such person." That part of section 14, Id., relied upon, reads as follows: "A patient committed to a hospital under the provisions of chapter six, title ten, part two, of the Penal Code of this state, shall, upon the certificate of the superintendent that such person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county and dealt with as provided for by said chapter six of the Penal Code." The provisions of the Penal Code regulating the commitment of persons charged with crime are found in sections 1367 to 1373. No question arises as to the regularity of Buchanan's commitment under these provisions. Section 1372 provides as follows: "If the defendant is received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the asylum and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged." Section 1473 of the Penal Code provides as follows: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." Section 5, art. 1, of the constitution reads: "The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension."

We find in the statutes no authority for making two classes of insane,—one civil and the other criminal,—and by any such classification to take the latter out of the operation of the statute as to the right of habeas corpus. Section 13, art. 3, of the insanity law makes no such distinction. But plaintiff contends that section 14, Id., in terms confers authority upon the medical superintendent to determine when the patient of the criminal class is restored to sanity, and, as the authority is not conferred upon any other person or tribunal, it is necessarily exclusive, and also proves that the law recognizes the two mentioned classes of insane. We cannot believe that the legislature intended to enact a law so entirely out of harmony with the spirit and letter of the constitution and the statutes to which attention has been called. It is our duty to harmonize sections 13 and 14, art. 3, of the insanity law so as to conform to the constitution and to the statutes quoted, if we can, rather than resort to the more extreme necessity of holding section 14 to be unconstitutional, as defendant claims it to be, if given the construction placed upon it by plaintiff. We think it was intended by section 14 to provide means by which a patient of Buchanan's class, whose reason has become restored, could be at once remanded to the sheriff of the proper county for trial; but it was not intended that the arbitrary power should rest with the medical superintendent to deprive the patient of the right to be so returned, nor was it intended that the medical superintendent should be the exclusive judge of the patient's restoration. The commitment is made under section 1370, Pen. Code, which provides "that upon his becoming sane he be redelivered to the sheriff"; and section 1372 provides that "if the defendant is received into the asylum he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the asylum and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged." The law does not justify the detention (1) if there be not a legal commitment, and (2) if the patient has recovered his sanity. If there be no legal commitment, or if the patient has become restored to sanity, there is lack of authority to detain him, and the question may be inquired into by habeas corpus. A fair construction of all the provisions of the statutes on the subject leads to the conclusion that, in a case like this, the superintendent of the state hospital may discharge the patient, and, if he fails or refuses to act, the inmate may institute the inquiry into his sanity by the process of habeas corpus. Defendant contends that the superior court can, upon inquiry by the writ, go no further than to adjudge the inmate to be sane, and cannot discharge him or grant the relief asked; and hence it was the plain duty of the court to discharge the writ, and remand the petitioner forthwith. We are cited to section 382b, Church, Hab. Corp. The author is there dealing with an attempt by the writ to review the proceedings by which the person was declared to be insane. Here there is no such attempt. The legality of the commitment is not questioned. The question here is not whether Buchanan was insane when committed, but whether he has since become sane,—a question not at all involved in the original proceeding. The question of Buchanan's recovery, in our opinion, is jurisdictional, and may be examined upon habeas corpus.

We can see no more authority for detaining an inmate of a state hospital against his will, after he has become restored to reason, than for detaining a prisoner upon conviction of crime after he has served out his sentence, or for detaining a person upon a criminal charge for an act to which the law attaches no criminality, and in this latter case the prisoner would be entitled to his discharge for lack of jurisdiction to hold him. Ex parte Kearny, 55 Cal. 212. If Buchanan has recovered his reason, the commitment under which he is held will not justify his further detention, for it operates only so long as the inmate is insane.

Counsel for plaintiff say in their brief that the learned judge (defendant) held at the hearing that he had the power to inquire into and adjudge the question of Buchanan's sanity, but had not the power to discharge him or order him returned to the sheriff of Yuba county; that the judge could only send him back to the hospital, and leave the enforcement of his rights to some other appropriate proceedings. It is hence argued that this is a misconception of the functions of the writ, and concedes the duty of the judge to remand Buchanan. It is true that section 14, art. 3, of the insanity law, provides that the patient shall, upon the certificate of the superintendent that he has recovered, approved by the judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with as provided by chapter 6 of the Penal Code; but that is where the superintendent acts. Where he refuses to act, and resort is had to the court, we think the judge has the power, not only to adjudge the patient to be sane, but to order him redelivered to the sheriff, to be dealt with under the Penal Code. Section 1484 of that Code declares that the court or judge "shall dispose of such party as the justice of the case may require." Section 1493 provides: "In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto." In his petition Buchanan does not ask to be restored to his freedom. He asks to be redelivered to the sheriff of Yuba county, to be there put upon trial under the charge resting against him. We can see no reason why the court or judge should not have the power by an order to direct that Buchanan be redelivered to the sheriff as prayed for by him, should he be found to be sane. Why should he be remanded to the custody of the superintendent, who would no longer have authority to detain him? Or why should he be required to resort to some other proceeding in order to obtain the relief which he may have in the habeas corpus proceeding?

2. Defendant makes the point that the judge of the superior court of Napa county alone has jurisdiction, since the language of section 13, art. 3, of the insanity law provides that the application authorized by it is to be made "to the superior judge of the county in which the hospital is located." The section also provides as follows: "Upon the return of such writ the fact of his insanity shall be inquired into and determined." The act does not require the hearing to be before the judge-elect of the superior court of the county. He may be disqualified to act by reason of relationship to the petitioner or for other cause. Section 71, Code Civ. Proc., provides that "a judge of any superior court may hold the superior court in any county, at the request of the judge * * * of the superior court thereof; * * *" and such judge "shall have the same power as a judge thereof." In re Newman, 75 Cal. 213, 16 Pac. 887. Defendant claims that if this Code section supports plaintiff, which we think it does, it must be held to be in violation of section 8, art. 6, of the constitution, which reads: "A judge of any superior court may hold a superior court in any county," etc. The argument is that this provision expressly limits the jurisdiction of the judge requested to act for another to holding a superior court of the county to which he is called, and that in section 71, Code Civ. Proc., the legislature has, without authority, added: "In either case the judge holding the court shall have the same power as a judge thereof." So far as I am aware, the constitutionality of this section of the Code has never before been questioned, although cases have come here for review where the question might have been raised. I believe the universal practice throughout the state has been, where a judge of one county has been called by the judge of another county to hold the court of the latter, or where the governor has requested him to do so, to accord to the judge thus called all the powers of the judge of the court to which he is called. I do not think the Code has enlarged the powers given by the constitution. In the absence of the clause in section 71, added to section 8, art. 6, of the constitution, we would hold the power to exist. Any other construction would make the provision of little value, would defeat the manifest intention of the constitution, and would disturb many judgments of our courts in numerous classes of cases which have been rendered upon the hitherto unquestioned belief that the judge for the time possesses all the powers of the judge whom he represents. We advise that the writ be denied.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the writ is denied.

McFARLAND, J. (concurring). I concur in the judgment because I see no way to hold otherwise consistently with the sacred right of the citizen to invoke the remedy of the writ of habeas corpus. Some slight impairment of the efficiency and discipline of insane asylums may possibly follow; but it is not to be assumed that a judge of the superior court will declare a man to be sane contrary to the judgment of the superintendent of the asylum, except in a very clear and strong case.

(126 Cal. 587)

VIZELICH v. SOUTHERN PAC. CO.

(Sac. 528.)[1]

(Supreme Court of California. Nov. 8, 1899.)

INJURY TO EMPLOYÉ—PROXIMATE CAUSE—FELLOW SERVANTS.

The proximate cause of the injury is the negligence of a fellow servant, thus preventing recovery, where a collision of a switch engine with a train was caused by negligence of the brakeman in manipulating the switch, and the water tank of the engine, insufficiently secured to withstand the shock of the collision, was thereby thrown forward onto a brakeman riding on the engine.

Department 2. Appeal from superior court, San Joaquin county.

Action by Harry G. Vizelich, an infant, by his guardian ad litem, against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Reversed.

Dudley & Buck, for appellant. Rodgers & Patterson and R. B. Terry, for respondent.

HENSHAW, J. This action was to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. The cause was tried before a jury, which rendered a verdict for plaintiff. From the judgment in his favor which followed, and from the order denying defendant's motion for a new trial, these appeals are prosecuted.

Plaintiff averred that he was in the employ of the defendant at the time of the accident. He was employed as a brakeman and an extra switchman in the railroad yards at Stockton. At the time of the accident he was riding in the cab of a switch engine. This engine collided with a train standing upon the side track. The water tank of the switch engine moved forward, and crushed the leg of plaintiff, necessitating amputation. It is charged that the cause of the accident was the negligence of the defendant in improperly maintaining its track and switch at the place of the accident, and also, in a separate count, the imperfect and defective condition of the water tank upon the switch engine, which was negligently and insecurely fastened. Upon the trial it was made to appear without conflict in the evidence that the switch engine had been used in and about the yard for some time, and that in its ordinary use no injury had ever resulted from the alleged insecure fastening of the water tank. It was also made to appear without dispute that the collision was caused by the negligence of a brakeman in manipulating the switch.

Of the many propositions urged by appellant, the following is the only one which need receive attention, for it is determinative of the controversy: In this discussion it will be assumed that the plaintiff satisfactorily established his relationship to the company as its employé, and it will further be assumed that the evidence was sufficient to show that the water tank of the engine was insecurely fastened. As to the allegation of the negligent condition of the track and switch, we think it clear that the evidence would not support a finding in plaintiff's favor upon that ground. The trial judge was of the same opinion, and little point is made of this matter in the briefs. The case, then, is one where an employé seeks to recover for personal injuries sustained by him by reason of the defective condition of the appliances furnished to him by the employer. In such cases he can recover only when the defective machinery or appliance was the proximate cause of the injury. Ordinarily this question is one of fact for the jury, under proper instructions; but, where the facts are not in dispute, it may become a question of law for the court. If the question is debatable,—one upon which reasonable minds may take opposing views,—it should, of course, be submitted to the jury; but, where it is clear and unmistakable that the proximate cause is one other than that upon which the cause of action rests, it is for the court so to declare. In this case it appears without conflict that the proximate cause of the injury was the negligence of the fellow employé who misplaced the switch and caused the collision. The case is paralleled by that of Trewatha v. Milling Co., 96 Cal. 494, 28 Pac. 571, and 31 Pac. 561. There an employé of a mining company, being hoisted from the mine in a bucket, was hurled against the sheave and injured. He charged the company with negligence in failing to furnish necessary and proper hoisting appliances. It was shown that the engineer hoisted the plaintiff from the mine with dangerous speed. This court said: "We do not think the verdict and judgment can be sustained, even if it be admitted that the appliances complained of were as defective as it is claimed they were. The immediate and proximate cause of the injury sustained by plaintiff was very clearly shown to have been the negligence of his co-employé. * * * Nothing but carelessness can account for the fact that the engineer allowed the bucket to be hurled against the sheave, twenty-three feet above the upper platform, whether he supposed he was hoisting a man or something else. But the rule is that, where the promoting cause of the injury is the negligence of a fellow servant, no recovery can be had, even though the machinery or appliances be defective. This was so declared in Kevern v. Mining Co., 70 Cal. 394, 11 Pac. 741, where the court said: 'The proximate cause of the injury is the object of inquiry, and, when discovered, must be regarded and relied on.' Hayes v. Railroad Corp., 3 Cush. 274. Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow servant, no recovery can be had. Wood, Mast. & Serv. 812. The same rule must apply where the appliances for doing work are defective." It is well settled that if injury has resulted in consequence of a certain unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. Cooley, Torts (2d Ed.) p. 73. It is here too plain to admit of discussion that the proximate cause was the negligence of the fellow employé who caused the collision. We leave the realm of certainty, and enter upon that of conjecture, when we seek to go behind the proximate cause, and to inquire, as would become necessary in this case, whether the company should have secured the water tank so as to withstand a collision; whether, if fastened with ordinary security, it would have withstood the shock of this particular collision; and other questions of like uncertainty which readily present themselves. Yet, notwithstanding that it so convincingly appears that the proximate cause was the negligence of the switchman, and notwithstanding the further fact that the utmost to which plaintiff could contend that he was entitled by way of instruction to the jury upon this question would be a charge to the effect that as they determined the proximate cause of the injury to be through the negligence of a fellow employé, or the defective appliance, so should their verdict be either for defendant or plaintiff, the court in fact went much further than this, and positively instructed the jury that, if they found that the defendant failed to provide a suitable roadbed, and an engine properly equipped with a tank securely fastened, and if this failure was the cause of the injury to plaintiff, they must find in plaintiff's favor, "notwithstanding the fact that the brakeman, a fellow servant, was guilty of negligence in leaving the switch described as 'Switch B' open." By this instruction the jury was, in effect, charged that, if injury resulted by reason of the defective appliance, the defective appliance itself, as matter of law, became the proximate cause. But, as has above been shown, it is clear, under the evidence in this case, that the proximate cause was the negligence of the fellow employé. For the foregoing reasons, the judgment and order appealed from are reversed, and the cause remanded.

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[1] Rehearing denied December 8, 1899.

We concur: McFARLAND, J.; TEMPLE, J.

(126 Cal. 600)

COMMERCIAL BANK OF SANTA ANA v. PRITCHARD et al. (L. A. 695.)

(Supreme Court of California. Nov. 8, 1899.)

LANDLORD AND TENANT—LEASES FOR YEARS—REGISTRATION—ASSIGNMENT—MORTGAGE—FIXTURES.

1. A lease of land for a term of years is a conveyance of real estate, within Civ. Code, §§ 1214, 1215, providing that every conveyance of real property, other than a lease for one year, is void as against a subsequent purchaser whose conveyance is first recorded, and that the term "conveyance" shall embrace every instrument by which any estate or interest in real property is created, except wills.

2. Under Civ. Code, § 2924, providing that every transfer of an interest in property, other than in trust as security, is to be deemed a mortgage, an assignment of a lease of land as security for the payment of a debt is a mortgage.

3. Under Civ. Code, §§ 658, 660, providing that real property consists of land and that which is affixed to it, and that a thing is deemed to be affixed when it permanently rests thereon, a warehouse, with concrete foundation, built by a lessee on land held under a lease for a term of years, providing that he may remove it before the expiration of the term, is real estate, as between the holder of a mortgage on the lessee's interest in the land and a subsequent purchaser of the warehouse.

Commissioners' decision. Department 2. Appeal from superior court, Orange county.

Action by the Commercial Bank of Santa Ana against B. F. Pritchard and others. From a judgment for defendant C. S. McKelvey, plaintiff appeals. Reversed.

E. E. Keech, for appellant. McKelvey & Bowe, for respondent.

COOPER, C. Action for foreclosure of mortgage. Judgment for defendant McKelvey. Motion for a new trial denied, and plaintiff appeals from the judgment and order.

The facts of this case are substantially as follows: On May 25, 1895, the Southern California Railway Company leased a small parcel of land, described by metes and bounds, to one Pritchard, for the term of five years from the date of said lease, at the nominal rent of one dollar per year, for the exclusive purpose of a warehouse site. The lease provided that it might be terminated by either party upon 30 days' notice in writing, that upon its termination the said Pritchard should have the privilege of removing all improvements placed by him thereon, and that at its expiration the said Pritchard should have the privilege of removal for a like period, and upon like terms. After the execution of the lease, and prior to the 12th day of August, 1895, said Pritchard built upon the land so leased a grain warehouse, with concrete foundation, 40 feet wide by 100 feet long; the same being a frame building, with shingle roof. On said last-named date the said Pritchard borrowed from appellant $600, giving his promissory note therefor, due one year after date, and, to secure the said note, gave a mortgage upon "all that certain personal property situate and described as follows, to wit: One grain warehouse, with concrete foundation, shingle roof, and frame structure, size forty wide and one hundred feet long, situated at Northam station, in Orange county, California, on the following described lands, to wit." Then follows a description of the lot so leased by Pritchard, by metes and bounds. The mortgage was verified by the mortgagor and mortgagee as a mortgage of personal property and was properly acknowledged. It was by appellant filed for record, and was recorded in volume 2 of Chattel Mortgages of Orange County. Thereafter, on October 9, 1896, the said Pritchard, to further secure the said note, transferred and assigned to appellant the said lease. On June 3, 1897, the appellant filed the said mortgage for record as a real-estate mortgage, and it was recorded in book 13 of Real-Estate Mortgages of said county. The promissory note was not paid, and appellant was the owner and holder of it at the time of the trial. All the above facts were found by the court below, and the court also made the following finding: "That the defendant Charles S. McKelvey is the owner and in possession of said warehouse, and at all times since the 27th day of May, A. D. 1897, has been, and now is, the owner and in possession of said warehouse; and said defendant entered into possession of said warehouse, and became the owner thereof, for a good and valuable consideration, and took the same without any notice whatever of any claim by the plaintiff, or any lien held by the plaintiff against said warehouse. That the said defendant became the purchaser of, and entered into the possession of, said warehouse, without any notice, constructive or otherwise, of plaintiff's lien." By reason of the finding just quoted, the learned judge of the court below refused to grant appellant a decree of foreclosure, and found that respondent was entitled to a judgment against appellant; that he was the owner of the warehouse and lease, and entitled to the control and possession thereof free and clear of any lien of the appellant. In this we think the court erred. The decision was evidently given upon the theory that the warehouse and lease were personal property.

Counsel for appellant says in his brief that the decision of this case depends upon whether or not the warehouse is personal property, and counsel for respondent say in their brief, "The only question to be decided is, is the warehouse chattel or real property?" This case does not depend upon the principle that the lessee, as against his lessor, upon the termination of the lease would have the right to remove the warehouse from the real estate described in the lease. It does not appear that the lease has ever been terminated, and no attempt has ever been made to remove the warehouse. Neither the lessor nor the lessee appears to have any interest in this controversy. The lessor was not made a party, and the lessee does not appear from the record to have made any defense or contest. It is therefore not necessary to discuss the rule as to the character of the warehouse in case this were a contest between the lessor and lessee. The lease made by the railway company to Pritchard was a conveyance of real estate. Civ. Code, § 1215; Garber v. Gianella, 98 Cal. 529, 33 Pac. 458. Pritchard was, therefore, by virtue of the conveyance, the owner of the estate thereby conveyed, and of all the improvements placed by him upon the premises therein described, and of the covenant for a renewal of his estate as therein provided. Being so the owner of the property, he could convey it by deed absolute, by way of mortgage, or by an assignment of his lease. He did so convey it by way of mortgage to appellant, and afterwards by a transfer of the lease; and this long before the time respondent claims to have purchased the warehouse as personal property. The court finds that Pritchard, in writing, and to secure the said note, assigned and transferred the lease to appellant October 9, 1896. The mortgage and assignment of the lease both being made to appellant prior to the attempted transfer to respondent, and both being so made as security for the note of $600, it will not be necessary to discuss the mortgage separately. This being the case, it must follow that on the 27th day of May, 1897, the attempted transfer to respondent conveyed nothing, or, at most, only conveyed the property subject to the lien of appellant thereon. Not only this, but the attempted transfer as set forth in the finding quoted only mentioned the warehouse, and not the lease. The transfer of the warehouse, if personal property, would not transfer the lease, which the court found had been transferred to appellant. The court, after so finding that the lease had been transferred and assigned to appellant as security, finds that, by a sale of the warehouse made long after the transfer of the lease to appellant, respondent became the owner and entitled to the lease, free and clear of any lien or claim of appellant. We cannot understand by what process of reasoning the court could find that the lease was transferred and assigned to appellant October 9, 1896; that the warehouse on the leased premises was conveyed to respondent May 27, 1897; and that from these facts alone the respondent became the owner of the lease, free of any lien or claim of appellant. The court evidently treated the respondent as an innocent purchaser for a valuable consideration, without notice. Pritchard certainly was guilty of the utmost bad faith towards appellant, in selling respondent the warehouse without letting him know anything about the mortgage or lien of appellant. The respondent, in his testimony, says: "I had no knowledge or information given me at any time of the existence of any mortgage or lien upon this property between Mr. Pritchard and the plaintiff. I knew nothing of the record. Had no personal knowledge of anything. Mr. Pritchard did not tell me about the mortgage to the bank. I did not ask him. Made no inquiry. Did not make any search of the records."

The court found that respondent was a purchaser for a valuable consideration without notice. It has been shown that the lease was a conveyance; that it had been assigned to appellant as security for the note of Pritchard. It was therefore incumbent upon respondent to show, not only that he was a subsequent purchaser for a valuable consideration, but that his conveyance was first duly recorded. Civ. Code, §§ 1107, 1214; Thomas v. Vanlieu, 28 Cal. 617; Warnock v. Harlow, 96 Cal. 306, 31 Pac. 166. It nowhere appears, either from the evidence or the finding, that respondent ever recorded his conveyance. It is provided by the Code of this state that every transfer of an interest in property, other than in trust, made as security for the performance of another act, is to be deemed a mortgage, except when, in the case of personal property, it is accompanied by actual change of possession, in which case it is deemed a pledge. Civ. Code, § 2924. The court having found that Pritchard assigned the lease to appellant as security for the payment of the $600, it was clearly a mortgage, within the definition just quoted. There is no law in this state requiring conveyances to be recorded. Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170. A mortgage is a lien upon everything that would pass by a grant of the property. Civ. Code, § 2926. Therefore Pritchard, by the assignment of the lease as security, conveyed to appellant everything that would have passed by a grant of the property. A grant of the property made by Pritchard would have conveyed all his interest in the leased premises, including the warehouse. In determining whether the warehouse is real or personal property, we must apply the same rule that would be applied if Pritchard had made a deed of grant of the property to appellant. Real property consists of land and that which is affixed to it. Id. § 658. A thing is deemed to be affixed to land when it is permanently resting upon it, as in the case of buildings. Id. § 660. The warehouse, 100 feet by 40 feet, with concrete foundation, would ordinarily permanently rest upon the land. In this case there is nothing to show that the building and concrete foundation did not rest upon the land, and it will be presumed that it did; and hence, under the definitions given, it is real estate. In the case of McNally v. Connolly, 70 Cal. 3, 11 Pac. 320, this court held that an engine, boiler, and machinery in a flouring mill erected by a lessee upon the leased premises, and securely attached thereto by bolts and screws, were fixtures, as between the lessee and his attaching creditors. In Lavenson v. Soap Co., 80 Cal. 245, 22 Pac. 184, it was held that a gun-metal digester, soap kettles, boiler, and candle machines, put into and attached to a building with the intention of using them for making soap and candles, were fixtures, and part of the realty, and would not pass, against a mortgagee, by bill of sale. In Breweries v. Schurtz, 104 Cal. 427, 38 Pac. 92, it was held that fixtures attached by a lessee to leased property became a part of the realty, and remain so until they are severed, and, while so attached, a mortgage of the leasehold interest covers the fixtures. To the same effect are Ewell, Fixt. pp. 276, 277, and note 1, p. 277; Jones, Mortg. §§ 428, 435. In Griffin v. Marine Co., 52 Ill. 130, a lessee of a lot of ground erected a building thereon, under an agreement with the lessor that the former might remove all the improvements placed by him on the premises, or the lessor should pay for them at their appraised value. The lessee and owner of the improvements executed a mortgage upon his interest in the premises, including the improvements; and it was held that the property mortgaged was an actual interest in real estate, and became immovable,—possessing none of those attributes as personal property which have shaped the law in regard to mortgaging such property. In the case of Knapp v. Jones (Ill. Sup.) 32 N. E. 382, it was held that a grain elevator built by a lessee on ground held under a lease which provided that the lessor might terminate the lease on 60 days' notice, and that the lessee might remove his buildings at any time before the expiration of the lease, was, together with the leasehold estate, to be classed as real estate, so that the holder of a recorded mortgage thereon had priority over a subsequent execution creditor. It follows that the judgment and order should be reversed, with directions to the lower court to enter judgment for appellant in accordance with the views herein expressed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the lower court to enter judgment for appellant in accordance with the views herein expressed.

McFARLAND, J. (concurring). I concur in the judgment; but the opinion of the commissioner might perhaps be construed as holding, generally, that an estate for years in land is real property, which, of course, is not so. An estate for years is, in its nature, personal property,—a chattel real; and it is subject, for most purposes, to the law which applies to personal property. See Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 Pac. 680, where the subject is discussed, and our Code division of property into real and personal is shown to be substantially that of the common law. But by sections 1214 and 1215 of the Civil Code a lease of land for a term exceeding one year is expressly made subject to the law concerning the recordation of conveyances of real property, and, as it is subject to that law, the reasoning of the commissioner applies to the case at bar. In my opinion, the question whether or not the warehouse was so fixed to the soil as to be a part of the land, and thus belong to the owner of the fee, is not important. The owner of the fee is not claiming it, and the questions involved pertain to the leasehold interest, as between the present appellant and respondent.

126 Cal. 551

ODELL v. BUTTRICK et al. (Sac. 556.)

(Supreme Court of California. Nov. 6, 1899.)

LANDLORD AND TENANT—UNLAWFUL DETAINER—PLEADING.

1. A complaint in unlawful detainer by a tenant after expiration of his term is not defective, because not stating the amount of the rent to be paid, where it avers a lease for a certain yearly rent, which was paid by defendant.

2. A finding in unlawful detainer against a tenant, after the expiration of his term, that defendant is still a tenant, is proper, as, though the term has terminated, the relation exists until the tenant surrenders possession.

Department 2. Appeal from superior court, San Joaquin county.

Action by Mary Odell against Charles Buttrick and L. Buttrick. Judgment for plaintiff, and defendants appeal. Affirmed.

J. G. Swinnerton and Budd & Thompson, for appellants. Louttit & Middlecoff, for respondent.

TEMPLE, J. This is an action for an unlawful detainer by a tenant after the expiration of his term. Defendants appeal from the judgment and from a refusal of a new trial. The court overruled a demurrer to the complaint, and it is charged that the ruling was erroneous. The demurrer was for want of facts, for uncertainty, for ambiguity, and that the complaint is unintelligible. It is now contended that the complaint is defective, because it does not state the amount of the rent to be paid. It is averred that it was for a certain yearly rent which was paid by defendants. As the cause of action is for unlawfully holding over after expiration of the term, no further statement upon the subject was called for, or would have been material if made.

It is said that the findings do not support the judgment.

1. There must have been the conventional relation of landlord and tenant. This is clearly shown by the allegations of the complaint, and by the findings.

2. It is said that the relation must have terminated, and the court finds that the defendants are still tenants. It was necessary that the term should have ended, but the relation still continues until the tenant surrenders possession. See section 325, Code Civ. Proc. Therefore finding 3 does not contradict finding 2.

3. The evidence is very clear that the lease was entered into, and this is really not controverted by the testimony of Charles Buttrick. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

126 Cal. 677

CITY OF SANTA ANA v. BALLARD, Judge. (L. A. 825.)

(Supreme Court of California. Nov. 11, 1899.)

STATEMENT—SETTLEMENT BY JUDGE—MANDAMUS.

Under Code Civ. Proc. §§ 650, 659, it is the duty of the judge to settle a bill of exceptions or statement, when properly presented, and, if it contains redundant or useless matter, to strike it out, or order it stricken out, and to make the statement truly present the case; so that, petitioner having presented for settlement a statement on motion for new trial, and it being objected to merely because it contained the entire transcript of the reporter's notes, and the judge having refused leave to petitioner to amend it in the particular mentioned, or in any other particular in which it might be informal, deficient, or inaccurate, and having refused to settle the statement, mandamus will issue to him to take proper steps to have the statement amended, and, on its being amended, to settle it.

McFarland, J., dissenting.

In bank. Application by the city of Santa Ana for mandamus to J. W. Ballard, judge. Writ granted.

W. F. Heathman, for petitioner.

VAN DYKE, J. Mandamus to compel the respondent, a judge of the superior court of the county of Orange, to settle a statement on motion for a new trial. The application is made on notice for a peremptory writ. The petitioner is plaintiff in an action in said court of the county of Orange, brought by said city against D. Gildmacher et al. to condemn a right of way for sewer purposes in said city of Santa Ana. At the close of the testimony on the trial of the cause the court, upon request of the defendants, instructed the jury to bring in a verdict for defendants, on the ground that there was no evidence to show the necessity for taking the land sought to be condemned for the purpose mentioned, and the jury thereupon brought in a verdict as instructed. When the proposed statement on motion for a new trial came up for settlement, the defendants objected to the settlement of said statement on the ground that said statement contained a literal transcript of the reporter's notes taken at the trial; but it was not objected that it did not contain a fair and correct statement of the case, or that it was not presented in due time. Thereupon attorney for plaintiff and petitioner asked leave of the judge to amend his statement in the particular mentioned, or in any other particular in which said statement might be informal, deficient, or inaccurate, or in which it did not comply with any law or rule of practice; but the said judge declined to allow plaintiff and petitioner to so amend the statement by condensing from questions and answers to a narrative form, and refused to allow plaintiff and petitioner to amend its statement in any respect, or at all, and refused to settle said statement, and retains the same in his hands, unallowed, unsettled, and unsigned.

It is the duty of the judge to settle a bill of exceptions or statement, when properly presented; and, if it contains redundant or useless matter, it is his duty to strike it out, or order it to be stricken out, whether the parties assent thereto or not, and to make the statement truly represent the case. Code Civ. Proc. §§ 650, 659. The practice of embodying in the statement or bill of exceptions the reporter's notes of the trial in bulk is not justified by the law or good practice, and is reprehensible in the highest degree. The language of the Code is that the statement shall contain "so much of the evidence or other matter as is necessary to explain" the objections or points sought to be presented. And if attorneys, notwithstanding the frequent declarations of this court as to the proper practice, in order to save labor to themselves, or for other cause, continue to insert the reporter's notes, instead of condensing the same, the trial judge, in settling the statement, should apply the remedy by striking out, or causing to be stricken out, the redundant or useless matter. In Sansome v. Myers, 80 Cal. 486, 22 Pac. 213, it is said: "It was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then to sign it. If the attorney for the petitioner had omitted anything material, the judge should have directed and required him to insert it, or, if the matter was incorrectly stated, he should have required him to correct it. * * * If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge, no doubt, would have been justified in refusing to settle the same; but not otherwise." In that case the judge refused to settle the statement in the first instance, and the court say: "This we think he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty." In Leach v. Pearce, 93 Cal. 618, 29 Pac. 236, in a mandamus proceeding, the same as the present, it was said: "Of course, the exercise of respondent's discretion cannot be controlled or reviewed in this proceeding. He cannot be compelled to settle any particular bill, or to insert or exclude any particular facts; but if the petitioner is entitled to move for a new trial, and has taken the proper steps within time, or if she has tendered a bill of exceptions to be used on appeal from the order within the time allowed by law, respondent cannot refuse to settle and sign a bill containing a record of the proceedings. It is an act which the law requires him to perform,—a duty resulting from his office." See, also, Winters v. Buck, 121 Cal. 279, 53 Pac. 799. In such case mandamus is the proper remedy. Code Civ. Proc. §§ 1085, 1086. In Kruse v. Chester, 66 Cal. 353, 5 Pac. 613, the court say: "The statement in question having been presented in due time, the law enjoined upon the referee the duty to settle it, and the writ of mandate will issue to compel the discharge of the duty." In Tibbets v. Banking Co., 97 Cal. 258, 32 Pac. 174, it is said the petitioner presented for settlement "quite a lengthy statement on motion for a new trial to the judge of the superior court, and that he refused to sign it, or any other bill of exceptions. In such case the judge can be compelled by mandamus to settle the bill or statement." From the facts stated in the petition in this case, which are not controverted, the petitioner should have been allowed to amend his statement as proposed, so as to avoid the objection raised, and then have said statement settled and allowed. A peremptory writ will therefore issue, directing the respondent to take such steps as in his judgment may be requisite for the purpose of striking out and omitting from the proposed statement all redundant and useless matter, and, upon the statement being amended and corrected, to settle and allow the same.

We concur: BEATTY, C. J.; HARRISON, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent. In my opinion, the respondent was not obliged to take any action whatever upon the document handed to him, and which is called a "proposed statement." It was not such a document as the law recognizes as the draft of a statement. The judge, in the exercise of his discretion, might have allowed appellant to amend by turning it into something presentable, or he might himself have taken up the task of preparing a statement, but he did not abuse his discretion by refusing to do either.

(126 Cal. 653)

BOWERING et al. v. ADAMS et al. (L. A. 754.)[1]

(Supreme Court of California. Nov. 10, 1899.)

APPEAL—DISMISSAL—FAILURE TO SERVE NOTICE.

In an action to quiet certain water rights the complaint demanded judgment that the adverse claims of all the defendants be determined, and the plaintiffs adjudged the owners of all the water except a certain surplus. The judgment awarded to some of the defendants advantages over others, from which two of them appealed, but no notice of appeal was served on certain defendants against whom judgment was rendered by default. *Held*, that the omitted defendants were adverse parties, and hence the appeal should be dismissed for failure to serve notice on them.

In bank. Appeal from superior court, Los Angeles county.

Action by William Bowering and others against Frank P. Adams and others. From a judgment for plaintiffs the defendants Gerrard and Fulton appeal. Dismissed.

J. W. Swanwick, for appellants. Frank W. Burnett, for respondents.

TEMPLE, J. This action was commenced by 38 plaintiffs against 100 defendants to quiet the right and title of plaintiffs to certain water to the extent of 70 inches, miners' measure. Many of the defendants defaulted, and, among them, the two appellants. In the decree the court determined that 73 of the parties to the action were the owners of all the water arising upon the land described, or which could be thereafter developed from the same, in the order and to the several amounts named in the decree. Of these parties 35 were plaintiffs and 38 were defendants, and the amount of water adjudged to belong to them is in the aggregate more than 120 inches. The judgment roll is not contained in the transcript, and we cannot tell whether, as to the defendants, the pleadings authorized a judgment in their favor. Plaintiffs, in their complaint, only asked that the defendants be enjoined from interfering with their claim to 70 inches flowing from the described tract, but admitted the right of the defendants to the surplus. Appellants contend that the decree is not sustained by the complaint in allowing a prior right to more than 70 inches of water, and in extending that priority to water which may hereafter be developed upon the described tract of land.

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[1] Rehearing denied December 8, 1899.

Motion is made by some of the respondents to dismiss the appeal on the ground that the notice of appeal was not served on all the adverse parties, to wit, upon 14 defendants named in the notice, who had been duly served with summons, and whose defaults had been entered, and against whom judgment had been rendered. The appellants admit the facts stated, except that they deny that the omitted parties are adverse parties, and that their interests will or can be injuriously affected by the appeal.

In the complaint it is alleged that in 1887 the San José Ranch Company acquired title to certain lands, and each of plaintiffs purchased from said company a specific portion thereof, and also certain water rights, which are specifically described in the complaint, and which have become and are appurtenant to the respective tracts of land owned by plaintiffs in severalty. It was also averred that, in addition to the water rights conveyed to plaintiffs, the company undertook to convey to other parties a right to water from sources undefined, such other parties being the defendants, who assert some right to the water adverse to plaintiffs; "that the claims of said defendants are without any right whatever except as to any surplus water there may be derived from said source over and above the amount belonging to the plaintiffs, as above set forth." Among other things, they demand that "all adverse claims of said defendants, or either of them, may be determined by a decree of this court, and that by said decree it be declared and adjudged that said plaintiffs are the owners of the right to use all the water flowing from the source above described, except the surplus, if any, over and above an amount equal to a constant flow of seventy inches under four-inch pressure, miners' measurement," etc. The effect of the decree has been partly stated.

The record, which does not contain the judgment roll, does not show that cross complaints were interposed by any of the defendants, but, for aught we can know, such may have been the case. The judgment awards to 35 defendants advantages over the other defendants, and adds to the 70 inches of water which may be taken before any surplus can exist about as much more. The appellants, so far as the judgment discloses, are in the same position under the decree as the defendants not served with the notice, but the decree adjudges, in effect, that none of the defendants, except those named in the decree as possessing prior rights, can appropriate to their special use water from the described tract, save as sharers in the surplus. By the terms of the decree no defendants can acquire independent rights to the water, and diminish the surplus. Should they appropriate to their individual use any of the water disposed of by the decree, it would necessarily lessen the surplus to be divided among the defendants, and, of course, the share which would go to each defendant who was not served with the notice of appeal. It must be borne in mind, also, that if the appellants succeed in causing the decree to be modified, it can be modified only as to appellants. The appeal is taken from portions of the decree only,—formally from five different portions. The first four are, however, aimed at the same adjudication, to wit, giving to the favored parties the right to the undeveloped water, to the exclusion of the appellants. In the fifth they appeal from those portions of the decree which affect the right of the appellants to the developed waters in said tract of land.

It is obvious that, if appellants are entirely successful in their appeal, they will be at liberty to claim, and in fact to appropriate to their special use, to the exclusion of all other parties, the entire amount of water which is disposed of by the decree, and thus prevent the possibility of there being any surplus water to be divided among the defendants who, by the decree, are not given prior rights, and who were not served with the notice of appeal. It is also obvious that, to whatever extent they so succeed in modifying the decree, the effect will be to place them in a position to claim some portion of the water already developed, or to be hereafter developed, to the prejudice of the defendants not served. Indeed, it is difficult to see how they can be benefited by any modification of the judgment, except to the injury of such defendants. It is true, the decree does not settle the rights of the defendants not named in the schedule attached to the decree, as between themselves. Possibly the appellants may be entitled to all the surplus water as against the defendants not served, but the complaint puts all upon the same level, and, although it is not an adjudication of their rights with reference to each other, it must be so regarded on this motion. The appeal is dismissed.

We concur: McFARLAND, J.; HARRISON, J.; VAN DYKE, J.

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126 Cal. 582

WALTER v. MERCED ACADEMY ASS'N et al. (Sac. 559.)

(Supreme Court of California. Nov. 8, 1899.)

CORPORATIONS—STOCKHOLDERS' LIABILITY—ENFORCEMENT—PARTIES—LIMITATION—DECREE.

1. It is not necessary, for one to subscribe to a subscription agreement, to become the owner of shares and the holder of original certificates of the first issue of a corporation's stock.

2. One who is the owner of stock of a corporation by receiving and paying for it cannot defeat liability to creditors of the corporation by showing a variance between the subscription agreement and the articles of incorporation as to the purposes of the incorporation.

3. Stockholders, after holding stock for six years, cannot, for the first time, to an action against them by creditors of the corporation, urge a variance between the subscription agreement and the articles of incorporation, as relieving them from liability.

4. The statute of limitations cannot be considered, not being pleaded in the answer, and the complaint not showing on its face that the claim is barred.

5. Actions by creditors of a corporation will lie against stockholders, remedy not being limited to sale of the stock.

6. Stockholders having paid 33⅓ per cent. of the par value of their stock cannot, in an action against them by creditors of the corporation to enforce liability to the extent of their unpaid subscriptions, be treated as holding their stock as a mere gratuity.

7. Right of creditors of a corporation to recover against stockholders to the extent of their unpaid subscriptions is not limited by other debts of the corporation.

8. Action may be maintained by creditors of a corporation against part of the stockholders only to enforce their liability to extent of their unpaid subscriptions.

9. Making and signing by the judge of the decision and decree in a county other than that of the trial is immaterial, they not being in force till filed by the clerk in the county of the trial.

Department 2. Appeal from superior court, Merced county.

Action by Doreth Walter against the Merced Academy Association, a corporation, and others, stockholders therein. Judgment for plaintiff. Defendant stockholders appeal. Affirmed.

J. W. Knox and T. C. Law, for appellants. James F. Peck, for respondent.

PER CURIAM. Heretofore the plaintiff had recovered judgment against the defendant corporation in a foreclosure suit, and, after sale of the premises involved, a deficiency judgment was duly docketed against said corporation for $5,587.25. Plaintiff prosecuted this action against the appellants to ascertain the amount due from each of them on said deficiency judgment as owners and holders of the stock of the said defendant corporation, and to obtain judgment and execution for the amount of her claim against each of them, not to exceed the amount that should be found due on their several subscriptions to the said stock of said corporation. The case was tried without a jury, and from a judgment for plaintiff and an order denying a new trial the defendant stockholders above named appeal.

It appears from the pleadings and evidence that the Merced Academy Association was incorporated in 1890, with a capital stock of $25,000, divided into 250 shares of the par value of $100 each. Its purposes, as stated in its articles of incorporation, were "to buy or acquire the Merced Academy property, * * * situated in the city of Merced, * * * together with the academy building and furniture and improvements connected therewith; and to own, use, improve, mortgage, lease, sell, and deal with said property, and to borrow money thereon, and to carry on a school or boarding house, or to lease the same for said purpose or any other purpose." All the appellants were named in the articles as stockholders, and Applegate, Lyons, Simonson, Law, and Landrum were mentioned as directors for the first year, and to the articles these five persons mentioned subscribed their names, and duly acknowledged the execution of the same. Some time prior to incorporation the appellants had signed a subscription agreement in which the objects of the proposed corporation were stated as follows: "To acquire the Merced Academy property by purchase or otherwise, and conduct thereon a school, or to use the said property for such other purpose or purposes as the stockholders of said corporation may determine." Soon after incorporation, certificates of stock were issued, and each of the appellants, excepting those who signed the articles, received one of these certificates representing a stated number of shares, and signed a receipt therefor, which receipt, after describing the certificate delivered, contained the following language: "Received the above certificate subject to the articles of incorporation and by-laws of the company." The appellants retained these certificates in their possession from 1890, when they received them, down to the time of the trial of this action, in 1897, holding themselves in readiness, as it is admitted, to share in the dividends of the concern, should any accrue. Appellants seek to avoid liability as stockholders, and contend that they are not stockholders in fact for the reason of variance in the purposes of incorporation as set forth in the subscription agreement and as declared in the articles of incorporation; and to sustain this position they cite Marysville Electric Light & Power Co. v. Johnson, 109 Cal. 193, 41 Pac. 1016, and many other cases. In none of these cases was the action against the defendant as an owner of shares or as an owner of stock in the corporation, but most of them are similar to the Marysville Electric Light Case, supra, and are based solely on the original subscription agreement, the defendants refusing to accept or pay for the stock of the corporation. In the case at bar, however, the complaint sets out, and the evidence shows, that appellants were at all the times mentioned in the complaint, and still are, the owners of shares in the corporation. To become the owners of shares and the holders of original certificates of the first issue, it was not necessary that appellants should have subscribed to any subscription agreement at all. "It would be a mockery of justice to permit such an objection to prevail." Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220. "Merely accepting and holding a certificate of stock is sufficient to constitute one a shareholder." Cook, Stock, Stockh. & Corp. Law, § 52; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203. It becomes unnecessary to determine whether there was a material variance between the subscription agreement and the articles as to the purposes of the corporation, because we may admit that there was such variance, and that appellants never signed any subscription paper for stock in the corporation which was in fact incorporated; and yet they are owners of such stock by virtue of receiving and paying for the same. Another answer to appellants' objections is that it would have been perfectly proper for appellants to have informed themselves as to the contents of the articles of incorporation when they received their stock, and they will certainly not be heard after six years to urge for the first time an objection of the character made here in a suit by one who, no doubt, credited the corporation on the faith of the appellants being, as the books showed them to be, stockholders of the corporation. Thomp. Liab. Stockh. §§ 150, 151, 125. It seems to be admitted, or at least not denied, that the five appellants who subscribed the articles of incorporation are to be treated as stockholders in the amounts set out in such articles. No statute of limitations being pleaded in the answer, and the complaint not showing on its face that the claim of plaintiff is barred by any statute, it is therefore not necessary to further notice any objection based on the statute of limitations.

On the evidence presented, the court properly found that $33⅓ per share, and no more, had been paid, and that $66⅔ per share had not been paid, and was due and unpaid. It was also alleged in the complaint, and not denied in the answer, that "upon the shares owned by each of said defendants the sum of thirty-three and one-third dollars per share, and no more," had been paid. Hence appellants' contention that their stock was fully paid for is not supported by the record.

Many of the minor points made by appellants are disposed of by the position we assume in holding the liability of appellants to arise out of the fact of their being stockholders and owners as shown by the record on appeal, and it will be unnecessary to notice such points in detail.

Appellants are mistaken in supposing that the stockholders are not liable for debts of the corporation until all the stock is subscribed. When one-fourth of the capital stock is subscribed, their liability begins. Civ. Code, § 331.

The contention that an action will not lie against the stockholders personally, and that the remedy is by sale of the stock, is disposed of in Baines v. Babcock, 95 Cal. 582, 27 Pac. 674, and 30 Pac. 776.

The amount of plaintiff's recovery is expressly limited by the judgment to the amount found to be due from the stockholders.

As we have already seen, the record shows that appellants had paid 33⅓ per cent. of the par value of their stock. They cannot, therefore, be treated as holding their stock as a mere gratuity.

Plaintiff's right to recover does not depend upon, nor is it limited in any way by, the other debts of the corporation, and an accounting was entirely unnecessary. Neither was it necessary that all the stockholders should be made parties defendant. Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Baines v. Babcock, supra.

The testimony of Simonson shows that the directors had no meeting, and that no assessment was levied to pay plaintiff's claim. This action is not barred by the provisions of section 726, Code Civ. Proc. Baines v. Babcock, supra; Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102.

The findings cover the material issues. The decision, therefore, is not against law. There was no irregularity in the trial judge making and signing the decision and decree in Stanislaus county. Until the decision and decree were filed by the clerk in Merced county, they were not in force. Comstock Quicksilver Min. Co. v. Superior Court of Santa Cruz Co., 57 Cal. 625.

There was no material error in the rulings of the court on objections to the introduction of evidence. The judgment and order are affirmed.

(126 Cal. 636)

GREENAWALT v. MUELLER. (L. A. 578.)

(Supreme Court of California. Nov. 10, 1899.)

FRAUDULENT CONVEYANCE—TRANSFER TO WIFE—CONSIDERATION.

Civ. Code, § 3442, provides that a transfer of property voluntarily by a party while insolvent or in contemplation of insolvency shall be fraudulent as to existing creditors. A wife bought with her own means a lot, and, as a part of the consideration, assumed an incumbrance thereon. Before the conveyance was executed, her husband agreed that, if the deed made him a co-grantee with his wife, he would pay the incumbrance. The deed was so made, but he failed to pay the incumbrance, and the wife paid it. Four days before he filed a petition in insolvency he executed a deed of the premises to his wife. *Held* that, when the wife paid the incumbrance, it created an implied obligation on her husband's part to pay her the amount thereof, and his deed to her was given in discharge thereof, and was not void as being without a valuable consideration.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Henry Greenawalt, assignee in insolvency, against Mary Mueller, to set aside a conveyance of real estate. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

R. Dunnigan, for appellant. Murphy & Gottschalk, for respondent.

CHIPMAN, C. Action to have a certain conveyance of real property to defendant declared to be void, and for a decree adjudging the property to belong to the insolvent estate of defendant's husband. The cause was tried by the court without a jury, and it found the following facts: That on December 6, 1893, defendant purchased with her own means lot 108 in Brook's addition to the city of Los Angeles for the sum of $500, "and as part of the consideration undertook and promised to pay off an incumbrance of two hundred and fifty dollars then resting on said lot"; that the deed, when first drawn, made her the sole grantee, but before delivery her husband requested that he be made one of the grantees, to which defendant consented, "upon his promise to pay off said incumbrance of two hundred and fifty dollars, whereupon his name was inserted and the deed delivered"; that he failed to pay said mortgage, and defendant thereupon paid the same "with means furnished to the defendant by a son of defendant, who gave his earnings to said defendant for the purpose of paying off said incumbrance, and thereby acquire an unincumbered home"; that defendant's husband never paid any part of the consideration for said lot; that defendant frequently requested him to execute a deed to her, for the reason that he had failed to keep his promise to pay off the mortgage, and because he had only a nominal interest in the lot, and that on January 14, 1896, he did execute to her a deed for said lot, conveying his interest therein, "the consideration named in said deed being ten dollars and love and affection"; that said deed was made within one month prior to the filing of petition in insolvency by Mueller, and after he had become insolvent, but at the time of said transfer "defendant did not know, or have any reasonable cause to believe, that her husband was insolvent, or was about to file his petition in insolvency, or that such conveyance to her was made with the view to prevent his property from coming to his assignees in insolvency," or to in any way hinder, delay, or defraud his creditors, or to evade any of the provisions of the insolvency laws of this state. The court gave judgment for defendant, from which, and from an order denying motion for new trial, plaintiff appeals.

The evidence is meager. Plaintiff's evidence consists of the deed of 1893 from defendant's grantor, and the testimony of the insolvent, Mueller, that he filed his petition in insolvency January 18, 1896, at which time, and when he conveyed to his wife, he had no property, and owed four hundred or five hundred dollars debts; that he knew when he made the deed that he could not pay these debts. This is all the evidence of plaintiff. The deed from Mueller to his wife is not given in the transcript. The evidence of defendant consists of the testimony of herself and her son, from which it appears that the findings of facts are amply supported; and, unless they fail to sustain the conclusion of law, the judgment and order must be affirmed.

Appellant claims that the deed of Mueller to his wife was absolutely void, and no testimony was necessary to establish that fact; citing Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025. As the court found that Mueller was insolvent when he made the deed, and that he made it within one month of filing his petition in insolvency, the conveyance is void as to the then existing creditors if "made or given voluntarily, or without a valuable consideration" (section 3442, Civ. Code), or the transfer was made with a view to give a preference to Mrs. Mueller, and she had reasonable cause to believe that her husband was insolvent at the time, and that he made the transfer with a view to prevent his property from coming to his assignee in insolvency, or to hinder, delay, or defraud his creditors, and the transfer was made within one month before the filing of his petition in insolvency (Insolvent Act, § 59; St. 1895, p. 131). The evidence shows that defendant paid no money to her husband when he made the deed, and the recital of the deed is that the consideration was $10 and love and affection. But the evidence also shows that Mrs. Mueller originally bought the property, in 1893, with her own means, the consideration being $525, and the deed was made out to her as grantee. At the time of the purchase there was a mortgage indebtedness resting on the property, which she testified she assumed when she bought the property. Before the deed was delivered, her husband promised that, if he was made co-grantee in the deed with his wife, he would pay the mortgage indebtedness, and accordingly it was drawn, making Mueller and wife grantees, and it contained the following clause: "This deed is made subject to a mortgage now on said lot, given by M. H. Pollard, to secure a note of two hundred and fifty dollars (being part of the purchase price of said lot), with accrued interest on said note." Mueller failed to pay this mortgage debt, and Mrs. Mueller paid it, and finally conveyed his interest in the property to his wife, four days before filing his petition in insolvency. She testified that she had no knowledge of his being in debt, or that he was insolvent or contemplated insolvency, or had any intention to hinder, delay, or defraud his creditors.

Respondent relies upon the cases involving the principles governing resulting trusts. It seems to us that the facts show that Mrs. Mueller was a creditor of her husband. When she paid the mortgage debt, there arose an implied obligation on his part to pay her the amount of that obligation. When he conveyed his interest in the property to her, it was in discharge of this obligation; and this was a valuable consideration for the deed (Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 36), and takes the case out of the operation of section 3442, supra. The evidence is, and the court found, that defendant had no knowledge of her husband's insolvency, and had no reasonable cause of believing him to be insolvent, or that he made the deed with intent to defraud his creditors. The case is thus taken out of the operation of the insolvent act. Saunderson v. Broadwell, supra; Bernheim v. Christal (Cal.) 18 Pac. 683; Haskin v. James, 96 Cal. 258, 31 Pac. 36. I advise that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

TEMPLE, J. I concur in the judgment.

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127 Cal. 26

COUNTY BANK OF SAN LUIS OBISPO v. GREENBERG et al. (L. A. 600.)

(Supreme Court of California. Nov. 22, 1899.)

PLEADING—BANKS—OVERDRAFTS—BILLS AND NOTES—INSTRUCTIONS—JUDGMENT.

1. Where the amended complaint on a note given to secure an overdraft showed the existence of an overdraft in excess of the note at the time the action was brought, and that no part of either the note or the overdraft had been paid, a demurrer to such complaint was properly overruled.

2. Where a note was given to secure an overdraft, and when the note was sued on the overdraft exceeded the value of the note and interest, judgment should be rendered for the value of the note and interest only.

3. Under Code Civ. Proc. § 447, providing that the due execution of a written instrument sued on is admitted unless the answer denying same is verified, it was not error, where a copy of a note was set out in the amended complaint, and the answer was not verified, to give an instruction that the answer admitted the execution of the note.

4. It was not error to refuse an instruction setting forth the rate of interest to be charged, in the absence of a special agreement, where the action was on a note given to secure an overdraft, and there was no question but that the amount of the overdraft and legal interest thereon exceeded the amount of the note.

5. Where an action was brought on a note given to secure an overdraft, the amount of which had varied from time to time, but which was treated by the parties as one obligation, it was not error to refuse instructions based on the theory that there were several obligations between the parties.

6. Code Civ. Proc. § 726, providing that there can be but one action on a mortgage debt, does not bar a suit on a note given to secure the payment of an overdraft, where a suit to foreclose a mortgage given as security for the original obligation by one of the depositors had been previously brought.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county.

Action by the County Bank of San Luis Obispo against Meyer Greenberg and others. From a judgment for plaintiff, defendant B. Schwartz appeals. Reversed, with conditions.

Graves & Graves, for appellant. Wilcoxon & Bouldin, for respondent.

GRAY, C. The defendant Schwartz appeals from a judgment in plaintiff's favor and from an order denying a new trial. The case was here on a former appeal (Bank v. Greenberg, 116 Cal. 467, 48 Pac. 386), wherein will be found a statement of the facts.

1. On the return of the case to the trial court the complaint was amended so as to make it show that Greenberg Bros., between the making and delivery of the note on which the suit is based and the time it was due, March 5, 1895, had overdrawn their account with plaintiff to an amount considerably in excess of the note, that said note was given to secure said overdraft, and that no part of said overdraft had been paid. This amendment cured the defect in the complaint for which the judgment was reversed on the former appeal. The complaint, as thus amended, showed the existence of the overdraft at the time the action was brought, that no part of either the note or overdraft had been paid, and clearly showed a liability of Schwartz to plaintiff for the full face value of the note. There is, therefore, no merit in the argument that the demurrer to the amended complaint should have been sustained.

2. The overdraft, with interest at the legal rate, after giving proper credit for the several payments thereon, exceeds the amount due on the note on the date of the rendition of the verdict, November 19, 1897. The note was dated March 5, 1894, and was given for $5,000, with interest at 10 per cent. per annum, payable quarterly, and, if not so paid, to be added to the principal, and bear like interest. According to its terms, there was due on the note on November 19, 1897, $7,210.07, and the verdict should have been limited to this amount. The judgment is therefore $148.55 in excess of the amount to which the plaintiff was entitled at the date of its entry.

3. The refusal of the court to give instruction No. 8, setting forth the rate of interest to be charged in the absence of a special agreement, could not injure defendant in any way, for the reason that plaintiff's action was based on a written obligation, and he was entitled to recover the face value of the note, if the overdraft, with interest thereon, reached that amount; and there is no question on the evidence that it did reach that amount, even if we allow interest on the overdraft at

no more than the legal rate. There is no specification in the record that the verdict is contrary to evidence for having allowed interest at the legal rate on the overdraft. Indeed, appellant seems to have proceeded at the trial on the theory that such interest was to be allowed. His eighth instruction and second specification of particulars indicate this, and render it unnecessary to decide the point made in the concluding paragraph of appellant's brief.

4. The instruction that the answer of the defendants admits the due execution by all of them of the note sued on was not error. A copy of the note was set out in the amended complaint, and the answer was not verified. The genuineness and due execution of the instrument are therefore deemed admitted. Code Civ. Proc. § 447.

5. Instructions 6 and 7 offered by appellant and refused by the court are inapplicable to the undisputed facts of the case. There were no "several obligations" from Greenberg Bros. to plaintiff, as is assumed in these instructions. Greenberg Bros. had but one obligation at the plaintiff's bank, and that was the overdraft that the note sued on was given to secure. All that was paid into the bank by the firm was paid on that overdraft, and all that was drawn out was added to it. The amount of the overdraft varied from time to time, no doubt, but the parties treated it as one concrete obligation, and so it should be treated on the trial of the case. It was held on the former appeal that the note was given "to secure whatever overdraft might exist on March 5, 1895, not exceeding the amount of the obligation and accrued interest thereon, * * * and contemplated continued transactions between them and the bank." The amount of the overdraft was the question for the jury to determine, and that was to be fixed by subtracting all that had been paid into the bank from all that had been drawn out, giving such credits on account of interest as the law or the agreement between the parties might indicate. These instructions, therefore, based on the theory of several obligations between the parties, could only confuse and mislead, and were properly refused.

6. The mortgage that was foreclosed at the suit of plaintiff herein against Meyer Greenberg was not given to secure the obligation upon which the present action is based. To quote from appellant's brief, "The makers of the note are sureties or guarantors for the payment of the overdraft," and the mortgage, by its terms, was limited to a security for the performance of the original obligation of the Greenbergs to pay this overdraft, and in no sense was it a security for the performance of the collateral personal obligation of appellant on the note given to secure the same overdraft. Hence we say that the previous suit on the mortgage given to secure the overdraft was no bar to this suit on the note given as collateral security for the same overdraft. Code Civ. Proc. § 726, providing that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage," is inapplicable to the case in hand, and therefore instructions 4 and 5 were properly refused. These views find support in the following well-considered cases: Vandewater v. McRae, 27 Cal. 596; Bank v. Casaccia, 103 Cal. 641, 37 Pac. 648; Carver v. Steele, 116 Cal. 116, 47 Pac. 1007.

We advise that the judgment and order be reversed, and the cause remanded, with directions to the court below to proceed to try the case anew, unless within 20 days after the filing of the remittitur in the court below the plaintiff shall file with the clerk of that court a written consent that the judgment be modified by striking out the amount therein awarded, and inserting in lieu thereof the sum of $7,210.07, and, on such consent being filed, it is ordered that the judgment be modified accordingly as of the date of the original judgment.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded, with directions to the court below to proceed to try the case anew, unless within 20 days after the filing of the remittitur in the court below the plaintiff shall file with the clerk of that court a written consent that the judgment be modified by striking out the damages therein awarded, and inserting in lieu thereof the sum of $7,210.07, and, on such consent being filed, it is ordered that the judgment be modified accordingly as of the date of the original judgment.

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126 Cal. 640

FRESNO MILLING CO. v. FRESNO CANAL & IRRIGATION CO. (S. F. 839.)

(Supreme Court of California. Nov. 10, 1899.)

CONTRACTS—ACTION FOR BREACH—DAMAGES.

A canal company was to supply plaintiff with water from its canal, constructed on a public highway, but was not to be liable for damages for nondelivery of water if it was lawfully "restrained from such delivery." The county supervisors filled in the canal, which was never reconstructed. Plaintiff sued the company for damages for breach of its contract. *Held* that, as the company was to supply the water from the particular canal so long as it was permitted to do so, it was not liable.

In bank. Appeal from superior court, Fresno county.

Action by the Fresno Milling Company against the Fresno Canal & Irrigation Company. From a judgment for defendant, plaintiff appeals. Affirmed.

T. P. Ryan, for appellant. F. H. Short and Geo. E. Church, for respondent.

HENSHAW, J. Plaintiff, as its name implies, is a milling corporation, engaged in the manufacture of flour in the city of Fresno. Defendant is a corporation engaged in the distribution and sale of water under the laws of the state. Plaintiff sues to recover damages for the breach of two certain contracts for the sale of water made by defendant with plaintiff's predecessors in interest. Appellant contends that the right to the water was appurtenant to the mill site, and passed to it by mesne conveyances from the original contracting parties. By the first of these contracts the defendant agreed, under certain limitations and restrictions, to furnish sufficient water to "carry three runs of stones." By the second contract, made with one Deming, and by Deming assigned to the plaintiff, the defendant, under similar limitations and restrictions, sold "all the water that may be required, not exceeding at any time eighty-three and one-third cubic feet per second, to be supplied by and through the canal known as the 'Mill Ditch,' on Fresno street, in the town of Fresno, county of Fresno, state of California." It is insisted by appellant that under these contracts it is entitled to 83⅓ cubic feet of water per second, and so much more as might be necessary to carry three runs of stones, estimated to be about 52 cubic feet of water per second. By respondent it is maintained that the later agreement for 83⅓ cubic feet provided for all the water to which, under any circumstances, the plaintiff was entitled. Regardless of the determination of the trial court upon this matter, we think its consideration unnecessary here, for the terms of the two contracts upon the question hereinafter to be considered are well-nigh identical. Plaintiff does not seek to have the water which the defendant for a long time admittedly has ceased to supply to the mill restored, but asks merely for damages for its failure to supply the water down to a given date. If, under the facts and under the terms of the contracts, plaintiff is not entitled to damages, the quantum of water ceases to be an important consideration.

Under the evidence, it appears that the defendant contracted to supply the water from an open canal constructed in part upon a county highway, and in part upon a public street of the city of Fresno; that in October, 1891, the road overseer of the county, acting under direction of the supervisors, went with men, teams, plows, and scrapers, and filled in the canal upon the county highway, and leveled the road to its grade. Thereafter that portion of the canal within the city was likewise filled, and its character as a canal destroyed. Cross actions for injunctions were brought by the canal company to restrain the overseer from destroying its canal, by the road overseer to restrain the canal company from its alleged unlawful use of the highway, and by the city against the canal and milling company to abate the canal as a nuisance per se. The destruction of the canal has never been repaired, and no water since the date of the destruction has been supplied to plaintiff's mill. The first contract contained the following covenant: "It is understood and agreed that the party of the first part [the Fresno Canal and Irrigation Company] shall be liable to no damage claimed by the party of the second part hereto for nondelivery of water as herein agreed, in case such first party shall be lawfully or forcibly restrained from such delivery." The second contract contained the following: "It is covenanted and agreed that said party of the first part [the Fresno Canal and Irrigation Company] shall not be responsible for deficiency of water caused by drought, insufficiency of water in the river, hostile diversion or obstruction, forcible entry, temporary damage by flood, or other accident, but shall use all due diligence in restoring and protecting the flow of water in said canal."

The court found "that since the execution of said contract the defendant had duly, faithfully, and fully performed each and every one of the terms, conditions, and provisions of the contract upon its part to be kept or performed, wherever the same could be done or performed by the defendant, and when not prevented by obstruction or force that could not be overcome by the use of due diligence and every possible diligence on the part of the defendant." This finding is assailed, and the appellant demands the application to these contracts of the rule declared in Klauber v. Car Co., 95 Cal. 353, 30 Pac. 555, where the sound principle is enunciated that if one has unconditionally contracted to do a particular thing, and seeks relief because of the impossibility of performance, the impossibility of performance must be shown to attach to the thing to be done, and not to him alone who has contracted to do it. It must be an impossibilitas rei, as distinguished from an impossibilitas facti. But in this case the defendant made no unconditional promise to supply the water, but hedged its liability with the covenants above quoted. That there was a hostile obstruction sufficient to prevent its supplying the water is shown, not only from the physical acts of the authorities and their abettors in filling the canal, but also by the injunctions under which both this plaintiff and defendant were placed. But to this appellant replies that it was the duty of the defendant to have maintained a suitable ditch or canal, and one which would not have interfered with the public's right upon the highways, and that, if it had so done, there would have been no interference with its use of the water. But it may be answered that, viewing the contract in the light of the circumstances under which it was made, and bearing in mind further that defendant's agreement went but to the supplying water from a given named canal, it is reasonable to conclude, as the trial court must have done, that defendant was to supply the water from this particular canal, so long as it was permitted to do so, and that it was not within the contemplation of the parties that the entire construction of the canal should be changed, as would have been necessary, to prevent either an anticipated interference with its use, or to enable it to continue to supply the water should such interference take place. Still further it appears that, after leaving the main canal of the company, the water used by the mill was conveyed by a smaller canal,—the mill ditch,—itself constructed upon the public highway by the plaintiff, and that, still upon the public highway, were constructed and maintained by plaintiff certain necessary head works to enable it to use the water. Plaintiff itself was under injunction restraining it from using the street for the indicated purposes, and its head works had been destroyed; and it is argued with much force that, if the defendant had succeeded in restoring the flow of water to its main canal, water would still have been unavailable to the plaintiff, by reason of the destruction of its works, and the disability of the injunction under which it labored, and that therefore it was suffering no damage, since it could not have used the water even if the defendant had supplied it.

As, under the uncontroverted facts applied to the contracts as thus construed, the plaintiff would not be entitled to a recovery, the other points made upon this appeal need not be considered. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN DYKE, J.

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126 Cal. 683

HINES et al. v. MILLER et al. (Sac. 538.)

(Supreme Court of California. Nov. 16, 1899.)

MECHANICS' LIENS—PERSONAL JUDGMENT—DEFICIENCY.

A judgment foreclosing mechanics' liens on a mine, which provides that judgment be entered in favor of plaintiffs in certain specified sums, and that the liens of plaintiffs be foreclosed against the defendants, and that the property be sold by the sheriff, and, if the proceeds be not sufficient to pay plaintiffs in full, then, on the coming in of the sheriff's return on such sale, the clerk shall docket the judgment for such deficiency against the defendants, is not a personal judgment except for such deficiency as might be shown by the sheriff's return on the sale; and is not in violation of Code Civ. Proc. § 1194, providing that whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency as in actions for the foreclosure of mortgages.

Department 1. Appeal from superior court, Tuolumne county.

Action by William Hines and others against Frank Miller and others to foreclose mechanics' liens. From a judgment for plaintiffs, defendants appeal. Affirmed.

A. E. Rogers, for appellants. Otis & Street, for respondents.

HARRISON, J. Judgment was rendered against the appellants herein upon their default for failure to answer the complaint, and they have appealed therefrom upon the judgment roll. An appeal from the same judgment, taken by certain other defendants who had answered the complaint, was considered by this court (122 Cal. 517, 55 Pac. 401), and the judgment was affirmed. In the opinion then given, the character of the action is sufficiently stated, and need not be here repeated. The present appeal is urged upon the ground that under the provisions of section 1194, Code Civ. Proc., the court was not authorized to render a personal judgment against the defendants except for such deficiency as might appear from the sheriff's return after his sale of the property charged with the lien. That section provides: "Whenever in the sale of the property subject to the lien there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages." A proper construction of the judgment in the present case shows that it does not violate the provisions of this section. After declaring "that judgment be, and the same is hereby, entered in favor of plaintiffs and against defendants" in certain specified sums, and "that the liens of the plaintiffs upon the mining claim be, and the same are hereby, foreclosed against the defendants," it directs that said property be sold by the sheriff in the manner provided by law, and, "if the amount derived from the sale of said property be not sufficient to pay each of the plaintiffs in full, then, upon the coming in of the return of the sheriff of said county on the said sale, the clerk of the court docket the judgment for such deficiency against the defendants" (naming them). Under these provisions there could be no judgment docketed against them until after a sale by the sheriff and his return showing a deficiency of proceeds. The judgment itself was not enforceable as a personal judgment against the appellants, except for such deficiency as might be shown upon such return. Mill Co. v. Center, 107 Cal. 193, 40 Pac. 334. See, also, Painter v. Painter, 98 Cal. 625, 33 Pac. 483; Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383. The judgment, as entered, is within the allegations of the complaint, and it does not appear that any execution has issued upon the judgment, or that any judgment has been docketed against the appellants. It was necessary that the court should ascertain and determine the amount for which the defendants were liable to the plaintiffs, in order that it might be seen, when the sheriff's return came in, whether there would be a deficiency in the proceeds of the sale. This determination by the court was its "judgment" upon the allegations of the plaintiffs in that respect, and, under section 668, Code Civ. Proc., was properly entered by the clerk in the "judgment book." Section 1194, Id., is silent upon the "entering" of judgment, but provides for "docketing" the judgment for whatever deficiency there may be in the proceeds of the sale. The court properly allowed to the plaintiffs interest upon their claims. Insurance Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Macomber v. Bigelow (Cal.) 56 Pac. 449. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

126 Cal. 644

WOLTERS et al. v. ROSSI et al. (S. F. 1,277.)

(Supreme Court of California. Nov. 10, 1899.)

VOLUNTARY DISMISSAL — ACTIONS — CONSOLIDATION — EFFECT—DEPOSITIONS—REVIEW — OBJECTIONS — CREDITORS' SUIT — FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—EVIDENCE.

1. An order vacating an order of dismissal, unappealed from, operates to annul the entry in the clerk's register showing dismissal, as well as the judgment of dismissal.

2. The entry of an order of voluntary dismissal by the clerk of the trial court in the form of a final judgment of dismissal, as directed by an order of plaintiff's counsel, is not judgment of dismissal, and is unauthorized.

3. Where two actions were consolidated by an order reciting that the parties beneficially interested therein were the same, to which no exception was taken, it was error to exclude a deposition taken in one of them on the trial of the issues involved in the other.

4. An order consolidating actions which the court had jurisdiction to make is binding on all the parties to the actions until vacated or reversed.

5. Objections to the competency of a deposition, not made in the trial court, cannot be considered on appeal.

6. The right to maintain a creditors' suit to subject moneys, alleged to have been fraudulently transferred by a debtor to his wife, to the payment of a judgment against him, does not depend on the validity of a lien attempted to be created by garnishment in aid of execution before the commencement of the action.

7. Where a judgment debtor's insolvency was admitted by the pleadings, and the evidence proved that he transferred money to his wife without valuable consideration, after an order of examination in supplemental proceedings had been served on him, a finding that the transfer was not fraudulent was erroneous.

In bank. Reversed.

For opinion in department, see 57 Pac. 73.

HARRISON, J. The appellants recovered a judgment in the superior court against the respondent Charles Rossi, June 19, 1894, for the sum of $1,643 and costs, and thereafter, under proceedings supplementary to execution thereon, an examination of the judgment debtor and of his wife, Lena Rossi, was had before a referee appointed therefor by the court. At this examination it was shown that about the 28th day of February, 1895, the judgment debtor had given to his wife moneys amounting to $1,652.19, which he transferred to her from the Bank of Central California, and that on March 1st she had deposited this money with the Farmers' Bank of Fresno, and received from it therefor its certificate of deposit, negotiable in form and payable to her order. The order for the examination was made February 23d, and an examination was had on February 28th, and again on March 2d. After the examination upon the latter date, the referee made his report to the court; and thereupon the court made an order authorizing the plaintiffs to bring an action against said Lena Rossi for the recovery of said sum of $1,652.19, and at the same time prohibited and restrained her and the Farmers' Bank of Fresno from making any transfer or disposition of the money until its further order in the premises. In pursuance of this order of the court, the present action was brought against Lena Rossi and her husband and the Farmers' Bank of Fresno. Rossi and his wife answered the complaint, claiming that the certificate of deposit and the money represented thereby was the property of Lena, and denying that it was the property of Charles, or subject to be applied upon the plaintiffs' judgment, and also alleging that immediately upon its issuance and delivery to Lena it had been transferred and delivered by her, and that they had neither of them any knowledge whatever as to its ownership or possession. No answer to the complaint appears to have been made by the bank. July 11, 1895, William Rigby, Jr., commenced an action against the Farmers' Bank of Fresno to recover the amount of the above certificate of deposit, and alleged in his complaint its indorsement in blank by Lena Rossi, and delivery to one Scott, and subsequent indorsement by Scott to the order of M. Ehrman & Co., and by Ehrman & Co. to the order of Rigby, the latter indorsement being "without recourse." Upon motion of the defendant in this action, the court made an order, November 7, 1895, under which the bank deposited in court the moneys represented by the certificate of deposit, and directed that the plaintiffs in the action of Wolters against Rossi be substituted as defendants for and in the place of the bank, and discharging the bank from all liability to them for and on account of said certificate of deposit. The plaintiffs in the original action thereupon answered the complaint in Rigby's action. The action of Rigby against the substituted defendants was brought on for trial January 23, 1896, and when nearly completed was continued for further hearing until January 29th. January 27th Rigby filed with the clerk an order entitled, "W. Rigby, Jr., vs. Farmers' Bank of Fresno (a Corporation)," as follows: "The clerk of said court is hereby authorized and directed to dismiss the above-entitled action, and to enter in the judgment docket the said judgment of dismissal." Thereupon the clerk made the following entry in his register: "In accordance with dismissal filed herein by counsel for plaintiff, I, T. G. Hart, clerk of said superior court, do hereby order, adjudge, and decree that said action be, and the same is hereby, dismissed." A document containing the same language was also indorsed, "Filed January 27, 1896. T. G. Hart, Clerk, by E. T. Wolcott, Deputy Clerk." Afterwards the substituted defendants moved the court to set aside and vacate this dismissal, and, after hearing the proofs upon this motion, the court made an order, March 23d, vacating and setting the same aside. March 25th these substituted defendants moved the court that this action be consolidated with the one brought by them against Rossi et al., and at the same time Rigby made a cross motion for the dismissal of his action. The motions were heard together, and on March 28th the court made an order in which, after reciting that it "finds the facts to be that the parties to, and beneficially interested in, the above-entitled action, are one and the same, and might have been joined," it denied the motion of Rigby to dismiss his action, and ordered that the motion of Wolters and others to consolidate said actions "be, and the same is hereby, granted, and said actions are accordingly hereby consolidated." The actions thus consolidated came on for trial May 17th, at which time Rigby objected to any further hearing or proceeding in the case brought by him, "for the reason that the case has been, at the request of the plaintiff, by written stipulation and order of the clerk, dismissed," and objected to the court taking any further proceedings in the case, of any kind, character, or description. The court sustained this objection, to which ruling the substituted defendants excepted, and thereupon the court proceeded to the hearing of the case of Wolters against Rossi and others. Upon the conclusion of the trial the court found that the certificate of deposit, from the date of its issue and delivery until the commencement of the action, was not in the possession or control of the defendant Lena Rossi, or her husband, or either of them, and that the ownership had been transferred to other persons, and that at the time the action was commenced it was outstanding, duly indorsed by the defendant Lena. Judgment was thereupon rendered in favor of the defendants, from which, and an order denying a new trial, the plaintiffs have appealed.

1. The action of the court in sustaining the objection of Rigby to any further hearing or proceeding in the case in which he was plaintiff was erroneous, and the ground upon which he placed his motion therefor was untenable. Whatever effect the act of the clerk upon Rigby's order for the dismissal might have had upon the action, if no order had been made in reference thereto, it was completely annulled by the subsequent order of the court vacating it. The action was still pending in the court (Code Civ. Proc. § 1049), and, even if a judgment had been entered upon the plaintiffs' order, the court had jurisdiction to entertain the motion of the defendant, and to make an order setting aside the order of the clerk. "Such an order, however erroneous, is not void. It is an order after judgment, is made in the exercise of the general jurisdiction of the court, and, if not appealed from, the order operates permanently to vacate and annul the entry in the clerk's register as well as the judgment." Page v. Superior Court, 76 Cal. 375, 18 Pac. 385. In Page v. Page, 77 Cal. 83, 19 Pac. 183, it was said: "The dismissal is not complete, in the sense that the control of the court over the cause is terminated, until the judgment is entered." In that case, as in this, there had been an entry of dismissal in the clerk's register, but no judgment had been entered thereon. The only entry of dismissal herein is that made by the clerk in his register, which was also filed by him on the same day. The clerk had no authority to "order, adjudge, and decree that said action be, and the same is hereby, dismissed," and this entry by him in his register was not an entry of judgment. The "register" is what its name purports,—"a book in which the clerk is to enter the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein" (Code Civ. Proc. § 1052); but judgments must be entered in the "judgment book" (Code Civ. Proc. § 668). The judgment to be entered upon the order of dismissal is a judgment of the court, although it is to be entered by the clerk.

In the present case the parties appeared before the court at the hearing of the motion, and upon the evidence offered in its support the court made an order vacating the dismissal. No appeal was taken from this order, but two days afterwards Rigby, in apparent recognition of its force, moved in open court for an order to dismiss his action, and the court, after a hearing thereon, made a further order denying his motion. When the cause came on for trial, and Rigby made the above objection, both of these orders were in full force, and the defendants were entitled to a trial and determination of the issues presented in the case. The court, therefore, erred in refusing to proceed with such trial.

This error was made the basis of another error at a subsequent stage of the proceedings. At the same time that the court denied the motion of Rigby for a dismissal of his action it made an order, as before stated, consolidating that action with the action brought by the appellants herein against Rossi and others. Upon the trial the appellants offered in evidence a deposition of Rigby, and also one of Ehrman, to which objection was made on the ground that they were taken in the action brought by Rigby, and not in the action brought by the appellants. Upon this objection the court excluded the deposition. The materiality of the evidence therein is not questioned, since it tended to sustain the allegation of the appellants that the certificate of deposit in question was at all times under the control of the defendant Lena. The order consolidating the actions had, however, the effect to destroy the force of the above objection, and the court should have received the depositions in evidence. By making this order, the court determined that the actions were "upon causes of action which might have been joined" (Code Civ. Proc. § 1048), and after the consolidation had been made it was immaterial in which action the depositions had been originally taken. In the order itself the court "finds the facts to be that the parties to, and beneficially interested in, the above-entitled action, are one and the same, and might have been joined." Whether the court was justified in making this order, or whether it erred therein, could not be considered at the trial of the action, nor is the question open to review here. The order was one which the court had jurisdiction to make, and, until it was vacated or set aside, was binding upon all the parties to the two actions. No exception was taken to it, nor was any motion made to set it aside, and the court should have recognized its effect, and admitted the depositions when offered.

The objections made by the respondents in their brief herein, that there was no preliminary proof of the facts entitling the depositions to be received instead of oral testimony of the witnesses, and that no opportunity had been given to the Rossis to cross-examine the witnesses, were not made before the superior court, and are not before us for consideration. If in fact the parties to, and beneficially interested in, the actions are one and the same, as found by the court in its order, this objection was without merit. See Briggs v. Briggs, 80 Cal. 253, 22 Pac. 334.

2. February 28, 1895, the plaintiffs caused a second execution to be issued upon their judgment against Rossi, and on March 2d, by virtue of this writ, all the money then belonging to Charles Rossi in the possession or under the control of the Farmers' Bank of Fresno was attached under process of garnishment. It is urged by the respondents that, as the court found that at the time of the service of this garnishment upon the bank the certificate of deposit was not in the possession or under the control of the defendant Lena, but had been indorsed by her and was outstanding, and the ownership thereof had been transferred to other persons, the plaintiffs acquired no lien upon the moneys represented thereby. This finding, however, is made without reference to the evidence contained in the depositions which were excluded. Such excluded evidence would tend to show that the certificate was under the control of the defendant Lena at all times prior to the commencement of the plaintiffs' action, and we cannot assume what the finding of the court would have been had this evidence been admitted. There is, moreover, an uncertainty in the findings of the court upon this point. In paragraph 10 of the complaint, it is alleged that the certificate of deposit from the date of its issue and delivery until the commencement of this action was in the possession and control of the defendants Lena and Charles, and the ownership thereof not transferred by them, or either of them, to any other person. The court finds that all the allegations contained in paragraph 10 of the complaint are true, but it also finds directly contrary to the above allegation in this paragraph. The plaintiffs' action is in the nature of a creditors' bill, for the purpose of subjecting the moneys claimed to have been given by their judgment debtor to his wife, in fraud of his creditors, to the payment of their judgment, and their right of action does not depend upon the validity of a lien created by the above garnishment. Moreover, any objection to the validity of the lien created by the garnishment of this money in the possession of the bank would more naturally come from the bank than from the payee of the certificate, especially in view of the allegation in her answer that the certificate was, immediately upon its issue and delivery to her, transferred and delivered by her, and that she has no knowledge whatever as to its ownership or possession. The bank, however, has paid the money into court, and an order has been made discharging it from all liability thereon to the holder of the certificate or to the appellants herein.

3. The finding of the court that the transfer of the money to Lena from her husband was not in fraud of the rights of any of his creditors, or with any intent on the part of Charles to hinder, delay, or defraud any of his creditors, was not justified by the evidence. The allegations in the complaint of the insolvency of Charles, and of his indebtedness to the plaintiffs at the time of this transfer, were not denied in the answer. The complaint also alleged that the money was voluntarily given by Charles to his wife, Lena, "without any consideration, legal and valid, as against his creditors, but as a gift pure and simple." In their answer the defendants deny "that the money represented by said certificate of deposit was given by said C. Rossi for a valuable consideration to said Lena Rossi, and deny that said money was in any manner given by the said C. Rossi to the said Lena Rossi without any consideration therefor, or as a gift pure and simple, or otherwise." The court finds "that the money represented by said certificate of deposit was transferred and given to Lena Rossi by C. Rossi," but does not find the consideration upon which the transfer was made, or whether it was made upon any consideration, or was voluntary. The denial of the defendants that the transfer was for a "valuable" consideration, coupled with their denial that the money was given "without any consideration," left the court at liberty to find that there was a valid consideration for the transfer. The testimony did not authorize the court to find that the money was given by the husband to the wife upon any other consideration than that of his love and affection for her, and this testimony, taken with the admission of insolvency and indebtedness, was insufficient to authorize the court to find that the transfer was without any intent to defraud his creditors. The declaration in section 3442, Civ. Code, that the question of fraudulent intent is one of fact, and not of law, is subordinate to the rule that a finding of the fact must be supported by the testimony in the case; and the further provision in the section, as it stood at that time, that the transfer cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration, is a negative, rather than a positive, provision. It has never been held in this state under this provision that a fraudulent intent should not be inferred from the absence of a valuable consideration, when coupled with other circumstances suggestive of fraud. In Judson v. Lyford, 84 Cal. 505, 24 Pac. 286, it appeared that, while the gran-

tor was heavily indebted to the plaintiff, he made a voluntary conveyance of his property for the benefit of his children, and that he had at that time no other property. The superior court found that there was no fraudulent intent, but this court reversed that finding upon the ground that, under these facts, the inference was irresistible that he intended to place the property beyond the reach of the plaintiff's judgment. This case was referred to in Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557, and was distinguished from that upon the ground that "two all-controlling facts" appeared therein, viz. "defendant conveyed away all his property, and at the same time was practically insolvent." In Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576, the superior court found that at the time of the conveyance Bray was ignorant of the fact that he was insolvent, but made no finding upon the question of intent, and for this reason granted a new trial. This order was affirmed here upon the ground that there was no irresistible inference that his intent was fraudulent under the finding that he did not know that he was insolvent at the time he made the conveyance. When the same transaction again came before the court in Knox v. Moses, 104 Cal. 502, 38 Pac. 318, the circumstances attending the transaction were held to fully support the finding of a want of fraudulent intent.

In view of these admissions in the pleadings and findings of the court, and the further showing that the transfer was made after the order of examination had been served upon the judgment debtor, it must be held that the inference is irresistible that the transfer to Lena was with the intent to hinder and delay the plaintiffs in the collection of their judgment. The judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; McFARLAND, J.; GAROUTTE, J.; VAN DYKE, J.; TEMPLE, J.

(126 Cal. 657)

STANTON v. SINGLETON et al. (L. A. 406.)[1]

(Supreme Court of California. Nov. 10, 1899.)

OPTION—SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—UNCERTAINTY—CONTINUED SUPERVISION—THIRD PARTY'S RIGHTS.

1. Defendants, owning, with another, certain mines, agreed that plaintiff should have 30 days' option on a half interest therein; that the option should be void if plaintiff should fail to exercise it within the time, and, in case he accepted, he should spend $10,000 in opening or developing the properties and in building a stamp quartz mill, and should have the right to form as many corporations as he should deem proper, the profits from stock of which or money received to be equally divided between the parties; that, if plaintiff should fail to begin active operations within 30 days, the contract should be void, and, in case plaintiff failed to fully carry out the contract, all money expended by him should be forfeited, and the properties returned to defendants. Within 30 days plaintiff spent $2,000 on said properties, and notified defendants that he elected to carry out said contract, but defendants refused to allow him to do so, and refused to perform their portion of the contract. *Held*, that since plaintiff was not bound to do anything under the option, and hence specific performance could not be decreed against him, he was not entitled to specific performance against defendants, there being no mutuality of the remedy.

2. It being uncertain as to which of the properties was to be opened or developed, as to which the stamp mill was to be erected on, and the limit within which the $10,000 should be expended in developing mines or within which the mills should be erected, specific performance could not be decreed, for uncertainty of the contract.

3. Specific performance will not be decreed where it involves a continuous and long series of acts of supervision requiring special knowledge, skill, and repeated examinations and new directions.

4. Where each of three parties owns an undivided one-third interest in mining properties, and only two of them agree to convey a half interest in such mines to another, he cannot enforce specific performance, since that remedy would unwarrantably interfere with the rights of the third owner, not a party to the contract.

In bank. Appeal from superior court, Kern county.

Action by O. B. Stanton against John Singleton and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Rothchild & Ach and J. W. Ahrens, for appellant. J. A. Haralson and Reddy, Campbell & Metson, for respondents.

McFARLAND, J. The court below sustained a demurrer to the complaint, and gave judgment for defendants, and plaintiff appeals from the judgment.

The action is brought to compel the specific performance by the two defendants named of a certain alleged contract, a copy of which is annexed to the complaint, marked "Exhibit A," and made a part thereof. The contract is as follows: "Agreement made and entered into this 22d day of June, 1895, between John Singleton, F. M. Mooers, and C. A. Burcham, of Kern county, state of California, parties of the first part, and O. B. Stanton, of Bakersfield, state of California, party of the second part. Whereas, the parties of the first part are owners by location of a certain mineral tract located in the Summit mining district, Kern county, California, and designated and described as follows: [Here follows a description of the property, which consists of 13 different quartz and placer claims.] And being desirous of obtaining capital to work the same, hereby agree with party of second part that for and in consideration of one dollar in hand to them paid, the receipt of which is hereby acknowledged, agree to give party of second part thirty days' option of a one-half interest of the above-enumerated claims, now owned by them, in consideration of the party of the second part agreeing to spend—First, ten thousand dollars ($10,000.00) in opening and developing said property; second, in erecting a ten-stamp quartz mill, modern in every particular, the stamps to weigh not less than seven hundred pounds, or the equivalent, as may be found the most desirous to work the ores. The parties of the first part hereby agree that, this contract having been entered into in good faith, any locations that they may make or cause to be made in the said district shall be made for the joint benefit of both parties. The party of the second part shall have the privilege to incorporate as many companies as he may deem fit: provided, always, that any money, stock, or other consideration that he may obtain as profit shall be divided equally between the parties hereto. The parties of the first part hereby agree that the party of the second part shall have the privilege any time within six months from the date of this instrument to purchase the aforesaid property for the sum of five hundred thousand dollars ($500,000.00). The essence of this contract being time, it is mutually agreed that, should the party of the second part not commence active operations within thirty days, this contract shall be null and void. The party of the second part hereby agrees that all stock delivered to parties of the first part shall be free and nonassessable, and, further, if he should fail to fully carry out this contract, that all moneys paid or expended by him shall be forfeited, and the full properties returned to the parties of the first part. [Signed] John Singleton, Party of the First Part. Frederick M. Mooers, Party of the First Part. O. B. Stanton, Party of the Second Part."

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[1] Rehearing denied December 8, 1899.

It will be observed that this contract, although purporting to be signed by the two respondents and C. A. Burcham, was not signed by the latter; and at the hearing in department (54 Pac. 587), while other points were briefly noticed by counsel for respondents, the stress of their argument was on the point that the contract was void because not signed by Burcham, and in the opinion of the court then rendered that point was alone considered. But at the hearing in bank, while that point was also urged, it was elaborately argued by counsel for respondents that, even if it be held that the contract was sufficiently executed without the signature of Burcham, still it was in its nature a contract which a court of equity will not decree to be specifically performed; and we think that this contention must be sustained. The action is based upon the contract, which was made a part of the complaint; and, of course, the meaning which appears on its face cannot be changed by any mere matter of averment in the pleading. There is one provision in the contract to the effect that the party of the second part shall have the privilege within six months "to purchase the aforesaid property" for $500,000, but whether the "aforesaid property" means the whole of the mining property described or only an undivided half thereof, we do not understand that this clause of the contract is particularly involved in this action. The contract gives to the appellant "thirty days' option of a one-half interest of the above-enumerated claims" upon the consideration—First, that he shall spend $10,000 in opening and developing the property; and, second, shall erect a 10-stamp quartz mill, "modern in every particular, the stamps to weigh not less than seven hundred pounds, or the equivalent, as may be found the most desirous to work the ores." If this means anything it means that he should have 30 days in which to determine whether he would spend the $10,000 and erect a mill, and thereby become entitled to an undivided one-half of the property. It is averred in the complaint that appellant notified the respondents within the 30 days that he elected to perform his part of the contract, "and to thereby acquire the undivided one-half interest"; that he then and there proceeded to expend and did expend $2,000 in pursuance of the contract; and that afterwards, on or about the 9th day of July, A. D. 1895, the defendants informed him that they would not be bound by the contract, and repudiated it, and have ever since refused, and do now refuse, to be bound by the terms thereof, or to permit plaintiff to continue the performance of labor on the property, or to expend the remainder of the $10,000, or to erect a mill, and refuse to allow the appellant to enter upon the claims, or to do work thereon, and have refused to execute to him a deed to the one-half interest. The prayer of the complaint is that the respondents be let into possession of the premises for the purpose of performing the work under the contract, and for the purpose of erecting the mill, and of otherwise performing and carrying out the covenants of the contract, and that defendants be restrained from interfering with the work of plaintiff, "and that upon the completion of said labor and the expenditure of said money and the erection of said 10-stamp quartz mill the plaintiff be decreed to be the owner of one-half interest in and to the premises set forth in said complaint," and that defendants execute a conveyance to him of an undivided one-half interest, etc. Nothing is said about the tender under the $500,000 clause, nor is any relief asked under it; so that the only asserted right to a decree of specific performance is that based on the $10,000 and quartz mill clause. Of course, there is, on the face of the instrument, no mutuality of contract, for appellant does not promise in it to do anything. It is contended, however, that afterwards his notice to respondents of his election to proceed under the contract made it mutual, under the principle announced in Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, and 52 Pac. 44, and some other cases cited; but, with our views of the case, it is not necessary to discuss the applicability of that principle here. Neither is it necessary to consider the point (which is certainly not without merit) that the contract itself is void for all purposes on account of its ambiguity and uncertainty. In our opinion, the contract is one which does not allow a mutuality of the remedy of a decree of specific performance, and is not, in its nature, a contract which a court of equity would undertake to enforce specifically at the suit of respondents; and it is settled law that a contract will not be specifically enforced unless its character be such that either party to it could have it specifically enforced as against the other. Cooper v. Pena, 21 Cal. 404, and cases there cited; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; Anson v. Townsend, 73 Cal. 418, 15 Pac. 49; King v. Gildersleeve, 79 Cal. 504, 21 Pac. 961; Banbury v. Arnold, 91 Cal. 608, 27 Pac. 934; Pom. Cont. (2d Ed.) § 162. In Cooper v. Pena, supra, the court states the principle in this language: "The remedy must be mutual as well as the obligation, and, where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." Therefore, waiving all other questions, if the obligations of appellant as a party to the contract (assuming that he incurred any) are not such as would be specifically enforced by a court of equity at the suit of respondents, then, under the principle and authorities above stated and referred to, this action cannot be maintained. And it is quite clear that his obligations were of that character.

Appellant contends that Cooper v. Pena, supra, which is a leading case on the general subject, and has been frequently cited, should not be taken as authority here, because the obligation of plaintiff there was for expressly designated personal services. But Cooper v. Pena is cited mainly to the point that there must be "a mutuality of remedy"; and, if there be not such mutuality,—no matter from what cause,—the principle declared in that case applies. Moreover, it is difficult to see any difference in kind between the obligation of the appellant here and that which was held not specifically enforceable in Cooper v. Pena; for "opening and developing" a mine, and "erecting" such a quartz mill as is described in the contract, certainly involved to some degree personal skilled services, knowledge, judgment, and skill, and a repose of confidence. But, apart from the foregoing consideration, the remedy of specific performance would not lie against appellant in the case at bar for want of certainty and exactness in the contract. A contract expressed in very general terms might not be void for uncertainty, and might be the basis of an action for damages for its breach, while it would be entirely too loose and inexact to warrant a decree for specific performance. In Pom. Cont. (2d Ed.) § 159, it is said: "A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough. Its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms. They must be exactly ascertained before their performance can be enforced." Now, in the case at bar the property to which the contract relates consists of a large number of mining claims of different kinds,—quartz and placer; and a provision for "opening and developing said property" is certainly too general and indefinite to be specifically enforced by an equity decree. Moreover, the provision for "erecting a ten-stamp quartz mill," etc., does not provide where it is to be erected,—not even that it shall be on "said property"; but, assuming its meaning to be that the mill shall be on some part of one of the large number of mining claims described in the contract, still, with that meaning, it is widely uncertain and indefinite as to the place where it was to be erected; and the place of the location of the mill would probably be a matter of very great importance. Again, there is no provision as to the limit within which the $10,000 should be expended in developing the mine, or within which the mill should be erected. The only provision touching that subject is that the appellant should "commence active operations" —whatever that may mean—within 30 days. In all these respects the contract is too loose and vague to justify a decree of specific performance.

Moreover, a court will not undertake to frame a decree of specific performance where it involves a continuous and long series of acts of supervision requiring special knowledge and skill, and repeated examinations and new directions. In Pom. Cont. (2d Ed.) § 312, the author states the law on this point—and he cites a multitude of authorities to sustain the text—as follows: "Finally, contracts which, by their terms, stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight,—such as agreements to repair or to build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings,—are not, as a general rule, specifically enforced." The rule is aptly stated, and authorities cited, in Clarno v. Grayson, 30 Or. 144, 46 Pac. 426, which, in its leading features, is much like the case at bar. In that case the plaintiff claimed under an option to purchase a mine, with the right to work it until a certain time, and then buy it at a certain price. He was ousted by the other party before the expiration of the time. He brought an action to be restored by a decree of specific performance to possession, and to be allowed to continue the work; claiming, also, that certain intermediate proceeds of the mine should be accounted for, and applied on the purchase price, which raises questions not pertinent here. With respect to the point now under consideration, the court said: "One element of the prayer of plaintiff is that he be put in possession, and maintained there, and that a future time be fixed in which plaintiff shall state any balance then due on an accounting after possession given; and this proposition was urged both in the briefs and at the argument. We think it untenable for two reasons: First, the act required of the court comprehends an order continuous in its nature, requiring protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in the oversight, to determine whether the mine is being operated under the conditions of the contract, and will not be specifically enforced. Pom. Cont. (2d Ed.) § 312; Marble Co. v. Ripley, 10 Wall. 358, 19 L. Ed. 955; Beck v. Allison, 56 N. Y. 367; Mastin v. Halley, 61 Mo. 196." In Mastin v. Halley the court refused to specifically enforce a contract to convey because the consideration of the contract was the plaintiff's undertaking to erect a certain building on the land, which could not have been specifically enforced against the plaintiff; the court saying, "A court of equity will not enforce building contracts." In Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515, this court held that the remedy of specific performance did not lie in favor of plaintiff, because it could not have been invoked in favor of defendant on account of the nature of the latter's obligations. The court said: "The agreement that McLoughlin will operate the road for the stipulated period in the mode agreed upon is a substantial and important part of the obligation, which has not been performed, and of which specific performance cannot be enforced by a decree." It is evident that the contract here involved is, on the part of appellant, within the principle above stated. A decree that appellant "be let into possession of said premises for the purpose of performing the labor provided for in the contract, and for the erection of said ten-stamp quartz mill, and to otherwise perform," etc., would be only the beginning of the court's work. It would have to be followed by numerous and repeated supervisions and investigations and additional decrees and orders, all requiring judgment and skill in a special business. It would have to be determined afterwards what would constitute "opening and developing" the property; on what part of the numerous mines the developing should be attempted; whether the work in developing was done properly, and in good faith; and whether it was done in such manner as would reasonably tend to so prospect the ground as to show whether or not it contained valuable ore, and to put it in such condition as to be worked to advantage if such ore should be discovered. The same supervision would be necessary over the building of the mill,—where it should be located; whether, if erected, it would be "modern in every particular"; and whether, if the stamps should be less than 700 pounds, it would still be "the equivalent, as may be found the most desirous to work the ore." And then within what time must the developing be done and the mill be built? All this—to say nothing of the tangled provisions about stocks of corporations "nonassessable"—clearly brings the case within that class with respect to which courts will not undertake to frame decrees for specific performance. Moreover, Burcham is a tenant in common of the whole property, holding an undivided one-third of every part and parcel of it, seised per my et per tout; and, as he did not execute the contract, and is not a party to the action, how can it be decreed that appellant be let into possession and allowed to use the property in the manner asked by him, when the court has no control over Burcham or his interest? This was one of the points considered in Cooper v. Pena, for the court there say: "It is proper to remark that there is no assurance that the offer could be carried out, for there is a third person to be consulted, who might refuse to act in the matter, or might not agree to a satisfactory partition." Appellant has cited a few cases tending somewhat to the point that appellant's obligation could have been specifically performed, but they are mostly railroad cases, where, in order to protect various interests of great magnitude, courts have undertaken to temporarily operate railroads through receivers, and in a few instances have ordered railroads to be completed. They are exceptional cases, and do not disturb the general rule as hereinbefore stated. Our conclusion is that the court below properly sustained the demurrer, and gave judgment for defendants, and that appellant, if he have any cause of action growing out of the contract, must be left to the remedy of a suit at law for damages. The judgment is affirmed.

We concur: **TEMPLE, J.; HENSHAW, J.**

BEATTY, C. J. I concur in the judgment of affirmance, but upon grounds to a great extent distinct from those stated in the opinion of Justice McFARLAND. It is conceded that a contract will not be specifically enforced unless the remedy is mutual. It is also conceded that the contract here in question does not, by its terms, bind the plaintiff to do anything, and that to impart to it the element of mutuality the plaintiff must have made a binding offer to perform on his part, and this offer must have been free from any conditions which the defendants on their part were not bound to perform. Civ. Code, § 1494. It does not appear that any such offer to perform has ever been made by the plaintiff at any time, and certainly he does not make it by his complaint. He alleges, it is true, "that immediately after the execution of said contract plaintiff notified defendants that he elected to perform his part of said contract, and to thereby acquire the undivided one-half interest in and to said mining claims as in said contract mentioned, and then and there proceeded to, and did thereafter, expend the sum of about two thousand dollars, hereinbefore mentioned, in pursuance of said contract." But this allegation is to be construed in connection with other parts of the complaint, which show that, according to plaintiff's construction of the contract, he was to become the owner of a half interest in the mines as soon as he had expended $10,000 in their development and erected a 10-stamp mill. All, therefore, that he ever offered to do at any time, so far as can be gathered from the complaint, was to expend $10,000 and build a mill upon condition that he should thereupon become the owner and have a conveyance of a one-half interest in the property. And that, indeed, is the condition upon which he offers to perform in the complaint filed herein, the prayer of which reads as follows: "That plaintiff be let into possession of the said premises for the purpose of performing the labor provided for in said contract, and for the erection of said ten-stamp quartz mill, and to otherwise perform and carry out the covenants of said contract, and that said defendants, their servants, agents, and employés, be restrained by this court from interfering with the work of plaintiff upon said mining claims, and that upon the completion of said labor and the expenditure of said money and the erection of said ten-stamp quartz mill that plaintiff be decreed to be the owner of one-half interest in and to the premises set forth in the complaint, and that the defendants cause to be executed and delivered to plaintiff herein a good and sufficient deed conveying to said plaintiff an undivided one-half interest in and to said premises." But the contract, which is annexed to the complaint as an exhibit, does not bear the construction which the plaintiff has placed upon it. The terms of this instrument are so obscure and ambiguous that no one can assert with much confidence that he has discovered the real and exact intention of the parties; but I think Justice Harrison, in his opinion delivered in department (54 Pac. 587), correctly held that the plaintiff, by expending $10,000 and building a mill, would only have secured an option to purchase a half interest for $500,000. Plaintiff, therefore, has never offered to perform the contract according to its true construction, and subject to its stipulated conditions, but only according to his erroneous construction, and subject to conditions which he had no right to impose; and, such being the case, it cannot be said that the remedy of specific performance ever became mutual.

Another ground of my concurrence is that the defendants Singleton and Mooers never agreed to do what the court is asked to compel them to do, and what the plaintiff makes another condition of his offer to perform. They never agreed to convey to plaintiff a half interest in the mines out of their two-thirds. They merely executed for themselves a contract which, if it had been completed, would have bound them, in conjunction with their co-tenant, Burcham, to convey a half interest in the whole; in other words, each of the defendants was a part with one-sixth, and not with the one-fourth, which the plaintiff demands. The failure of Burcham to execute the contract left it incomplete, and the defect is not cured by the fact that defendants represented that they had authority to act for him. Whatever authority to act for Burcham they may have had or claimed, it is very certain that they neither acted nor pretended to act for him in the only way they could have done so effectively; i. e. by executing the contract in his name, and as his attorneys in fact. If plaintiff was relying upon their asserted authority to act for Burcham, why did he not require them to execute the contract in Burcham's behalf? If he had done so, Burcham would have been bound, if they had authority, and, if they did not have authority, they themselves would have been bound to perform what they had promised in his name. But in the incomplete condition in which the contract was delivered (assuming that the complaint shows it was delivered), neither defendants nor Burcham were bound to convey the one-sixth interest which, upon a fair construction of the written terms, was to be contributed from Burcham's third. Plaintiff nevertheless offers to perform only upon condition that he shall become the owner of that sixth interest, and that it be transferred to him by parties who never contracted to transfer it.

(6 Cal. Unrep. 354)

HILLMAN v. GRIFFIN. (Sac. 342.)[1]

(Supreme Court of California. Nov. 27, 1899.)

ATTACHMENT—COLLATERAL ATTACK—ADMISSIBILITY OF EVIDENCE—CONFLICT IN EVIDENCE — REPLEVIN — SUFFICIENCY OF EVIDENCE.

1. Evidence to impeach an affidavit of attachment is not admissible in a collateral proceeding by a stranger to the attachment suit to recover possession of the property.

2. Where there is a substantial conflict in the evidence, the finding of the trial court will not be disturbed.

3. Defendant seized in attachment certain stock which plaintiff claimed to have purchased from the defendant in attachment. Plaintiff's statement that he purchased the stock, and had been in continued possession for some years prior to the attachment, was uncontradicted. *Held*, he was entitled to recover such stock although

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[1] For opinion on rehearing, see 59 Pac. 696.

it happened to be, at the time of the levy of attachment, on the ranch of defendant in attachment.

Department 1. Appeal from superior court, Sacramento county.

Action by A. C. Hillman against C. W. Griffin. Judgment for defendant. Plaintiff appeals. Reversed.

Robert T. and William H. Devlin and F. E. Baker, for appellant. C. W. Thomas, for respondent.

VAN DYKE, J. This action is in the nature of replevin. The plaintiff claims the property through purchase from Mrs. Emma H. Briggs, owner of the Glorietta Vineyard ranch in Yolo county. It consists of a large quantity of boxes and trays used on a fruit ranch, together with the tools and implements of various kinds necessary for the cultivation of such ranch, all embraced in the bill of sale dated the 12th of January, 1895, for the consideration, as stated by the plaintiff, of $6,000; also two mules and one mare, of the value of $500, not embraced in said bill of sale, but purchased by the plaintiff from the said Mrs. Briggs in 1893. The defendant justifies the taking of the property in question as sheriff of Yolo county under proceedings in attachment in the suit of the West Valley Lumber Company, a corporation, against said Emma H. Briggs. The property, at the time of the seizure and taking by the defendant as sheriff, was on the said Glorietta Vineyard ranch. The affidavit in the attachment proceedings states that the action is brought upon a certain promissory note for the principal sum of $3,160, dated June 30, 1893, due eight months after date, with interest at the rate of 10 per cent. per annum from date until paid; "that the same has been and is secured by a mortgage on real property, as appears of record in the records of Yolo county, California, in book 37, at page 626; that since the making and delivery of said mortgage, without any act of plaintiff, such security has become and is valueless." The defendant in said action, Mrs. Emma H. Briggs, appeared in the action, but raised no objection to the attachment proceedings. In rebuttal the plaintiff offered to prove the value of the Glorietta Vineyard ranch, the property covered by the mortgage to the West Valley Lumber Company, and that it had not decreased, but had increased, in value, and was worth more than the prior incumbrance thereon, and had not become valueless since the mortgage to the said West Valley Lumber Company, as stated in said affidavit. The court sustained an objection to this offered testimony, and this ruling of the court is assigned as one of the errors on the part of plaintiff, and pressed with considerable vigor. The plaintiff was not a party to the attachment suit, and the offered testimony is in the nature of a collateral attack by a stranger to the proceeding. In Shea v. Johnson, 101 Cal. 457, 35 Pac. 1023, the contest was between a junior and prior attachment, and it was sought, as in this case, to attack the prior attachment collaterally, and the court said: "The general rule is that, where the claim of the prior attaching creditor is for a bona fide debt without tinge of fraud, such an objection to the attachment proceedings as that insisted on in the case at bar can be successfully made only by the defendant in the attachment suit;" citing Fridenberg v. Pierson, 18 Cal. 152; Patrick v. Montader, 13 Cal. 435; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Drake, Attachm. § 771. In Scrivener v. Dietz, referred to, as in this case, it was sought to impeach the affidavit in the attachment proceeding, and the court say: "Admittedly, this irregularity in the affidavit constituted good ground for a motion by the attachment debtor to dissolve the attachment; and, if such a motion had been made by him to the court in which the action was pending, it would have been the duty of the court to have dissolved the attachment. * * * But neither the regularity of the affidavit nor the validity of the attachment issued upon it was questioned by the debtor. He therefore waived whatever irregularities existed in either, and as against him, at least, the attachment was valid and operative; so that its execution according to law operated to create a provisional lien upon the property on which it was levied in favor of the attaching creditors. * * * The attachment proceedings are not attackable collaterally for an infirmity in the affidavit,"—citing authorities. "Notwithstanding the infirmity, the judgment was not void; it was only voidable at the instance of the attachment defendant, and could not be assailed collaterally by a stranger." The court below, therefore, in excluding the offered testimony, is sustained by authority. The same rule holds in regard to plaintiff's objection to the undertaking in attachment. One of the issues tried in the action was as to the delivery of the property sold by Mrs. Briggs to the plaintiff, mentioned in the bill of sale, and on this issue the court finds as follows: "That on the —— day of January, 1895, the said Emma H. Briggs made, executed, and delivered to the plaintiff herein a bill of sale of the property herein, and that on the 8th day of February, 1895, at the date of the levy of said writ of attachment and the date of the taking and seizure of said property by the defendant herein, the said Emma H. Briggs had not delivered the possession of said property to the plaintiff herein; that at said date last aforesaid the property was in the possession of Emma H. Briggs; that the transfer of said personal property from said Emma H. Briggs to the plaintiff herein (she at the time having possession and control of said property) was not accompanied by immediate delivery, and was not followed by an actual and continued change of possession of the property so transferred, the property in question; that said transfer and bill of sale were fraudulent and void against the said West Valley Lumber Company, it being a creditor of said Emma H. Briggs while she was in the possession of said property." The most that can be said in favor of the contention of the plaintiff that this finding is not supported by the evidence is that there was a substantial conflict in the evidence in reference to the delivery and continued change of possession of the property mentioned, and, that being the case, the finding must be allowed to stand. But, in addition to the property mentioned in the bill of sale, and referred to by the court in its finding, the sheriff seized at the same time, as already stated, two mules and one dark brown mare, of the value, as found by the court, of $500. The testimony of plaintiff shows that these two mules and mare were purchased at Davisville in 1893, and brought by him to the Glorietta vineyard, which is about 10 miles from where they were purchased; and he testifies that they had been in his possession since their purchase in 1893, except for a short time, when he sold them to a Mr. Maxwell, who did not come up to the terms of sale, and returned them to the plaintiff. There is no evidence in the record in conflict with or contradicting the testimony of the plaintiff in this respect, and his testimony is corroborated by the bill of sale, which is set out in the record, and which does not contain these mules and mare, but does enumerate specifically all the other articles seized excepting them. The finding, therefore, that these articles had not been delivered at the time of sale, and that the possession had not continued in the plaintiff, is entirely unsupported by the evidence. They were purchased by the plaintiff, if not before the date of the note on which the attachment proceedings were had, at any rate long before the said note matured, and there is nothing to show that their sale and transfer was not founded upon a valuable consideration, and made in good faith; and the mere fact that they happened to be at the time of the seizure upon the Glorietta Vineyard ranch does not alter the case. Much other property might have been on that ranch, belonging to various parties entirely unconnected with Mrs. Briggs, at the time of the attachment proceedings. The judgment is reversed, and the superior court is directed to correct its findings according to the evidence at the trial as herein pointed out, so that it will appear therefrom that the above-named mules and horse were not the property of Emma H. Briggs at the time they were taken by the defendant, or subject to seizure on such writ of attachment then held by the defendant; and thereupon to enter judgment in accordance with the findings as so modified and corrected. The order denying a new trial is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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127 Cal. 55

DAY v. GUNNING. (Sac. 670.)

(Supreme Court of California. Nov. 24, 1899.)

ELECTION—MARKING BALLOT FOR IDENTIFICATION.

Under Pol. Code, § 1211, providing that, if a voter marks more names than there are persons to be elected to an office, his ballot shall not be counted for such office; and section 1215, providing that no voter shall place any mark on his ballot by which it may afterwards be identified as the one voted by him,—a ballot, whereon a voter has marked more names for a certain office than there are persons to be elected to that office, cannot be rejected, except as to such office, as being a ballot marked for identification.

Department 1. Appeal from superior court, Yuba county.

Election contest by Fred H. Day against S. O. Gunning. From the action of the trial court in rejecting certain ballots which defendant claimed had been voted for him, he appeals. Reversed.

W. H. Carlin and J. E. Ebert, for appellant. W. T. Phipps, for respondent.

GAROUTTE, J. This appeal presents an election contest for the office of auditor and recorder of Yuba county. The consideration of a single question disposes of the merits of the litigation. The trial court rejected 13 ballots which had been voted for this appellant, upon the ground that they contained a mark which identified them. The face of these ballots disclosed that the voter had marked more names for a certain office than there were persons to be elected to that office, and this act of the voter was held to be a mark of identification. For illustration: In the city and county of San Francisco, 18 supervisors are elected. If the elector should vote for 19, the entire ballot should be rejected as containing an identifying mark. This contention of respondent, which was sustained by the trial court, cannot be approved, and a citation of the statutes of this state demonstrates its unsoundness to a certainty. Section 1215 of the Political Code, among other matters, declares, "No voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him." Section 1211 of the same Code also declares, "If a voter marks more names than there are persons to be elected to an office * * * his ballot shall not be counted for such office." It may be conceded that a vote for 19 supervisors, when there are but 18 to be elected, would be one way of identifying the ballot; but it would no more identify the ballot than if the voter had voted for 17 supervisors. Yet clearly such action of the voter would not justify a rejection of the ballot. It is thus apparent that any and every mark upon a ballot which might possibly be used as an identification does not necessarily demand that the ballot be rejected; and, when we read said section 1211, it is plain that the marks here involved do not come within the prohibition of section 1215.

These two sections are not necessarily in conflict. Force and effect may be given to both, and under such conditions force and effect must be given to both. If the marks upon these ballots in any sense may be said to be identifying marks, then they are relieved from the force and effect of section 1215 by virtue of the provisions of section 1211. Section 1215 is general in its nature, and covers a broad field. Section 1211 is special in its nature, and directed to a single object and purpose. It is essentially a limitation upon section 1215, and must be held controlling. Section 1211, by all rules of construction, is susceptible of but a single meaning. It means that the ballot must be rejected, as to the particular office, where more than the number of names allowed by law are voted for that office, and that it must be counted as to all other names for all other offices. This is as plain as though it were declared in direct and positive language. The statute means this, or it means nothing. Any other construction would involve a contradiction, even an absurdity. If these crosses constitute an identifying mark forbidden by the statute, then the ballot could not be counted for any office by virtue of section 1215; and it was idle and absurd legislation to enact section 1211, declaring that such a ballot should not be counted for any person for that particular office. Counsel for respondent declares the portion of section 1211 here involved to be inadvertent legislation. The soundness of this claim is not made plain to us, but, however that may be, if there was inadvertent legislation it is inadvertence that may only be effectively cured by the lawmaking body of the state. Various cases from other states are cited by both parties to this appeal which bear upon the question here under consideration. It is unnecessary to review those authorities. Our statute is succinct and controlling, and, tested by its provisions, these 13 ballots should have been counted for appellant. Respondent was declared elected by a plurality of 9 votes. The conclusion arrived at demands a reversal of the judgment. For the foregoing reasons, it is so ordered.

We concur: VAN DYKE, J.; HARRISON, J.

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127 Cal. 58

RICHARDSON v. DISS. (L. A. 584.)

(Supreme Court of California. Nov. 25, 1899.)

CLAIM AGAINST SOLVENT ESTATE—INTEREST AFTER ALLOWANCE.

In the absence of a statute directing the interest rate which a claim against a solvent estate shall carry after allowance and before payment, as is provided by Code Civ. Proc. § 1494, as to claims against insolvent estates, such a claim should draw the contract rate until paid.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county.

Proceeding by Charles W. Richardson, as claimant against an estate, against J. W. F. Diss, as clerk of the superior court, to determine the rate of interest which his claim should carry after allowance. There was a judgment in favor of claimant, and the clerk appeals. Affirmed.

J. P. Hight and Chas. L. Allison, for appellant. Curtis & Curtis, for respondent.

GRAY, C. The record in this case presents the single question, what rate of interest should an allowed claim, based on a promissory note, against a solvent estate of a deceased person, bear? On the part of appellant, it is contended that the claim, after allowance, should bear the legal rate of 7 per cent.; and on the part of respondent it is claimed that the agreement as to interest contained in the contract upon which the claim is based is the measure of the rate of interest as well after the claim is allowed as before. The learned judge of the trial court adopted the latter theory, and decided that the claim, after allowance, should draw the contract rate of interest, which in this case was 15 per cent. per annum, compounded quarterly. We think this decision correct. Section 1920 of the Civil Code provides that "interest is payable on judgments recovered in the courts of this state at the rate of seven per cent. per annum, and no greater rate, but such interest must not be compounded in any manner or form." Section 1494 of the Code of Civil Procedure provides as to estates of deceased persons: "If the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the superior court." There is no statutory or Code provision cited in the briefs herein fixing any rate of interest on claims against a solvent estate, and we infer that no such provision exists. Appellant claims that the headnote to section 1494, Code Civ. Proc., quoted as follows, "Claims to be sworn to, and, when allowed, to bear same interest as judgments," constitutes such provision; but the headnote of a section of the Code should not be treated as an enactment of law, standing by itself, but should be read and construed in its contextual relation to the whole section of which it is a part. Thus read and construed, it is obvious that the legislature intended by the said section to provide for a rate of interest only as to claims against insolvent estates. Before the enactment of any law reducing the interest on judgments from the contract rate to the legal rate, all judgments based on contracts which provided for interest in excess of the legal rate continued to draw interest at the rate agreed upon in such contracts. Corcoran v. Doll, 32 Cal. 82. It would seem, also, that prior to the adoption of section 1494, Code Civ. Proc., all allowed claims against estates of deceased persons, whether such estates were insolvent or not, bore interest at the contract rate when the contracts upon which they were based provided for a rate of interest in excess of the legal rate. In re Den's Estate, 35 Cal. 692. Upon this we argue that, it being necessary to pass statutes to reduce the interest on judgments and on claims against insolvent estates, in the absence of any statute directed to the same purpose in reference to claims against solvent estates, such claims must still be held to bear interest, up to the time of their payment, at the contract rate. Indeed, the whole course of legislation on the subject of interest would seem to show that such was the intention of the legislature. Section 1494, Code Civ. Proc., in specially mentioning insolvent estates as subjects for reduction of interest, ex industria excludes all estates not mentioned from the operation of this law reducing interest, and shows, as plainly as anything short of positive enactment can show, that it was the intention and purpose of the legislature that claims against solvent estates should continue, after allowance, to draw interest at any rate in excess of the legal rate that the contracts upon which they were based would warrant. Such seems, also, to be the construction placed upon the law by the bench and bar of the state since the enactment of the Code referred to herein; for we find in Bank v. Hayes, 112 Cal. 75, 44 Pac. 469, and in Finger v. McCaughey, 114 Cal. 64, 45 Pac. 1004, that the contracts therein controlled the rate of interest the claims bore after allowance. It is true there is no discussion found in these cases of the question as to what the rate of interest should be. Indeed, all parties and the court seem to have coincided in the same rule of interest adopted by the trial court in the case at bar as being the only rule to be deduced from the Code provisions on the subject, and therefore requiring no discussion. We have found no decision conflicting with this rule. For the foregoing reasons, we advise that the judgment and order of the court below be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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127 Cal. 40

BRINGHAM v. KNOX et al. (Sac. 531.)

(Supreme Court of California. Nov. 23, 1899.)

MECHANIC'S LIEN—RAILROADS—DESCRIPTION OF PROPERTY AFFECTED—FILING—EVIDENCE—PLEADING.

1. A demand, at the conclusion of a claim for a lien for material furnished, "that the claimant have the benefit of the law allowing the lien," is equivalent to a statement that he claims a lien on the property in question.

2. A lien claim, stating that the materials were furnished in the construction "of that certain railway known as and called S. V. & M. Ry.," and further describing such road as commencing at a certain point, and continuing "to its present westerly terminus, distant about 900 feet from the K. M.," is sufficient, under Code Civ. Proc. § 1183, which provides for a lien in general against the entire road, although the company at the time owned the roadbed, and shortly afterwards shifted its terminus further west, since it is a fair inference that the further particulars set forth in the claim were intended as particulars for the identification of the road as an entirety, and not as exclusive of the westward extension, then incomplete.

3. Where a railroad lies in two counties, the filing of a mechanic's lien against it in one county only is sufficient, under Code Civ. Proc. § 1187, which provides for record in "the county in which such property, or some part thereof, is situated."

4. Where materials are furnished at an agreed price, such price is prima facie evidence of their value.

5. A complaint to enforce a mechanic's lien which alleges the furnishing of materials at an agreed price is sufficient, prima facie, as alleging the value thereof.

Department 2. Appeal from superior court, Plumas county.

Action by M. C. Bringham against H. L. W. Knox, the Sierra Valleys Railway Company, and others. From a judgment in favor of the Sierra Valleys Railway Company and others, plaintiff appeals. Reversed.

G. G. Clough, for appellant. Goodwin & Webb, for respondents.

PER CURIAM. One H. C. Bowen was the owner of certain narrow-gauge railway property called the Sierra Valleys & Mohawk Railroad, which in different parts of the line was in various stages of advancement. The section on which rails had been laid began at the eastern terminus of the line, a place called "Junction," in Lassen county, and extended thence northwest and westerly a distance of 14 miles. The roadbed had been graded something more than 16 miles beyond the end of the laid track, and the right of way for the road had been obtained a few miles yet further to the westerly terminus, at Mohawk Valley, in Plumas county; the total distance from said Junction to Mohawk Valley being about 35 miles. In October, 1894, the defendant H. L. W. Knox agreed in writing with said Bowen to construct additional track on said line, commencing at the end of the 14 miles already laid, and proceeding westward about 9 miles to Rock Quarry, a point a few hundred feet west of a place called "Kerby Mill." This contract was not, nor was any memorandum thereof, filed in the office of the recorder of either of said counties, so that it was void, under the provisions of section 1183, Code Civ. Proc. Nevertheless Knox proceeded thereunder, and completed his work in accordance therewith on August 8, 1895. The plaintiff in this action, M. C. Bringham, furnished 17,000 timber ties to said Knox for use, and which Knox did use, in the construction of said extension of the track to Rock Quarry. Knox agreed to pay plaintiff 18 cents apiece for said ties, and yet owes him on account thereof a balance of $1,855. On September 6, 1895, plaintiff filed in the office of the recorder of Plumas county his claim of lien, presently to be described, for the amount of said balance.

This is an action to recover said amount and enforce such lien. The court below rendered judgment against Knox, who had made default, for the money due plaintiff, but refused to enforce the asserted lien. From the judgment in favor of the defendants other than Knox, plaintiff has appealed.

1. Respondents contend that plaintiff has sought to enforce his lien against a part only of a continuous railroad, whereas the law required him to proceed against the whole property; and this is the question mainly discussed by counsel. Pending performance of Knox's contract with Bowen, and before plaintiff filed his claim of lien, the title to the entire line of track, roadbed, and rights of way from Junction to Mohawk Valley had passed from said Bowen to the defendant Sierra Valleys Railway Company. In his claim of lien filed as aforesaid on September 6, 1895, Bringham stated that he "furnished materials actually used in the construction of that certain railway known as and called the Sierra Valleys & Mohawk Railway, and also such other property than the railroad as may be necessary for the operation and use of said railroad, which railroad is described as follows, to wit"; setting out a particular description, commencing at Junction, and continuing to the town of Beckwith, from which point it is stated that the road "bears about due west to Kerby Mill, and to its present westerly terminus, distant about nine hundred feet from Kerby Mill; that the entire distance from the point called 'Junction' to the present westerly terminus of said Sierra Valleys & Mohawk Railroad is about twenty-three and one-half miles; * * * that not less than twenty-five feet of ground on each side of said railroad, as constructed, is necessary for the use and operation of said road, together with the ground on which all freight and other houses are situated." The instrument concluded with a statement that Bringham claims the benefit of the law relative to liens of mechanics and others upon real property. At the time the claim was filed, work was in progress for the completion of the track on a section of the road extending seven miles west from Rock Quarry, and the same was completed on November 15, 1895, since which time the Sierra Valleys Railway Company has operated the same as part of the continuous line westward from Junction. The allegations of the complaint in the action, considered together, show that plaintiff proceeds for the foreclosure of his lien upon whatever property is described in the said claim. It seems to be well settled that the proper construction of the statute allowing to material men and others a lien for materials or labor furnished for use in the construction of a railroad (Code Civ. Proc. § 1183) requires that the lien must, in general, be claimed and enforced against the entire road. Cox v. Railroad Co., 44 Cal. 18; Boisot, Mech. Liens, § 190, and cases cited. In our opinion, the plaintiff here has brought his case within the rule. He distinctly stated in his filed claim that he furnished materials used in the construction, not of a part or section of the railroad, but "of that certain railway known as and called the Sierra Valleys & Mohawk Railway." It is true, he further says that the said railroad is described as commencing at Junction, and continuing to its present westerly terminus, about 900 feet from Kerby Mill; but it is to be noted that he says its present westerly terminus is at that point, carrying the implication that the railroad was projected beyond such point, and might be extended. The terminus of the road as an actual railroad —a way for traffic—was at the place stated in his claim. Work was then in progress for its extension, and in the course of a few weeks the terminus was shifted 7 miles further westward. In view of the statement that the materials were actually used in the construction of a certain railway, correctly described by name, it is a fair inference that the further particulars given in the claim of lien were intended by the claimant, and should be regarded, merely as particulars for the identification of the road as an entirety, and not as exclusive of the westward extension, then incomplete. Such extension, although not within the descriptive particulars, yet was not excluded by them, and was within the descriptive designation, "Sierra Valleys & Mohawk Railway." The statement that 25 feet of ground "on each side of said railroad, as constructed, is necessary for the use and operation of the road," applies as well to future construction as to the part then complete. No ground on each side could become necessary for operation of the railroad, except as the same should be put in condition to be operated. The demand with which the claim of lien concluded, that the claimant have the benefit of the law allowing the lien, was equivalent to a statement that he claimed a lien on the property he had described. Mill Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747. And, for the reasons indicated, we think it would be hypercriticism to say that he described less than the whole line for the purposes of his lien. See Tredinnick v. Mining Co., 72 Cal. 78, 13 Pac. 152; Mills Co. v. Kremer, 94 Cal. 205, 29 Pac. 633.

2. Respondents also object that, since the road lies in the two counties of Plumas and Lassen, the claim of lien was void, because filed in the office of the recorder of Plumas county only. As to this, it is sufficient to say that the statute requires the party claiming the lien to file his claim "for record with the county recorder of the county in which such property, or some part thereof, is situated." Code Civ. Proc. § 1187. The courts have no power to amend the statute by requiring the filing of the lien in every county where any part of the property is situated.

3. It is urged that since the contract between Knox and Bowen was void, and since for that reason the plaintiff could claim his lien only for the value of the materials furnished by him, and not for the contract price agreed on with Knox (Code Civ. Proc. § 1183),

therefore both the claim of lien and the complaint are insufficient, in failing to allege the value of plaintiff's materials. It was, however, stated in the claim that the agreed price was 18 cents apiece for the ties. This statement was a sufficient showing, prima facie, of their value. Jewell v. McKay, 82 Cal. 144, 150, 23 Pac. 139; Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, and 25 Pac. 1101; Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. 896. And so in relation to the complaint. It contained no direct averment of the value of the ties, but it was alleged that plaintiff furnished them to Knox at the said agreed price. Since the agreed price was prima facie evidence of their value, it must be held that the pleader in this manner alleged the value. Although he averred evidence of the fact, rather than the ultimate fact itself, yet, as the complaint was not demurred to for uncertainty in this particular, it is sufficient on appeal. Mill Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747; Amesoy v. Transit Co., 95 Cal. 311, 30 Pac. 550; Mullally v. Townsend, 119 Cal. 52, 50 Pac. 1066, and cases cited. It is said further that the value of the materials was not proved at the trial. But the said averments of the complaint were not denied by the answer of respondents. It was unnecessary, therefore, that plaintiff should make proof of them. The judgment is reversed, and the cause remanded for a new trial.

127 Cal. 31

SNIBLEY v. PALMTAG. (S. F. 1,902.)

(Supreme Court of California. Nov. 22, 1899.)

ELECTION CONTEST—DEATH OF PARTY—ABATEMENT.

Under Code Civ. Proc. § 1125, providing that, if an election contest proceeding be dismissed for want of prosecution, or if the election be affirmed, judgment must be rendered against the party contesting for costs, an election contest is not abated by the death of the contestant occurring after appeal by contestee from a judgment vacating the decision of the board of supervisors declaring contestee elected, but may be continued by contestants' personal representative.

Department 2. Appeal from superior court, San Benito county.

Election contest by Daniel Snibley against William Palmtag. From a judgment of the trial court setting aside the decision of the board of supervisors declaring defendant elected, he appealed. Subsequent to the appeal plaintiff died, and the defendant moved the appellate court to remand the case, with directions to vacate the judgment, and dismiss the action. Motion denied.

H. W. Scott and Briggs & Hudner, for appellant. A. M. Cunning and L. W. Jefferson, for respondent.

TEMPLE, J. This is an election contest for the office of supervisor of San Benito county. Appellant was declared elected by the board of canvassers. Respondent, being the opposing candidate, contested the election under the provisions of the Code of Civil Procedure, charging that illegal votes were counted for Palmtag, and that upon a proper count contestant would be found to have been elected. Upon the trial the court found that contestant and contestee had received the same number of legal votes, and ordered and adjudged that the alleged election of William Palmtag, "whose election to said office was so declared by the board of supervisors of San Benito county, state of California, on November 14, 1898, be, and the same is hereby, set aside, canceled, and annulled." Defendant appeals, and contends that, having found that there was a tie, and therefore that no other person had received a greater number of legal votes than the contestee, the election could not be annulled, but the contest should then be dismissed. But he also contends that the court committed errors in the count, and erroneously found that appellant did not receive the highest number of legal votes. After the appeal had been taken, the respondent died, and the contestee now asks the court to remand the case, with directions to the trial court to vacate the judgment and dismiss the action. He takes the ground that the action abated upon the death of contestant. The estate of deceased, he argues, cannot be interested in the action. It will not be benefited by any possible judgment, and is not an elector, and the legal representative may not be such. The statute does not provide for the contingency of the death of the contestant, and no one can be substituted in his place. The contest is a special statutory proceeding, and it often happens in such cases that the legislature has failed to anticipate and provide for all possible contingencies. Any elector may inaugurate the contest, and, had Snibley not been the opposing candidate, the same difficulty would have existed. And the trouble would have been the same if the court had found that Snibley had received a majority of the legal votes, or if the finding had been in favor of the contestee, and he had died after judgment. In either case it seems very hard if the survivor, against whom the judgment has been rendered, cannot appeal from it. Were the cause of action one which would die with the person, still after judgment the action does not abate. It is then property, and goes to the estate of the successful party if he dies after judgment. The judgment may be attacked and set aside on appeal, but so long as it stands it is not affected by the death of either party. Atlantic Dock Co. v. Mayor, etc., of New York City, 53 N. Y. 64; Shafer v. Shafer, 30 Mich. 163; Danforth v. Danforth, 111 Ill. 236. It is not correct to say that the estate of the deceased has no interest in the controversy. It is provided in section 1125 that, if the proceeding be dismissed for want of prosecution, or if the election be affirmed, "judgment must be rendered against the party contesting such election for costs." Having commenced the proceeding, and prosecuted it to judgment, by which the contestee is deprived of an office to which he had been declared elected, neither he nor his estate could escape the responsibility he has assumed. Appellant has a right to his appeal, and there is a chance that the judgment may be reversed, and that upon a retrial the election will be affirmed. The motion of the appellant is denied, but, upon causing the representative of the estate of Snibley to be substituted, the case will be heard.

We concur: HENSHAW, J.; McFARLAND, J.

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127 Cal. 21

HOLLENBEAK v. McCOY et al. (Sac. 292.)

(Supreme Court of California. Nov. 21, 1899.)

JUDGMENT—ENFORCEMENT—INJUNCTION—APPEAL—LACHES.

1. Where judgment was wrongfully recovered against a party in an action for malicious prosecution, and he was informed, shortly after the trial, of all the grounds which he urged in an independent action to procure a decree to enjoin its enforcement, but failed to take an appeal within the time prescribed, he was not entitled to such injunction, since negligence to take an appeal within the time prescribed is not a ground for equitable interference.

2. Where a justice of the peace before whom an action for malicious prosecution was tried informed defendant, against whom judgment had been rendered, that the recovery was erroneous, and that he would grant a motion for a new trial, and the hearing of such motion was set by the justice for a day beyond the time allowed for an appeal from the judgment, and denied, defendant was not entitled to a decree enjoining the enforcement of such judgment because his right to appeal therefrom had been lost through reliance on the justice's promise, in the absence of proof that the plaintiff was a party to the promise or knew that it had been made.

Department 1. Appeal from superior court, Shasta county.

Injunction by one Hollenbeak against one McCoy and others to restrain the enforcement of a justice's judgment. From an order sustaining a demurrer to the complaint and entering judgment against plaintiff, he appeals. Affirmed.

Francis Carr, Clay W. Taylor, and J. Chadbourne, for appellant. F. P. Primm and Jas. T. Boyd, for respondents.

HARRISON, J. The plaintiff was sued by the defendant McCoy in the justice's court of Fall River township, county of Shasta, for having maliciously caused his arrest upon a criminal charge, and at the trial of the action a verdict and judgment thereon was rendered against him. A motion for a new trial in the justice's court was denied, and he then appealed from the judgment to the superior court, where his appeal was dismissed upon the ground that it was not taken within 30 days after the judgment was rendered. The present action was brought by him to procure a decree enjoining the enforcement of this judgment, and directing it to be canceled of record. In the title of the action he has named as defendants, in addition to the plaintiff in the original suit, "F. A. Moers, justice of the peace," and "O. W. Levens, constable"; but there are no allegations in the complaint with reference to either of these last defendants, nor is it alleged that Moers was the justice before whom the action was tried. The grounds upon which he seeks the relief are, in substance, that certain persons were improperly admitted as jurors to try the cause, and that their verdict was arrived at by chance, and in disregard of the evidence and the law applicable thereto. It is also alleged in the complaint that, after the entry of judgment, "the justice of the peace holding said court voluntarily informed him" that the verdict of the jury was against the law and evidence, and that, if he should move for a new trial of the action, he would grant the motion; and that, relying upon such information, he made such motion, and that the hearing thereof was set by the justice for a day beyond the time allowed by law for appeal from the judgment to the superior court, and was then denied; and that thereafter he took an appeal, which was dismissed upon the ground that it was not taken within the time allowed by law. To this complaint the defendants filed a general demurrer, which was sustained by the court, and from the judgment entered thereon the plaintiff has appealed.

The complaint fails to show any ground for the interference of a court of equity to restrain the enforcement of the judgment rendered in the justice's court. It appears from the complaint that the plaintiff was informed of all the grounds which he urges in support of his action within a week after the verdict was given by the jury, and he then had a complete remedy against all the errors committed at the trial by an appeal to the superior court. His failure to take such appeal until more than 30 days after the rendition of the judgment was his own negligence, and cannot be invoked as a ground for the interference of equity. Quinn v. Wetherbee, 41 Cal. 247; Daly v. Pennie, 86 Cal. 552, 25 Pac. 67. "The correctness of a judgment cannot be reviewed in an independent action upon grounds which were available to the litigant in the original action." Johnson v. Reed (Cal.) 57 Pac. 680. Neither is the plaintiff entitled to relief by reason of his having relied upon the promise of the justice to grant him a new trial. He does not claim that the plaintiff in the action in that court was a party to this promise, or knew that it had been made. He was, moreover, bound to know that the time for an appeal from the judgment was not prolonged by any proceedings before the justice's court. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(126 Cal. 670)

LOS ANGELES COUNTY v. SPENCER et al.
(L. A. 486.)[1]

(Supreme Court of California. Nov. 11, 1899.)

CONSTITUTIONAL LAW—TITLE OF ACT—JUDICIAL POWER—INSECT PESTS—NUISANCES—STATUTES—POLICE POWER—PLEADING.

1. St. 1881, p. 88, as amended by St. 1889, p. 413, and St. 1891, pp. 260, 268, entitled "An act to protect and promote the horticultural interests of the state," and providing for the appointing of a horticultural commission, prescribing the terms of its members, defining their duties and powers, fixing their salaries, and making the expense of removing and abating insect pest nuisances a lien on the property on which the nuisance had existed, is not unconstitutional, as treating of more than one subject under a single title, since every provision therein points directly to the protection of the state horticultural interests, according to the title.

2. St. 1881, p. 88, amended by St. 1889, p. 413, and St. 1891, pp. 260, 268, declaring orchards and nurseries where certain pests exist to be nuisances, and providing for the appointing of a horticultural commission with power to abate or remove such nuisances, and making the expense of such abatement a lien on the land on which the nuisance had existed, is not unconstitutional, as being contrary to Const. art. 3, providing that the executive, judicial, and legislative functions of government shall be separate, since the commission's judicial power is the exercise of police power only, and liens created by it are enforceable only in a court of justice.

3. St. 1881, p. 88, amended by St. 1889, p. 413, and St. 1891, pp. 260, 268, declaring that places infested with pests injurious to fruits and plants are nuisances, and creating a commission with power to remove or abate them, and making the expense for such removal or abatement a lien on the property on which the nuisance had existed, is a proper exercise of the constitutional privilege given the legislature to subject private property to such reasonable restraint and burdens as will secure the general welfare, since the existence of the fruit industry depends upon the suppression of the pests named in the statute.

4. St. 1891, p. 268, providing that the expense of removing or abating nuisances therein named shall be a county charge, payable out of the general fund, and shall be made a lien on the property on which the nuisances had existed, and recoverable by an action against such property, is not a statute creating a lien for a delinquent tax, but for an indebtedness due the county, and hence the manner prescribed for its enforcement is valid.

5. In an action to subject property to a lien declared by a horticultural commissioner, an allegation that such commissioner "was duly appointed" is insufficient; it being necessary, under Code Civ. Proc. § 456, to state that the appointment was "duly given and made."

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Los Angeles county against W. D. Spencer and others. From a judgment in favor of defendants following an order sustaining a demurrer to an amended complaint without leave to further amend, plaintiff appeals. Reversed.

J. A. Donnell and W. P. James, for appellant. Tanner & Taft, for respondents.

GRAY, C. The amended complaint purports to set out a cause of action to foreclose a lien for the expense of abating an insect pest nuisance in defendants' orchard. This lien is claimed to exist by virtue of an act entitled "An act to protect and promote the horticultural interests of the state," and acts amendatory thereof and additional thereto. The act in question may be found in St. 1881, p. 88, and the amendments and additions thereto in St. 1889, p. 413, and St. 1891, pp. 260, 268. In sustaining the demurrer without leave to amend, the learned judge of the court below filed an opinion in which the principal reason assigned for the action of the court is that the act in question is unconstitutional, and this, also, is the main reason urged on this appeal in support of the judgment.

It is said, first, that the act embraces more than one subject grouped under one title. The act as amended provides for the appointment, by the board of supervisors of any county in the state to whom the required petition is presented, of a horticultural commission of not exceeding three members. It also prescribes the length of the terms of office of said commissioners, and the manner of filling vacancies therein. It then defines the duties and powers of the board of horticultural commissioners, fixes their compensation, and provides for their removal. It makes the expense of removing or abating an insect pest nuisance from any property infested thereby a lien upon the property or premises from which such nuisance has been abated. All the duties and powers conferred upon said board appertain to the abating of those insect pest nuisances which interfere with the business of horticulture. From this brief summary, it will be readily seen that every provision of the act points directly to the protection and promotion of the horticultural interests of the state, and hence all said provisions relate to but one subject, and may be properly grouped in one act, under the very appropriate title of "An act to protect and promote the horticultural interests of the state." This view seems to be supported by the following cases and the cases therein cited: Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383.

It is urged that the act in question is unconstitutional and invalid because it confers judicial powers upon the horticultural commissioners, contrary to article 3 of the state constitution; but we do not think that this contention can be maintained. This provision of the constitution must be understood as construed by judicial decisions, and with reference to the subject of police power. The act itself defines the nuisances to which it relates, and declares that "all places, orchards, nurseries," etc., infected with "scale insects, or codlin moth, or other pests injurious to fruit, plants," etc., are public nuisances. In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion, which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of officers under many other laws and ordinances which have been held valid. Ordinances prohibiting the erection of wooden buildings within fire limits, except upon the order of fire commissioners; giving viticultural commissioners power to prohibit the importation of diseased vines; prohibiting the carrying on of a public laundry without a certificate of the health officer and of the board of fire wardens; prohibiting retail liquor business without permission of the board of police commissioners; giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any rubbish should be deposited; forbidding orations, harangues, etc., in a park without consent of the park commissioners, or upon other grounds except by permission of the city government committee; beating drums, etc., without permission of the president of the village; prohibiting manufacturers and others from ringing bells, etc., except at such times as the board of aldermen may designate; authorizing harbor masters to station vessels and to assign each its place; forbidding the keeping of swine without a permit from the board of health; and giving to boards of health, quarantine officers, and milk inspectors discretion as to the exercise of police powers,—all such laws and ordinances have been judicially held to be valid, although they confer the same power upon designated public officers as is given by the act here in question to the commissioners. Ex parte Ah Fook, 49 Cal. 402; In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529, and cases there cited; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; Train v. Disinfecting Co., 144 Mass. 523, 11 N. E. 929; Newton v. Joyce, 166 Mass. 83, 44 N. E. 116. The efficiency of many police regulations depends upon their prompt and summary execution; and therefore, from necessity, certain discretion must be given to the officers who are to make the regulations effective. In Ex parte Ah Fook, supra, this court said: "It is obvious that, to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws, it must be prompt and summary, and we are not aware that any reasonable provisions of the statute clothing such officers or boards with enlarged powers, often exercised by them, have ever been held unconstitutional." In the case at bar the acts of the commissioner are not clothed with that sanctity and protection which accompanies the judicial acts of courts and judges, and the commissioner would be liable officially and personally for wrongful acts done under the color of his office. And then, again, the lien in question here could not be enforced until after a judicial investigation and determination by a court.

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[1] For opinion on petition for rehearing, see 59 Pac. 385.

Beyond any question, the legislature has the power to declare that to be a nuisance which is such in fact, and we think it safe to assert that everything declared to be a "public nuisance" in the act in question comes clearly within the meaning of that term as defined in Civ. Code, §§ 3479, 3480. It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is therefore a proper exercise of the police power which the legislature has, under section 1 of article 19 of the constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state. Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Train v. Disinfecting Co., 144 Mass. 523, 11 N. E. 929. In this connection it may be well to observe that the statute does not authorize any injury to, or destruction of, property, but, on the contrary, its provisions are beneficial to the very property upon which it operates. The lien given by the statute is not for a delinquent tax, but for an indebtedness due the county, and the enforcement of it in the way prescribed by the statute is not obnoxious to any constitutional inhibition. The case of Boorman v. City of Santa Barbara, 65 Cal. 313, 4 Pac. 31, and the other California cases cited by respondent to show that private property cannot be subject to burdens without due process of law, are sound in principle, but as to the matter of notice the statute here under consideration is not like any of the statutes in those cases. The subject of those statutes (street improvement) does not naturally call for such prompt and immediate action as might be necessary in the abatement of a contagious nuisance like that treated of in the statute here in question. Surocco v. Geary, 3 Cal. 69. We discover no conflict with any constitutional provision in the act under consideration as finally amended in 1891.

The demurrer, however, was properly sustained for the reason that the complaint, in alleging the appointment of John Scott as horticultural commissioner, did not follow strictly the language and directions of section 456 of the Code of Civil Procedure. The language of the complaint was that "the board of supervisors of Los Angeles county duly appointed John Scott to be and constitute a horticultural commission," etc. To accord with said section 456, the averment should have shown that the appointment was made by order of the board, "duly given and made." Judah v. Fredericks, 57 Cal. 389. But this is a matter that may be corrected by amendment of the complaint to conform to said section. Paving Co. v. Bolton, 97 Cal. 8, 31 Pac. 625. We see no other particular in which the complaint is materially defective. For the foregoing reasons, we advise that the judgment be reversed, and the cause remanded, with directions to the court below to permit the plaintiff to amend its complaint to accord with the views expressed in the foregoing opinion.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to permit the plaintiff to amend its complaint to accord with the views expressed in the foregoing opinion.

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126 Cal. 680

PEOPLE v. ARNETT. (Cr. 537.)

(Supreme Court of California. Nov. 11, 1899.)

CRIMINAL LAW—INDICTMENT—CONVICTION OF ANOTHER OFFENSE—VERDICT—INSTRUCTIONS—JUDGMENT.

1. A defendant cannot be convicted of an assault with a deadly weapon under an indictment for an assault with intent to commit murder, which does not charge that the assault was made with a deadly weapon.

2. Under a verdict finding defendant guilty of an assault with a deadly weapon, the prosecution being based on an information charging him with assault with intent to murder, but failing to charge that the assault was with a deadly weapon, the court has no jurisdiction to enter judgment against defendant for an assault with a deadly weapon, though the verdict for such crime was found under an erroneous instruction requested by him.

In bank. Appeal from superior court, Lassen county.

J. W. Arnett was convicted of an assault with a deadly weapon, and appeals. Reversed.

E. V. Spencer and H. D. Burroughs, for appellant. Atty. Gen. Ford, for the People.

McFARLAND, J. In the information in this case it was charged that the appellant did feloniously, etc., "assault Mrs. Belinda Arnett, with intent then and there to murder said Mrs. Belinda Arnett, contrary to the form," etc. The jury returned the following verdict: "We, the jury in the above-entitled cause, find the defendant, J. W. Arnett, guilty of an assault upon the person of Mrs. Belinda Arnett with a deadly weapon." Thereupon the court entered judgment that appellant be imprisoned in the state prison for a term of two years. The appeal is from the judgment, and from an order denying the motion for a new trial.

It is well settled that, under an indictment or information for an assault with intent to commit murder which does not charge that the assault was made with a deadly weapon, the defendant cannot be convicted of an assault with a deadly weapon. People v. Murat, 45 Cal. 281; People v. Vanard, 6 Cal. 562. These case have always been followed. People v. Gordon, 99 Cal. 227, 33 Pac. 901, only holds that a party may be convicted of an assault with a deadly weapon "under an indictment or information charging the greater offense to have been committed with a deadly weapon." The fact that the defendant in the case at bar asked for the erroneous instruction, under which the jury, no doubt, found their verdict, makes no difference; for the court had no jurisdiction to try him for any other offense than such as is charged in the indictment, or included within it. Consent cannot confer jurisdiction. People v. Granice, 50 Cal. 448.

It has been suggested that the verdict can be construed as finding the appellant guilty of only a simple assault, and that the court below should be instructed to enter judgment upon the verdict as if it was for the crime of simple assault and affix the punishment accordingly; but we see no ground upon which we can change a verdict for a well-defined crime, which is a felony if imprisonment in the state prison is imposed, into a verdict for a misdemeanor only. In People v. Vanard, supra, which is relied on as supporting this suggestion, under an indictment for "an assault with intent to commit murder" the verdict was, "Guilty of an assault with intent to do bodily injury;" but there was no such crime as an assault "with intent to do bodily injury," and the court could well hold the latter part of the verdict to be mere surplusage. But in the case at bar the jury found the defendant guilty of the very crime declared in section 245 of the Penal Code, and in the language of that section, which makes it a crime to commit "an assault upon the person of another with a deadly weapon." The verdict, therefore, cannot be held to be anything different from the one which the jury returned, to wit, an assault upon the person of Mrs. Arnett with a deadly weapon; and, as there was no jurisdiction to try the appellant for the crime of which he was found guilty by the verdict, there was and is no jurisdiction in the court to enter any judgment upon that verdict. The judgment and order appealed from are reversed, and a new trial is ordered.

We concur: HENSHAW, J.; HARRISON, J.; VAN DYKE, J.

GAROUTTE, J. I concur in the views and conclusion declared in the main opinion. It is suggested that this court may now declare the verdict to be one of assault. But this is not possible. Such a verdict would be one rendered by this court. The jury declared the defendant guilty of an assault with a deadly weapon,—a verdict which was complete and perfect, as far as any matter of form is concerned,—and this court cannot change it. It would be usurping the functions of a jury to do so. The mere fact that "assault" is an offense included in the offense declared by the verdict in no way changes the legal aspect of the matter. Let us assume that two lower-grade offenses were included in the verdict as found by the jury.

Which one would this court declare the offense of which defendant was found guilty? The crime of assault is included in the crime of rape. If the verdict in this case had found the defendant guilty of rape, with equal propriety it could now be claimed that this court should declare such a verdict one of assault.

127 Cal. 1

PACIFIC PAV. CO. v. MOWBRAY. (Sac. 473.)

(Supreme Court of California. Nov. 18, 1899.)

MUNICIPAL CORPORATIONS—APPEAL—RECORD — IMPROVEMENTS—PROTEST — MAJORITY OF FRONTAGE—EVIDENCE—DETERMINATION OF COUNCIL.

1. A finding that a proposed street improvement was not objected to by a majority of the property owners fronting on the line of such proposed improvement will not be reversed on appeal, where the record merely shows that the owners of a certain amount of frontage protested, but failed to show the aggregate frontage included in the improvement.

2. An assessment, and warrant for its collection, in the hands of a contractor, who has made a public improvement, is prima facie evidence of its regularity and correctness, and of the validity of prior proceedings and acts of the city council on which the assessment depends.

3. Where a protest against a proposed improvement, presented to a city council, does not purport to be signed by the owners of a majority of the frontage, the council need not determine or enter of record its judgment that such protest was not signed by the owners of a majority of the property along the line of the proposed improvement.

Department 1. Appeal from superior court, San Joaquin county.

Action by the Pacific Paving Company against J. L. Mowbray to enforce an assessment for a city improvement. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John E. Budd, for appellant. Jas. A. Louttit and W. J. Bartnett, for respondent.

HARRISON, J. Action upon a street assessment. The city council of Stockton ordered certain improvements to be made upon Market street, in that city, from the west line of Hunter street to the west line of American street, and awarded the contract therefor to the plaintiff. After its completion to the satisfaction of the superintendent of streets, that officer issued to it an assessment for the cost of the work, together with a warrant for its collection, and after demand therefor plaintiff brought the present action to foreclose the lien of its assessment upon certain property belonging to the defendant. Judgment was rendered in its favor, from which, and an order denying a new trial, the defendant has appealed.

The plaintiff's right of action was contested by the defendant upon the ground that the city council had no jurisdiction to order the improvement, for the reason that the owners of a majority of the frontage of the property on the line of the proposed improvement filed a protest against the same within 10 days after the expiration of the publication of the notice of intention. Upon this issue the court found against the allegation of his answer, and this finding is attacked as not supported by the evidence. In support of his averment, the defendant introduced a document, which had been filed within said 10 days with the city clerk, purporting to be a protest against the improvement from certain owners of property along the line thereof. This document appears to have been originally signed by the owners of 1,396 feet of frontage, but upon its face the signatures of certain signers owning 303 feet had been erased, leaving 1,093 feet of frontage represented by the other signers. It is claimed by the appellant that the erasures were unauthorized, and that, by reason of the protest as originally signed, the city council was barred from proceeding with the improvement. This proposition, however, depends upon whether the original signers of the document constituted the owners of a majority of the frontage. The record fails to show the amount of the entire frontage of Market street between Hunter and American streets, and we are unable to say whether 1,396 feet is a majority thereof. The superior court has found that it was not, and it was incumbent upon the appellant, if he would have that finding set aside, to have it appear from the record that it was contrary to the evidence. Error is not to be presumed, but must in all cases be made to appear before the appellant is entitled to a reversal. It is thus unnecessary to consider whether the erasures on the protest were properly made.

The assessment, and other documents connected therewith, are made by the statute prima facie evidence of its regularity and correctness and of the prior proceedings and acts of the city council, and their introduction in evidence by the plaintiff threw upon the defendant the burden of establishing the contrary. Such prima facie evidence was not overcome by introducing the above protest, unless the defendant also showed that it was signed by the owners of a majority of the frontage. As this protest did not "purport" to be signed by the owners of a major frontage, it was not necessary that the city council should determine or enter of record its judgment that it had not been legally signed by such owners. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(127 Cal. 37)

LAKE SHORE CATTLE CO. v. MODOC LAND & LIVE-STOCK CO. (Sac. 550.)

(Supreme Court of California. Nov. 22, 1899.)

ENGROSSMENT OF STATEMENT FOR NEW TRIAL—CERTIFICATION—DISMISSAL OF MOTION—ABUSE OF DISCRETION.

1. Under the statute it is sufficient engrossment of documents on file for the purpose of a hearing in the trial court on a motion for a new trial to refer to them as "exhibits" with the direction, "Here insert."

2. At a hearing on motion for a new trial appellant showed a statement engrossed within the meaning of the law, and sought leave to obtain the certification of the trial judge thereto, who, it appears, refused to certify to it when first presented, because of some minor omissions, which were corrected, but not until his term had expired, and he had left the county. Later he returned for about 10 days, but during that time appellant neglected, through pressure of other business, to present the statement to him. *Held*, appellant's negligence in not presenting the statement was not of such consequence as to warrant the court in dismissing the motion, and in doing so abused its discretion.

Department 1. Appeal from superior court, Modoc county.

Action by the Lake Shore Cattle Company against the Modoc Land & Live-Stock Company. From an order dismissing defendant's motion for a new trial, it appeals. Reversed.

Spencer & Raker and Clarence A. Raker, for appellant. D. W. Jenks, D. F. Harris, and J. T. Richards, for respondent.

HENSHAW, J. This appeal is from the order of court dismissing defendant's motion for a new trial for want of diligence in its prosecution, and for unnecessary and vexatious delay in the engrossment of the statement on the motion. The statement on motion for a new trial was settled upon September 25, 1896, by the Honorable C. L. Claflin, then judge of the trial court, and the judge who tried the cause. The moving party was given until November 25, 1896, to engross the statement as settled. Before November 25th the statement was delivered to the adverse attorneys for comparison, and to the judge for his certificate and signature. It did not receive the judge's signature, but no intimation was made to appellant's attorneys, either by the judge or by opposite counsel, that the engrossed statement was defective or incomplete. Later appellant's attorneys obtained possession of the engrossed statement, and presented it to the judge for his signature on December 30, 1896. The judge's term of office was about to expire, and the attorneys were informed that he proposed leaving the county, and going to Los Angeles, as in fact he did. The judge returned to and was present at the county seat for about 10 days in the early part of the month of February, but during that time the attorney for the appellant who had charge of this particular matter, being much pressed with other business affairs, neglected to re-present the statement to the judge. On February 17th the plaintiff in the action served notice upon defendant of its motion to dismiss defendant's motion for a new trial upon the indicated grounds, and upon the same day served a subpœna duces tecum upon one of the attorneys for defendant to produce the proposed statement of the case on motion for a new trial, with the amendments thereto. Upon the hearing these facts were disclosed, and, in addition, it was shown that Judge Claflin had never refused to settle the engrossed statement, but had made objection to signing the statement offered to him upon the ground that it was incomplete in certain particulars. Appellant here further showed that it had been unable to forward the proposed statement to Judge Claflin in Los Angeles, or to take it to him for his certification, because of the subpœna duces tecum which had been served upon its attorney, and it sought leave of court to withdraw the proposed statement, and take it to Judge Claflin for his certification. Permission to do so was refused. The alleged defect in the engrossed statement was that certain documents on file in the action had not been transcribed at length in the engrossed statement, but exact reference had been made to them as exhibits, with the direction, "Here insert." But as to documents on file this is a sufficient engrossment for the purposes of the hearing before the trial court. It is a procedure countenanced by the Code (Code Civ. Proc. § 648), and justified by our decisions. Of course, in printing the transcript on appeal to this court, the documents must be inserted at length. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Hayne, New Trial & App. § 156 et seq. Aside from any consideration of the question of the court's power to dismiss a motion for a new trial pending the settlement of the statement upon appeal, and conceding that it has such power, we think its exercise under the circumstances indicated was an abuse thereof. Appellant had engrossed and presented its statement in due time. Judge Claflin's refusal to certify to it seems to have been based upon one or two minor and trifling omissions, which were at once corrected. He left the county the day after this refusal, remaining away for a month, and returning for but 10 days in the early part of February. Within a few days after his second departure this motion to dismiss was noticed and served. At the hearing appellant showed a statement engrossed within the meaning of the law, and sought leave of court to obtain the certification of Judge Claflin, for Judge Claflin had never refused to act, and in fact at a later time, as appears by another appeal in this case, did actually certify to the statement presented to him. If it be said that the appellant was negligent in not seeking out the judge and obtaining his signature during the 10 days of his last stay in the county seat, it was not, we think, negligence so gross, or of such consequence, as to warrant the extreme penalty imposed by the court of an absolute dismissal of the motion. We think in so doing that the court abused its discretion.

The second appeal—that from defendant's motion to vacate the order of dismissal upon the ground that it was improvidently made—needs no consideration.

The third appeal—that from the order of the court taxing costs—presents no especial matters calling for comment. The evidence was sufficient to support the terms allowed by the court, and they appear to have been legal charges. The order of the court taxing costs is therefore affirmed, and the order of the court dismissing defendant's motion for a new trial is reversed.

We concur: McFARLAND, J.; TEMPLE, J.

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127 Cal. 33

DEMARTINI v. ANDERSON. (Sac. 596.)

(Supreme Court of California. Nov. 22, 1899.)

EVIDENCE—REPUTATION OF PREMISES—LEASE OF PREMISES FOR IMMORAL PURPOSES.

1. Evidence of the character of the inmates and frequenters of a house is admissible to show that it was being used for prostitution and assignation.

2. In an action for rent, evidence of the reputation of a house as one of ill fame is admissible on the part of defendant to show that it was being so used with the owner's knowledge, and that the contract was illegal.

Department 2. Appeal from superior court, Sacramento county.

Action by G. B. Demartini against W. A. Anderson, executor of Manuel Dubois, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

L. T. Hatfield, for appellant. A. A. De Ligne, Johnson, Whitaker & Linford, and H. W. Johnson, for respondent.

McFARLAND, J. Appeal by plaintiff from a judgment in favor of defendant, and from an order denying his motion for a new trial. The action is against the respondent, Anderson, as executor of Manuel Dubois, deceased, to recover rent upon a written lease of a certain house and premises on Third street in Sacramento city. It is alleged that the lease was executed by appellant and the deceased on the 1st day of April, 1895, and was for a term of five years from and after that date, at the rental of $50 per month, which the deceased, as lessee, promised to pay; that he paid the rent until his death, which occurred in April, 1897; and that since then respondent has refused to pay any rent, and has repudiated the lease. The defense was that the house was leased by the deceased from appellant for the purpose of conducting it as a house of prostitution and assignation, and that appellant knew of this purpose at the time of the execution of the lease; and that the lease, having thus been made for immoral purposes, against good morals and public policy, was and is illegal and void. The court found the facts to be as averred in the answer,—that at the time of the execution of the lease the house was a house of prostitution, and was conducted as such with the knowledge and consent of appellant; that it continued to be so conducted from the date of the lease to the death of the deceased, with the knowledge and consent of appellant; and that it was rented to the deceased by appellant with the latter's knowledge that it was to be used for the purposes aforesaid. If the lease, with the knowledge and consent of appellant, was made for the purposes alleged in the answer and found by the court, it was unlawful and void; and a court will not aid either party in an attempt to enforce such a contract. Civ. Code, § 1667; Pen. Code, § 316; Chateau v. Singla, 114 Cal. 93, 45 Pac. 1015. The contention of appellant—waiving the objection of the respondent that there are no sufficient specifications—that the evidence did not justify the findings above referred to cannot be maintained. It is sufficient to say that it would be difficult to conceive how the court could have been justified in not finding as it did.

The only contention for a reversal which calls for especial notice is that the court admitted evidence which was inadmissible, and prejudicial to defendant. On this subject the transcript shows 101 specifications of alleged errors, but the main points to be gathered from them all are that the court erred in receiving evidence of the characters of the inmates of the house and of the reputation of the house itself as one of ill fame. As to the evidence of the characters of the inmates and frequenters of the house, the cases seem to all concur in holding it admissible. In section 1452 of 2 Whart. Cr. Law, the author, although he somewhat questions the rule that the bad reputation of the house may be shown, says: "But, however this may be, it is settled that the bad reputations of the persons visiting the house may be put in evidence;" and, as the current of authorities is all that way, the question need not be further discussed.

Whether or not the reputation of the house itself as one of ill fame may be shown is a question about which the cases are somewhat conflicting; but we think that the weight of authority, and the better reason, support the affirmative of the proposition. It has been so held in a large number of states, and the following are some of the cases which so hold: Sylvester v. State, 42 Tex. 496; Morris v. State, 38 Tex. 603; Allen v. State, 15 Tex. App. 321; State v. McDowell, Dud. 346; King v. State, 17 Fla. 183; O'Brien v. People, 28 Mich. 213; Betts v. State, 93 Ind. 375; Graeter v. State, 105 Ind. 271, 4 N. E. 461; State v. Brunell, 29 Wis. 435; State v. Smith, 29 Minn. 193, 12 N. W. 524; Territory v. Bowen, 2 Idaho, 607, 23 Pac. 82; Drake v. State, 14 Neb. 535, 17 N. W. 117; Cadwell v. State, 17 Conn. 467; Com. v. Kimball, 7 Gray, 328. See, also, Moore, Cr. Law, par. 1072, and cases there cited, to support the statement in the text that "a house of ill fame may be proved to be such by direct evidence, or by reputation, or by circumstances,—as that the inmates were reputed to be prostitutes." We are much more impressed with the reasoning and consistency of the cases which hold that evidence of the reputation of a house of prostitution is admissible than with the reasoning and consistency of those cases which hold differently; for the latter, while excluding evidence of the reputation of the house, permit evidence of the reputation of the inmates of the house for the purpose of showing that it is a house of prostitution, and this seems to be a distinction without much difference. Nearly all the cases to which we have been referred by counsel on both sides were criminal cases, where parties were being criminally prosecuted for either keeping houses of prostitution or leasing them for that purpose; but, if the rule as above stated applies to a criminal prosecution where a man's liberty is at stake, it certainly applies with more force to a mere civil case, where nothing is involved except property.

Appellant complains because evidence was admitted tending to show the character of the house some months before and down to the time of the execution of the lease; but this evidence was clearly admissible, as tending to show the appellant's knowledge of the character of the house, and for what it was used, and what it was expected to be used for. Knowledge, of course, had to be brought home to the appellant, and evidence tending to show that knowledge was properly admitted. In Graeter v. State, supra, the court said: "The owner of a house so occupied may not shut his eyes to that which is patent to the community around him, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge." And in Cadwell v. State, supra, the court said: "Evidence of reputation of the house previous to a particular time conduces to show its reputation afterwards." The appellant's brief consists to a very great degree in the mere copied statements of his specifications of error as they appear in the transcript, and we think that what has already been hereinbefore said disposes of the material points upon which the claim for a reversal of the judgment is based. We think that the case was properly tried, and correctly decided, and we see no reason for disturbing the judgment of the court below. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

127 Cal. 24

DONNELLY v. ADAMS et al. (S. F. 1,781.)

(Supreme Court of California. Nov. 21, 1899.)

MECHANICS' LIENS — BUILDING CONTRACT — MISREFERENCE TO PLANS—WAIVER.

A building contract referred to plans and specifications as having been signed by the parties as is required by Code Civ. Proc. § 1183, as a condition to the contract's validity, but which in fact were never signed. *Held* a misreference or misdescription which could not be cured by any oral waiver or oral agreement so as to validate the contract in support of a lien.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Thomas Donnelly against Frank P. Adams and others, foreclosing a lien under a building contract. Louisa Helbing was substituted as plaintiff. From a judgment dismissing the action on sustaining a general demurrer to the amended complaint, plaintiff appeals. Affirmed.

Chas. E. Peery, for appellant. Adams, Stafford & Stafford, for respondent. Tobin & Tobin, for respondent H. S. & L. Society.

GRAY, C. This case has been here before (Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916); and it was then held that the building contract involved in the case was void because it referred to the plans, drawings, and specifications as having been signed by the parties to the contract, when in fact they were not so signed. The court held this to be "a false reference in a written contract, which cannot be aided by parol evidence," and that thereby "the contract is left inchoate and not complete, and could not form the basis of recovery." The judgment, decreeing foreclosure of a mechanic's lien for work and materials done and furnished pursuant to said alleged contract, was reversed, and the cause remanded. The plaintiff then amended his complaint as to the plans and specifications so as to make it read as follows: "That thereafter, and prior to the commencement of the work upon said building, the provision of the said contract requiring the said plans and specifications to be signed by the parties thereto was, by the verbal consent of both parties thereto, duly waived, and the said specifications were not signed by the defendant Frank P. Adams, but the said building was duly erected and completed according to the plans and specifications made by B. E. Hendrickson, the authorized architect employed by the owner, and which were kept in the office of the said architect, subject to the inspection of the parties to the said contract, and others concerned in the erection." To the complaint as amended the defendants interposed a general demurrer, which was sustained by the court, and the action dismissed. From the judgment of dismissal the plaintiff appeals.

The amendment to the complaint did not cure the defect pointed out on the former appeal. There was no such stipulation in the builder's contract as the amendment to the complaint says was waived. It was not provided or required in the contract that the plans and specifications should be signed by the parties. They were merely referred to and described as already signed. This was a misreference or misdescription that could not be cured by any oral waiver or oral agreement. It is necessary, under section 1183, Code Civ.

Proc., that the whole contract shall be in writing, and signed by the parties thereto. In the present case the plans and specifications are a most important part of the contract. Without them, the nature and extent of the work and materials to be furnished cannot be ascertained. They should have been made a part of the written contract which was signed by the parties, in such a way that no resort to oral evidence would be necessary to show that it was the intention of the parties that they should be a part of such contract. This not having been done, the whole contract, as this court held on the former appeal, is void. Neither the whole of it nor any part of it can be revived by an oral waiver of any other part of it. Oral evidence to contradict or vary the terms of the written contract will be equally improper, with or without the amendment. In any view that may be taken of the amendment to the complaint, it obviates none of the objections upon which the former decision was based. Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533; Willamette Steam-Mills, Lumbering & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Worden v. Hammond, 37 Cal. 61. We advise that the judgment be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

126 Cal. 303

HIGGINS et al. v. CITY OF SAN DIEGO et al. (L. A. 577.)

(Supreme Court of California. Nov. 29, 1899.)

In bank. Dissenting opinion. For majority opinion, see 58 Pac. 700.

BEATTY, C. J. I dissent from the order denying a rehearing of this case, because I think the decision of department 1 herein is in conflict with the decision of department 2 in People v. Compton, 123 Cal. 403, 56 Pac. 44. The result will be confusion in a matter which ought to be made plain, if possible, by a decision of the court in bank.

127 Cal. 49

BIRCH v. PHELAN et al. (S. F. 2,085.)

(Supreme Court of California. Nov. 24, 1899.)

JURORS—FEES—LIABILITY OF COUNTY—CRIMINAL CASES.

1. Act Feb. 27, 1866 (St. 1865–66, p. 122), fixes the amount of fees which jurors in the county and city of San Francisco shall receive, and provides for payment by the parties in civil cases, but makes no provision for payment in criminal cases; and the city charter (St. 1856, p. 145) provides that municipal funds may be used to pay the fees of jurors in criminal cases when the same are by law payable out of the county treasury, and forbids such payment unless required by law. *Held*, that mandamus will not lie to compel the supervisors of the city and county of San Francisco to allow a claim against the city and county for services rendered as a juror in criminal cases in the superior court of said city and county.

2. Act March 28, 1895 (St. 1895, p. 267), establishing the fees to be paid to jurors and witnesses, does not make jurors' fees in criminal cases in the superior court of the city and county of San Francisco payable out of the county and city treasury.

In bank. Appeal from superior court, city and county of San Francisco.

Mandamus by William Birch against James D. Phelan and others, as supervisors of the city and county of San Francisco, to compel the allowance by the respondents of a claim presented by plaintiff for services rendered by him as juror in criminal cases. From a judgment in favor of defendants, the plaintiff appeals. Affirmed.

Louis P. Boardman, for appellant. Franklin K. Lane, for respondents.

BRITT, C. The defendant Phelan is the mayor of the city and county of San Francisco, and in virtue of his office is president of the board of supervisors of said city and county. The other defendants are members of said board. The plaintiff served as a juror at various times—11 days in all—during the month of March, 1899, upon the trial of sundry criminal causes prosecuted in the superior court of said city and county. He presented to the said board a claim in the sum of $22 for his services as such juror, and demanded that the same be allowed as a valid claim payable out of the municipal treasury. Defendants having refused, plaintiff petitioned the superior court for a writ of mandamus to compel them to allow his claim. The court denied his writ; hence this appeal.

In most of the counties of the state express provision has been made by the legislature for compensation of jurors in criminal cases from the public county funds. Act March 5, 1870, § 28 (St. 1869–70, p. 176) amended March 1, 1872 (St. 1871–72, p. 188); Jacobs v. Elliott, 104 Cal. 320, 37 Pac. 942. But by section 52 of said act of 1870 the city and county of San Francisco was exempted from the operation of said section 28 thereof. Plaintiff urges, however, that certain other statutes "indicate a positive legislative intent that such fees should be paid," referring to the fees of all jurors in like situation with himself. The first of the statues thus relied on is the act of February 27, 1866, "concerning fees of jurors and witnesses in the city and county of San Francisco" (St. 1865–66, p. 122), which proceeds as follows:

"Section 1. In the city and county of San Francisco the fees of jurors and witnesses shall be as hereinafter provided.

"Sec. 2. The fees of jurors shall be for each cause—and if a cause occupy more than a day, then for each day's attendance—two dollars, * * * to be paid in civil cases by the party in whose favor verdict is rendered before the same may be recovered as costs against the party losing the case. * * * Until they are paid no further proceedings shall be allowed in the action. No person shall receive fees for serving on a coroner's jury."

Section 3 relates to the fees of witnesses in civil suits only.

The court, per Mr. Justice Harrison, said in a recent case: "The right of compensation for services as a juror is purely statutory, and it is for the legislature to determine in what cases such compensation shall be made, as well as the amount and mode of payment, or it may withhold any compensation therefor." Hilton v. Curry, 124 Cal. 84, 56 Pac. 784. Comparing and considering together the several parts of said act of 1866, we find it difficult to perceive in it any intelligible provision for the compensation of jurors in criminal cases. If, however, we could admit that such was the legislative intent, and that language has been employed from which the intent appears, the statute yet fails to support the plaintiff's case. The charter of the city and county—the consolidation act (St. 1856, p. 145)—provides that the municipal funds may be used to pay the fees of jurors in criminal cases "when the same by law are payable out of the county treasury," and forbids such payment from that source unless required "by law," which it defines to be "the constitution and laws made or adopted by the legislature in pursuance thereof" (sections 82, 83, 95). Obviously, there is nothing in the act of 1866 declaring, or even intimating, that such fees are payable out of the local treasury; and we have no more warrant to say that the charge arises by implication against the city and county than to say that it is implied against the state of California,—perhaps not even as much. See Modoc Co. v. Spencer, 103 Cal. 498, 500, 37 Pac. 483.

The other statute, which, in the view of plaintiff, affords foundation for his demand, is the act of March 28, 1895, "to establish the fees of county, township and other officers, and of jurors and witnesses in this state." St. 1895, p. 267. It is unnecessary to set out its provisions touching jurors' fees. The interpretation thereof is affected by considerations quite similar to those already stated in reference to the act of 1866. This court has held, in Hilton v. Curry, above cited, that the purpose of the act of 1895, as regards the fees of jurors, is but to establish the amount of the same, and that it does not fix the source of payment, nor authorize payment out of the public treasury. 124 Cal. 84, 88, 56 Pac. 784. The ruling in that case related to fees of jurors in civil causes, but we see nothing in the statute which would allow a different conclusion upon its effect in the present instance. The claim of plaintiff cannot be supported, and the judgment of the court below should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the court is affirmed.

126 Cal. 675

BEDELL v. SCOTT. (Sac. 503.)

(Supreme Court of California. Nov. 11, 1899.)

TOLL ROADS—JURISDICTION—SUPERVISORS—RECORD OF ACTION OF SUPERVISORS.

Under County Government Act, § 25, subd. 41 (St. 1893, p. 359), providing that the supervisors may authorize the collection of tolls on a free public highway whenever, in their judgment, the expense necessary to operate such public road as a free public highway is too great to justify the county in so maintaining it, the supervisors have no jurisdiction to grant a franchise to collect tolls on such a highway, without first determining that the expense is too great to justify the county in so doing, and one claiming such right must affirmatively show by the records that the supervisors found the prerequisite facts to exist.

Department 2. Appeal from superior court, Placer county.

Action by E. C. Bedell against J. B. Scott to collect tolls. There was a judgment for plaintiff, and defendant appeals. Reversed.

Tabor & Tabor, for appellant. John M. Fulweiler, for respondent.

HENSHAW, J. Defendant appeals from the judgment and from the order denying his motion for a new trial. This was an action to collect an assigned claim for tolls alleged to be due from defendant to plaintiff's assignor for the passage of animals and vehicles over a highway in the county of Placer. The court found the road in question to be a free public highway. The authority of the board of supervisors to fix a toll rate, and to provide for the collection of tolls upon a free public highway, is drawn from subdivision 41 of section 25 of the county government act (St. 1893, p. 359). In the case of a free public highway, the supervisors may authorize the collection of tolls "whenever in their judgment the expense necessary to operate or maintain such public road or highway as a free public highway is too great to justify the county in so operating or maintaining them." The court also found that the license and franchise to collect tolls over and along said free public highway was granted to plaintiff's assignors because, in the judgment of the board of supervisors, the expense necessary to maintain and operate the same as a free public highway was too great to justify the county in so operating and maintaining the same. This finding is attacked. The records of the board of supervisors introduced in evidence failed entirely to show that the board received evidence and made any determination to this effect. Its judgment that the necessary expense in operating a public highway was too great to justify the county in so operating it is prerequisite to its power to confer a license or franchise upon any one to collect tolls over such public highway. Its jurisdiction depends upon the determination of the fact, and its records should show such determination. It is too well settled to need discussion that, when the jurisdiction of an inferior court or tribunal depends upon facts to be ascertained by such tribunal, its record must affirmatively show the existence and determination of such facts. Johnson v. Eureka Co., 12 Nev. 28; Rosenthal v. Plankroad Co., 10 Ind. 359; Wightman v. Karsner, 20 Ala. 446; Plummer v. Inhabitants of Waterville, 32 Me. 566; Armija v. Board (N. M.) 7 Pac. 19; People v. Brown, 23 Colo. 425, 48 Pac. 661. Upon the face of the record of the supervisors, it nowhere appears either that the road was a free public highway, or that, in the judgment of the supervisors, the expense of operating and maintaining it was too great to justify the county in the undertaking. The order, being thus radically defective, cannot avail the plaintiff in his asserted right to collect tolls. The judgment and order are therefore reversed, and the cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.

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6 Cal. Unrep. 350

BLAIR v. SQUIRE et al. (S. F. 1,132.)

(Supreme Court of California. Nov. 22, 1899.)

REVIEW—DEEDS—CONSIDERATION—PRESUMPTION—CONSTRUCTION—MORTGAGE—BURDEN OF PROOF—EVIDENCE.

1. The supreme court will not, on appeal, disturb a finding of fact made by a trial court, if there is any substantial evidence to support it.

2. Under Code Civ. Proc. §§ 1614, 1963, subd. 39, providing that a written instrument is presumptive evidence of a consideration, the introduction of a deed in evidence places the burden of showing want of consideration on the party alleging it, and carries with it a presumption that it was given for a valuable consideration.

3. Defendant's mother owed her, and defendant was surety for her mother for more than the value of the mother's interest in land conveyed to defendant by absolute deed, in consideration of full satisfaction of the mother's indebtedness. Defendant took possession of the land, collected rents, and paid interest on other liens assumed by her. She did not surrender her mother's notes, but did not keep them with any idea of collecting them, and, at the time of the execution of the deed, defendant took a continuing mortgage from her mother on the land in renewal of a previous mortgage for the same amount, to preserve her priority over other liens. *Held*, that the evidence was sufficient to support a finding that the deed was an absolute conveyance, and not a mortgage.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Partition by Florence Ethel Blair against Mabel E. Squire and others. From a decree in favor of plaintiff, and from an order denying a motion for a new trial, the San Francisco Tool Company, one of the defendants, appeals. Affirmed.

Pringle & Pringle, for appellant. Samuel B. McKee and Fitzgerald & Abbott, for respondent.

COOPER, C. This is an appeal by the San Francisco Tool Company from an interlocutory judgment and decree and from an order denying its motion for a new trial. The action was brought by the plaintiff for the partition of a tract of land of about 256 acres, situate in the county of Alameda. The title was originally in one Walter Blair, who died intestate leaving surviving him, as his only heirs, his widow, Phebe A. Blair, and two daughters, Florence Ethel Blair, the plaintiff, and Mabel E. Squire, one of the defendants. On the 23d day of August, 1894, the superior court of Alameda county, by proper decree of distribution in the matter of the estate of said Walter Blair, distributed the said real estate to said widow and daughters herein named, in the proportions to which they were entitled under the law. No question is made as to the validity of the said decree of distribution, and there is no conflict between the mother and daughters. and no objection by either of them, to the decree of distribution or to the interlocutory decree and judgment herein entered. The appeal has, in pursuance of a stipulation filed in this court, been dismissed as to the plaintiff, and the decree was satisfactory to all the defendants except the San Francisco Tool Company, which is the appellant herein. The appellant does not question the correctness of the decree as to the plaintiff, nor as to any of the defendants except as to the defendant Mabel E. Squire. For convenience, the San Francisco Tool Company will in this opinion be called the appellant, and the defendant Mabel E. Squire the respondent, as they are the only parties contending here and the parties to be affected by the judgment of this court.

On the 23d day of August, 1894, Phebe A. Blair, by grant, bargain, and sale deed, duly executed and delivered, sold and conveyed all her interest in said tract of land to respondent, which deed was duly recorded in the recorder's office of Alameda county. After this deed was delivered and recorded, and in the month of September, 1894, the appellant brought suit against Phebe A. Blair upon an indebtedness due from her to said appellant. A writ of attachment was duly issued against said Phebe A. Blair, and levied upon all her right, title, and interest in and to said real estate. The appellant in its answer herein did not deny the due execution, delivery, and recording of the said deed to respondent, but alleged, upon information and belief, that the said deed was intended only as a mortgage to secure respondent for certain advances made by her to her mother, and certain indorsements and obligations made by respondent on behalf of, and for the benefit of, her mother, Phebe A. Blair. The real issue, and the only issue in the court below, was as to whether the deed to respondent was in fact a deed or a mortgage. Phebe A. Blair was made a defendant, but did not appear after being served with summons, and her default was duly entered. The case was tried in the court below without a jury, and the court found that the deed "was not given by way of mortgage or security, but was and is an absolute conveyance, as hereinbefore found." The appellant claims that the said finding is not supported by the evidence, and, although the printed record contains 862 folios, this is the sole and only point to be determined here. We have carefully examined the record, and we think the evidence supports the finding. The learned judge of the lower court having seen and heard the witnesses and found the fact, under the elementary rule we cannot disturb the finding if there is any substantial evidence to support it.

The respondent introduced in evidence the deed made by Phebe A. Blair to her. This was presumptive evidence of a valuable consideration. Code Civ. Proc. §§ 1614, 1963, subd. 39; Rogers v. Schulenburg, 111 Cal. 284, 43 Pac. 809. The burden of showing a want of consideration was then cast upon appellant, who was seeking to invalidate the deed as an absolute conveyance. Civ. Code, § 1615; Rogers v. Schulenburg, supra. The rule is well settled that evidence to show that a deed absolute on its face is in fact a mortgage must be clear, unequivocal, and convincing. Mahoney v. Bostwick, 96 Cal. 58, 30 Pac. 1020; Ganceart v. Henry, 98 Cal. 284, 33 Pac. 92; Cadman v. Peter, 118 U. S. 73, 6 Sup. Ct. 957, 30 L. Ed. 78.

The appellant called the respondent as a witness in its behalf, and she testified that at the time of the execution of the deed the amount due her from her mother, and the amount of her mother's indebtedness for which she had become and was responsible, was about $108,000; that this was more than the value of her mother's interest in the land; that the deed was intended as an absolute conveyance, and not as a mortgage, and was in full satisfaction of all indebtedness due her from her mother, and of all obligations for which she had become responsible; that after the execution of the deed she has ever since held possession of the property, collected the rents, and paid interest on all obligations so due by her mother; that she assumed and agreed to pay the debts of her mother which were a lien upon the property. This testimony is not contradicted, and is the only evidence offered by appellant to show that the deed was in fact intended as a mortgage. It amply sustains the finding. It certainly is not clear and convincing that the deed was given as security for a continuing indebtedness. It is said that respondent did not deliver up the notes to her mother, and that she at the same time took a continuing mortgage from her mother for some $5,117. The respondent explained keeping the notes. She said that she did not know why they were kept; that her mother did not ask her for them; and that she did not keep them with any idea of collecting them. The $5,117 mortgage was for money actually loaned by respondent to her mother, and she held a prior mortgage to secure it. She explained that to preserve this priority, and as a safeguard, the mortgage was renewed and kept alive separate from her ownership in the land. This the respondent had the right to do. She was not compelled to surrender and cancel a prior lien upon the land deeded to her because by the deed she took the legal title. At most, the circumstances could only tend to throw suspicion upon the good faith of the parties to the deed. They would not here be held sufficient to overthrow a finding based upon, and supported by, uncontradicted evidence in the record. The judgment and order should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

127 Cal. 114

MAURER v. KING. (S. F. 1,754.)

(Supreme Court of California. Dec. 8, 1899.)

ADMINISTRATION—CLAIMS — PRESENTMENT — LIMITATIONS—CONTRACTS—PERFORMANCE—FUTURES.

1. Where a decedent had contracted to take certain shares of stock at a certain time, presentment to his administrator of a verified claim for the price agreed, including a copy of the contract, and an offer to surrender the certificates, is a sufficient statement of "particulars of the claim" required by Code Civ. Proc. § 1494.

2. A claim which becomes due on presentation is one "then due," within Code Civ. Proc. § 1498, requiring suit on a claim within three months after rejection by an administrator, "if it be then due."

3. The provision of Code Civ. Proc. § 1498, that, if a claim against an estate be not due at the time of its rejection, suit shall be brought within two months after it becomes due, was not intended to shorten the preceding provision, requiring suit within three months, if it be then due, but to extend it.

4. Though demand and tender be necessary to mature a claim under a contract as against a party if he be alive, yet they are not prerequisite to filing the claim against his administrator, since the latter cannot perform, and the mere presentment does not subject the estate to costs.

5. Where a person gave in part payment of property certain stock, guarantying it would be worth a certain price within two years, and agreeing to take it back at that price at the end of that time, if the buyer then "holds said stock and so requests," the latter was only bound to make the request within a reasonable time after the two years; and Civ. Code, § 1490, providing that, where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, does not apply.

6. The agreement was not within Const. art. 4, § 26, avoiding contracts for the sale and future delivery of stock.

Department 2. Appeal from superior court, Alameda county.

Action by George H. Maurer against C. K. King, administrator of the estate of J. W. Smith, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

Darwin C. De Golia, for appellant. Wm. R. Davis and F. W. Sawyer, for respondent.

TEMPLE, J. This is an appeal by plaintiff from the judgment, and the contention is that the findings do not support the judgment. The court found all the facts substantially as they are set out in the complaint, and that all the denials and allegations in the answer are untrue, and rendered judgment for defendant.

On the 8th of February, A. D. 1895, one J. W. Smith, for a valuable consideration, executed and delivered to plaintiff the following instrument in writing: "At settlement this 8th day of February, 1895, at Oakland, Cal., and at which time I have purchased George H. Maurer's interest in twenty-five acres of fruit trees, house, etc., on south one-half of section 7, township 18 N., R. 5 E., in Butte county, Cal.; and in part payment I give said Geo. H. Maurer (1,000) one thousand shares of the capital stock of the Shenandoah Quartz-Mining Company (reorganized), at fifty cents per share; and, in order to save said Maurer from any loss on said stock, I guaranty that it will be worth fifty cents or more per share inside of two years from this date, in cash, and if he holds said stock at the end of two years from this date, and so requests, I will take it from him, and pay him for it at fifty cents per share, and I will pay all assessments on said stock that may be levied on it up to April 1, '95, gratis, —as witness my hand the day and date above written. J. W. Smith." Smith died intestate November 15, 1895, and defendant is his administrator. At the end of the stipulated period of two years, plaintiff still had and owned the shares of stock mentioned in the agreement, and on the 12th day of February, 1897, requested the administrator to take said stock, which was then tendered to him, and pay plaintiff 50 cents per share, which was the first demand made by plaintiff upon the administrator. On the same day plaintiff presented to the administrator for allowance his claim for the said sum of $500, which claim was verified on the 8th day of February, A. D. 1897, as a claim for money due. A copy of the contract was attached to the claim, and the same included an offer to surrender the certificates of stock, duly indorsed in blank by Smith, in the same condition in which plaintiff received them from the deceased. The claim was rejected by the administrator on the said 12th day of February, A. D. 1897. This suit was commenced more than two months after that time. Upon this the first point logically in order arises. Respondent, to sustain the judgment, contends: (1) That the money was not due until after demand was made, and, being a claim for money not due, was not presented as required by section 1494 of the Code of Civil Procedure, because the particulars of the claim are not stated. I think the particulars are stated. (2) That, being in fact a claim not due, suit should have been brought within two months after its rejection, under section 1498, Id. That section declares that suit must be brought "within three months after the date of its rejection, if it be then due, or within two months after it becomes due." It is argued that this claim became due, if at all, upon demand by presentation, and suit should have been brought within two months. There are two quite conclusive answers to this contention: First, if a claim is one which would become due upon presentation, it is a claim then due, within the meaning of this statute; and, secondly, the provision that, when the claim is not then due, suit shall be brought within two months after it becomes due, was manifestly not intended to shorten the time allowed for the commencement of an action, but to extend it. The statute itself makes this obvious.

The next contention is that the amount of 50 cents per share was not due when Maurer verified his claim, because he had not then tendered the stock to the administrator, and had not made his demand for the money. It does not strike me that there is any merit in this contention. Demand could not have been made upon J. W. Smith, for he was dead. It was useless to tender the stock to the administrator and demand payment, for he could not pay until the claim had been allowed. The presentation of a claim to an administrator is in many respects analogous to the commencement of an action, but there are some differences, and one difference is important here. One may not maintain an action on a claim which will become due only on demand, until demand has been made, because it is unjust to subject a defendant to costs until he has neglected or refused to perform his obligation; but the administrator not only cannot perform on demand, but the mere presentation of a claim for an allowance does not subject the estate to payment of costs. And then, in reality, the requirement that claims must be presented before suit can be brought is the statutory mode, as well as the statutory requirement, for making demand upon an estate.

It is also contended that the claim was presented too late, because it was not presented until four days after the stipulated period of two years had elapsed. Respondent cites section 1490 of the Civil Code, which reads: "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterwards." The contract in question imposed no obligation upon plaintiff, within the meaning of that section. Maurer had paid the consideration for the contract, but Smith had not fully performed. The stipulated two years was not a period within which Maurer was bound to do anything. It was an extension of credit to Smith. Within that time Smith could not be compelled to pay the $500 in lieu of the stock. No doubt, Maurer was bound to exercise his option within a reasonable time after the expiration of the credit, and he certainly did do so. The condition is not, however, "if he requests at the end of two years," but "if he holds said stock at the end of two years, and requests." As already stated, the period was a credit to Smith, and was fixed only for that purpose; and there was no express requirement that Maurer should make his request at the end of the period, but that he could not make it sooner.

It is also contended that the contract is void as a contract to deliver stock at a future day, under the provisions of section 26, art.

4, of the constitution: "All contracts for the sale of shares of the capital of any corporation or association on margin, or to be delivered at a future day, shall be void." This provision of the constitution has been considered in several cases by this court. Cashman v. Root, 89 Cal. 373, 26 Pac. 883, 12 L. R. A. 511; Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393; Kullman v. Simmens, 104 Cal. 595, 38 Pac. 362. These cases establish the proposition that the constitutional policy was to prohibit wagering contracts in regard to the future market value of stocks. "Dealing in futures," such transactions have been sententiously called. As explained in Sheehy v. Shinn, these contracts take various forms, one of them being margin sales. Others are variously called by brokers "puts," "calls," "options," etc. In all cases the customer, if the deal is with a broker, pays and risks something for the purpose of securing a profit from an expected rise in the market value of stocks. Often no actual purchase is contemplated, but settlements are made according to market rates. It has been held that this constitutional inhibition cannot be evaded by varying the form of the contract. If it be in reality a wagering contract, of the character denounced, it is void. It is not so easy to hold the converse of this proposition, that whenever the transaction was but an ordinary business operation, with no intent to gamble in futures, it will be upheld. That would tend to destroy the constitutional policy, and, so far as intent is material, it goes only to the intent to do the act prohibited. The acts plainly prohibited are sales of stock on margin, and contracts for the future delivery of shares of stock. But the provision is highly penal, and greatly obstructs legitimate business transactions. A large amount of property is now owned by corporations, and the daily business transactions of the community naturally involve sales or agreements to sell corporate stock. While, therefore, courts must enforce the constitutional policy, contracts which are neither prohibited by the letter of the inhibition, nor evasions of it, will be upheld. The restriction will not be extended by construction. In the present case there was no contract for the delivery of stock at a future day. The transaction was not a wager as to fluctuations in the market value of stock. The stock was delivered to Maurer as a conditional payment, or as payment with a guaranty. One thousand shares of stock were given in payment of the sum of $500, with a guaranty that Maurer would be able to get that sum for it within two years. If he did not realize that sum within two years, Smith would take the stock back, and pay him $500 in cash. Perhaps this form of contract could be used to effect a prohibited transaction. If such were the case, and the intent was made to appear, it would be declared an attempt to evade the prohibition, and be unlawful. It is to be regretted that public policy requires this restriction upon business transactions, many of which are perfectly proper, and would not really be within the evil which it was intended to remedy. Persons, other than stock dealers, are likely to do the very thing prohibited, without knowing that it is wrong and unlawful, and without intending to wager as to future values. But whether public interests require this drastic provision, so likely to interfere with legitimate business, and often to serve as an instrument for oppressing the unwary, is not for the courts. The case is remanded, with directions to the trial court to set aside the judgment and to enter judgment for the plaintiff, to be paid in due course of administration.

We concur: HENSHAW, J.; McFARLAND, J.

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127 Cal. 107

CALIFORNIA SAVINGS & LOAN SOC. v. CULVER. (Sac. 568.)

(Supreme Court of California. Dec. 7, 1899.)

MORTGAGES—FORECLOSURE—LIMITATIONS—ESTOPPEL.

1. Where a mortgagee sued to foreclose a mortgage under a stipulation that he might elect to declare the debt due on the mortgagor's failure to pay interest as provided, which suit was subsequently dismissed by consent, and without prejudice, on payment of the interest due, limitations did not begin to run against a subsequent action to foreclose after maturity of the debt from the date of the prior suit, since the mortgagor's election to consider the debt due at that time was waived by his acceptance of the interest and dismissal of the suit.

2. Where, after a suit to foreclose a mortgage under an election to consider it due on failure to pay interest, the mortgagor paid the interest, and on his motion the suit was dismissed without prejudice, he and his successors in interest, having thereafter made payments both of principal and interest on the debt, are estopped to claim that limitations, as against a subsequent suit to foreclose the mortgage within the time limited after its maturity, began to run from the mortgagor's election to declare the debt due, by the institution of the former suit.

In bank. Appeal from superior court, Shasta county.

Action by the California Savings & Loan Society against F. D. Culver, administrator, etc. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. H. Cobb, for appellant. J. F. Cowdery, for respondent.

McFARLAND, J. Action on a note and mortgage made and executed to plaintiff by the defendant Lake. The only defense is the four-years clause of the statute of limitations applicable to written instruments. Judgment went for plaintiff, and the appeal is from the judgment, upon the judgment roll and a bill of exceptions by the owner of the mortgaged premises, who got title, subject to the mortgage, through mesne conveyances from Lake, who does not appeal.

The note was for $10,000, was made and dated January 21, 1891,—the mortgage being of the same date,—and is, on its face, payable "three years after date." This action was brought July 16, 1896, which was within four years after the maturity of the note; but appellant contends that the statute should be held to have run from the 14th day of March, 1892, which was more than four years before the commencement of the action. This contention is based upon the following facts: The note provides that the interest should be paid yearly, upon the 1st of January, and that, if not so paid, it should become part of the principal; and, further, that, if any part of the interest should not be paid within 30 days after the same should become due, "then the whole of said principal and interest shall forthwith become due and payable, at the election of the holder of this note." The provision of the mortgage on this subject is that, if any interest shall remain unpaid for 30 days after due, then "said mortgage might be foreclosed by an action for that purpose brought, without demand or notice to defendant of election to consider the mortgage due." On said March 14, 1892, plaintiff brought an action against Lake to foreclose for the whole amount of the principal and interest, upon an averment in the complaint that the interest due January 1, 1892, had remained unpaid for more than 30 days. Summons was served on Lake, who did not answer or appear in time; and, his default having been entered, a judgment of foreclosure was rendered. Afterwards, in November, 1892, Lake made a motion to open the default in the action and to set aside and vacate the judgment; and he based his motion upon an affidavit made by himself, in which, among other things, he stated that he had paid the interest due; that, for various reasons given, the default was improperly taken against him; and that he had "a good and substantial defense to this action, on the merits thereof." The affidavit closed with a prayer "that the said judgment may be set aside, and said default opened, and this defendant be allowed to answer on the merits to said complaint, and that said action may be dismissed." Afterwards the plaintiff filed a written paper in the case, whereby he "consents to said default being opened, and to judgment vacated, and the action dismissed without prejudice to a new action; each party to pay its own costs." Thereafter the court made the following order: "Upon reading and filing the stipulation of the parties consenting thereto, it is hereby ordered that the default of said defendant, heretofore taken in said cause, be set aside, and the judgment heretofore rendered be vacated, and that said action be dismissed, without prejudice to a new action; each party to pay its own costs." The court found that on "September 21, 1892, all the interest in default at the time of the institution of said action, and all interest due or payable on said promissory note up to said September 21, 1892, was, by the then legal holder and owner of the premises by said mortgage conveyed, paid to plaintiff, and by plaintiff received in full discharge of said default, and with and under the agreement that said action of March 14, 1892, should be dismissed, and the time of payment of said promissory note and the moneys therein mentioned be and remain as by the terms of said promissory note expressed." This finding is sustained by the evidence. Thereafter, and up to January 1, 1896, all interest on the note was paid as it became due by the holder of the legal title of the mortgaged premises, and about $2,000 of the principal was also paid. This present action was brought to recover the balance due upon the principal, together with interest from January 1, 1896. The contention of appellant is that, notwithstanding the above facts, the whole of the principal and interest of the note unpaid was barred in four years from the commencement of the first suit. We do not think that this contention can be maintained.

Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time, to the surprise of parties or their representatives, when loss of papers, deaths of witnesses, and worn-out recollections make the presentation of the actual facts in the case impossible or extremely difficult, and are not intended as defenses to just demands of comparatively recent origin. Still, as such statutes must necessarily fix definite periods of time, they uphold defenses which are clearly within them, however unjust and unconscionable such defenses may be. But where, in cases like those last mentioned, the facts relied on leave it greatly in doubt whether or not the defense is within the clause of the statute pleaded, a court will not indulge in a strained construction in order to support it. This rule is always observed. It is stated in 13 Am. & Eng. Enc. Law. p. 692, as follows: "It is important to keep clearly in mind the double aspect of statutes of limitations—First, as an obstacle to just claims; and, secondly, as an aid to just defenses which have been rendered uncertain by the moldering effects of time." In the case at bar appellant says that the statute commenced to run on March 14, 1892, when the first suit was commenced; and he bases his whole contention upon the asserted rule—which is frequently reiterated in the briefs—that, when the statute is set in motion, it never ceases to run. This rule has, no doubt, been frequently declared, in general terms, in judicial opinions and text-books. But it will usually be found to have been used as stating the two propositions that when the statute has begun to run no subsequently accruing disabilities can interrupt it, and that one disability cannot be tacked onto another. In Id. p. 732, it is said: "These two rules, together with the preliminary one that when the statute is once in motion nothing interrupts it, are merely different forms of statement of a single principle, already stated,—that, after the statute is under way, no subsequently accruing disabilities can in any way affect it." And, as instances of the rule, it has been held that (when there is no statute to the contrary) if a man dies even one day after his cause of action accrues, and leaves infant heirs, the latters' disability of infancy does not avail; that if a woman is an infant when her right accrues, and before she comes of age marries, becomes insane, and dies, leaving infant heirs, no one of these subsequent disabilities is material; and that where a plaintiff was insane when his cause of action accrued, but recovered his sanity for a period, and then relapsed into insanity, the statute was set in motion by his sanity, and his relapse did not stop its running. These considerations are perhaps not very important in the case at bar; but, since the rule is so confidently relied on here, it is proper to look somewhat to the reason which underlies it, and the extent to which it goes. In the case at bar, plaintiff is not seeking the aid of a subsequently accruing disability, or of any disability whatever.

But, whatever the full meaning of the rule above noticed may be, it clearly has no applicability until after the statute has begun to run. When did it begin to run in the case at bar? That is, when did it begin to run against the cause of action upon which this present suit is based? Appellant contends that the commencement of the first action in March, 1892, set the statute in motion. It is somewhat of a solecism to say that the commencement of the action starts the statute of limitations, for the general rule is that the bringing of the suit stops the running of the statute. 13 Am. & Eng. Enc. Law, p. 746, and cases there cited. It is meant, however, we suppose, that the bringing of the suit in 1892 was a declaration by plaintiff of his election to consider the whole amount of the note due. It has been definitely settled, however, in this state, that, even where it is expressly declared on the face of the note that upon default in the payment of any interest the whole principal shall become immediately and absolutely due, still such a clause is a mere penalty for the benefit of the payee or holder, which he may waive by accepting interest after due, and that the statute in such a case does not begin to run until the principal becomes due according to the terms of the note. Belloc v. Davis, 38 Cal. 242; Mason v. Luce, 116 Cal. 232, 48 Pac. 72; and Richards v. Daley, 116 Cal. 336, 48 Pac. 220. And where, as in the case at bar, the provision of the note is that upon a default in paying interest the principal shall become due, at the election of the holder, there the assertion of such election merely puts the holder in the position of the holder of a note which upon its face declares, in the first instance, that upon default in interest the whole principal shall immediately become due. And the declaration of plaintiff's election by bringing the first action did not put it out of his power to waive the penalty, which he did by accepting the interest and dismissing the action. He still had the same power to waive the penalty which he would have had if the note, as in the cases above cited, had originally provided for the maturity of the principal upon default in paying any interest. In 2 Jones, Mortg. § 1183, it is said: "When a mortgagee has made his election to recover the principal sum due, under a stipulation that he shall have this election upon the nonpayment of interest for thirty days after it becomes due, he cannot be compelled to waive this provision and accept the interest. Undoubtedly the unconditional acceptance of the interest in default would be a waiver of the default." And in Lawson v. Barron, 18 Hun, 414, and in Langridge v. Payne, 2 Johns. & H. 423, cited in support of the text, the principle was applied where the interest had been accepted after suit to foreclose had been commenced. Appellant has stated one or two cases where the court, after the real questions involved in the case had been disposed of, said, by way of dictum, that it would have been otherwise if the plaintiff had elected to consider the principal due; but, as in those cases the judicial mind was not directed to the question as one before the court to be determined, the expressions used have little weight as authority. Moreover, the cause of action in the case at bar was not, as in the first action, a failure to pay the first year's interest, but was a failure to pay the principal then due according to the terms of the note, with some interest which accrued in later years; and against this cause of action, under the circumstances of this case, the statute of limitations had not commenced to run before the maturity of the note. Moreover, the appellant is estopped by his acts and those of his predecessors in interest, as above stated, from setting up the statute of limitations in this case; and to allow him to do so would be to allow him to practice a fraud upon the plaintiff. If plaintiff had commenced the first action when no interest was really due, and had been compelled for that reason to dismiss it or to allow judgment against him, no one would claim that the provisions of the note had been in any way changed. And the same result follows from the facts that Lake, in his motion to open the default, stated in his affidavit that such interest had been paid and accepted; that he prayed to have the action dismissed for that reason; and that for such reason, by consent and stipulation of both parties, the action was by the court dismissed. These facts bring the case entirely within the principles upon which estoppels are founded. The judgment appealed from is affirmed.

We concur: VAN DYKE, J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

127 Cal. 119

SMITH et al. v. HAWKINS. (Sac. 578.)

(Supreme Court of California. Dec. 8, 1899.)

WATERS AND WATER COURSES—JUDGMENT—REVIEW.

Where, in an action to quiet a water right, defendant claimed a certain amount of water as a riparian proprietor, plaintiff, claiming a prior right to a certain amount of the water, was not injured by a judgment finding defendant to be the owner of the water as riparian proprietor, but subject to plaintiff's prior rights to a fixed amount, measured as prescribed; he having claimed no riparian rights.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county.

Action by Mary Ella Smith and others against Patrick Hawkins. From a judgment for plaintiffs, they appeal. Affirmed.

P. F. Simonds and A. Burrows, for appellants. C. W. Kitts and J. M. Walling, for respondent.

CHIPMAN, C. Action to quiet title to certain water and ditch rights. Plaintiffs had judgment, from which they appeal on the judgment roll alone. There is no brief by respondent on file. Appellants complain that there is a want of certainty in both the judgment and findings, "in not fixing by any known method of measuring the amount of water defendant is entitled to take from Wolf creek" (citing Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560), and also because the judgment "ignores the rule that the right of defendant is limited to the one hundred inches of water which it is found the defendant has appropriated to a useful purpose" (citing Senior v. Anderson, 115 Cal. 497, 47 Pac. 454). The answer alleged "that defendant is the owner of lot 25, through which the creek runs, and of all dams, ditches, and water rights thereon," and "that he is the owner and has a prior right to so much of the water as will supply his ditch with a capacity of five hundred inches, measured under a six-inch pressure." The findings and judgment award to plaintiffs a prior right to 180 inches, and to defendant 100 inches, measured under a 6-inch pressure, "subject to such prior right of plaintiffs; * * * that defendant is the owner as riparian proprietor, subject to the prior right of plaintiffs aforesaid to all the water of said Wolf creek." Plaintiffs express themselves as satisfied with the findings and judgment to this point. But they complain (1) of the conclusion of law "that defendant is entitled, as appropriator and riparian proprietor, to have the balance [i. e. the water remaining after plaintiffs receive their 180 inches] of the waters of said creek flow onto and over lot twenty-five, described in the manner herein"; and (2) to the judgment, "that the defendant is the owner as riparian proprietor, subject to the prior right of plaintiffs aforesaid to all the waters of said Wolf creek." We are asked to strike this latter clause from the judgment.

It is manifest that defendant gets no rights whatever, except subordinate to plaintiffs' rights. He can take no water at all, either as an appropriator or riparian proprietor, until after plaintiffs have received the 180 inches awarded them. When plaintiffs have had their portion, we cannot see that it concerns them by what method defendant measures to himself the 100 inches awarded to him as an appropriator. Plaintiffs make no claim as riparian proprietors, and we cannot see that they are injured by the findings or judgment as to defendant's riparian rights. Defendant alleged enough in his answer to raise an issue as to his riparian rights, and we must presume that the evidence justified the findings on this appeal. The court had, just previous to the clause last above quoted, adjudged that defendant, "aside from his riparian rights, is the owner of the right to the use of one hundred inches of the waters of said creek, and no more, measured under a six-inch pressure, miner's measure, to the extent of the use of the same from May 1st to October 1st of each year, * * * subordinate to the said rights of said plaintiffs." Reading this latter provision in connection with the clause which plaintiffs ask to have stricken out, the judgment gives defendant 100 inches as an appropriator, and the remaining water as a riparian proprietor, but both rights are subject to plaintiffs' prior right to 180 inches at all times. We may fail to clearly understand plaintiffs' point, but, so far as we are able to discover, they cannot possibly be injured by the judgment. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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127 Cal. 65

PEOPLE v. VALLIERE. (Cr. 486.)

(Supreme Court of California. Nov. 28, 1899.)

CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—TRIAL—PROSECUTING ATTORNEY—MISCONDUCT.

1. Where, in a prosecution for burglary, an officer testified that he had searched the prisoner's trunk, it was reversible error for the prosecution to ask him how he came to make the search, knowing that the answer would show that the prisoner was suspected of another theft though the court sustained an objection to the question after the officer's answer to that effect had been given.

2. Where an officer's testimony that he had searched prisoner's trunk because he was suspected of a theft other than that charged had been ruled out, it was reversible error for the prosecuting attorney, in his closing address, to state that he personally knew that the prisoner's trunk was not searched for the theft stated by the officer, but for a third theft, though such misconduct was rebuked by the court.

In bank. Appeal from superior court, Butte county.

John J. Valliere was convicted of burglary, and he appeals. Reversed.

Geo. E. Gardner, for appellant. Atty. Gen. Ford, for the People.

TEMPLE, J. Defendant, having been convicted of the crime of burglary, appeals from the judgment and from the order denying a new trial. The crime was committed, if at all, in the dormitory, called a "bunk house," on the Cosby ranch, in Butte county, on the 15th of November, 1897. Defendant had once been employed on the ranch, and on that day called to see some of the workmen. He complained of illness, and went into the bunk house ostensibly to rest. The men were in the fields at work. The next day several of them missed various articles which they had left in the bunk house, and defendant was at once suspected of the larceny. The defendant was arrested on the evening of the following day at Marysville, and certain articles, which were identified by some of the workmen as their property, and which at the time of the alleged burglary were in the bunk house, were found in his possession, among others a certain revolver. Defendant was a witness in his own behalf, and testified that the revolver was his property, and had been in his possession for a long time previous to the alleged crime. In rebuttal, a constable was called, who testified, against objections which were perhaps insufficient, that on the 15th of November he searched the person and trunk of defendant at Chico, because on that morning a number of articles had been taken from rooms in the Hallam House, and he testified that defendant then had no pistol. The evidence was relevant, if, as the judge then stated, defendant had testified that the pistol was in his trunk all that day. I have not found that statement in his evidence, but, in any event, it was improper to ask the witness how he came to make the search, knowing, as the district attorney must be presumed to have known, that the answer would disclose the fact that defendant was suspected of having taken articles from the rooms of the Hallam House in Chico.

The objection, at first overruled, was finally sustained, but the answer had been given. The matter was again brought up in the argument. In addressing the jury, among other matters, the prosecuting officer said: "This trunk was not searched for this theft in Chico, but for another theft that I know of to my own knowledge." This statement was in the nature of testimony. It was the assertion of a damaging fact, not only not proven, but in regard to matters which had been expressly ruled out. The misconduct was much more flagrant than that in the Bowers Case, 79 Cal. 415, 21 Pac. 752. Indeed, among the numerous cases discussed in People v. Wells, 100 Cal. 459, 34 Pac. 1078, there is none worse. In my opinion, the examination was inexcusable, and the statements contained in the closing address were an outrage upon justice, which ought not to be allowed to pass. The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts as procured aside. The judgment and order are reversed, and a new trial awarded.

We concur: BEATTY, C. J.; HARRISON, J.; HENSHAW, J.

(126 Cal. 471)

HART v. CHURCH et al. (L. A. 507.)[1]

(Supreme Court of California. Nov. 25, 1899.)

Judgment modified.

For former opinion, see 58 Pac. 910.

PER CURIAM. The judgment heretofore rendered in department is hereby modified to read as follows:

It is therefore ordered that the judgment of the trial court, in so far as it decrees invalid and orders the cancellation of the mortgage, be affirmed; but that it be modified by striking therefrom such portion thereof as decrees invalid, and orders the cancellation of, the note.

(126 Cal. 418)

SECURITY LOAN & TRUST CO. OF SOUTHERN CALIFORNIA v. BOSTON & S. R. FRUIT CO. et al. (L. A. 476–479.)

(Supreme Court of California. Nov. 23, 1899.)

In bank. On rehearing. Judgment modified, and motion denied.

For former opinion, see 58 Pac. 941.

PER CURIAM. The judgments heretofore entered herein in the above causes are hereby modified by directing the superior court to strike from its judgment in said causes the direction therein for the sale of the capital stock of the Temescal Water Company. The rehearing asked by the appellants is denied.

(127 Cal. 45)

SIMON et al. v. JUSTICE'S COURT OF CITY OF STOCKTON et al. (Sac. 483.)

(Supreme Court of California. Nov. 24, 1899.)

JUSTICES OF THE PEACE—JURISDICTION—REVIEW OF PROCEEDINGS.

An action was commenced in justice court, and on the next day after the day set for trial, no answer having been filed or appearance made, judgment by default was entered by a justice holding court in the absence of the regular justice. Forty days thereafter defendant's attorney filed an affidavit, setting forth that he had prepared an answer in the case, and mailed it to the regular justice, asking that the case be continued; that he also addressed a similar letter to plaintiff's attorney; that the letters were mailed in time to have reached the parties before the day set for trial; that the regular justice was absent, and that the said letter addressed to him was received by a party in his office, who made an indorsement showing that it had been received before the day set for trial. *Held*, that an order by the justice declaring the judgment void, and ordering defendant's answer filed, and fixing a day for trial, were beyond his jurisdiction.

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[1] Rehearing denied November 25, 1899.

Department 2. Appeal from superior court, San Joaquin county.

Certiorari by Charles Simon and another against the justice court of the city of Stockton and C. P. Rendon, the justice of the peace. From an order of the superior court confirming an order of the justice annulling a judgment, relators appeal. Reversed.

Max Grimm, for appellants. H. W. Hutton, for respondent.

McFARLAND, J. This is an appeal from a judgment of the superior court in a proceeding in certiorari in which the petitioners therein, Simon and Busch, sought to have certain orders of a justice's court annulled. The petitioners commenced an action in a justice's court of the city of Stockton, of which C. P. Rendon was the justice, against one Sparks, who was served with summons in San Francisco, and had until the 31st day of August, 1897, to appear. On the 1st day of September, 1897, it appearing that no answer had been filed by Sparks, and no appearance made by him in any way, default was entered against him by A. C. Parker, a justice of the peace who was then holding court for said Justice Rendon, in the absence of the latter; and, as the suit was for damages for an unlawful act, witnesses were examined and evidence received on the part of plaintiffs, and judgment was rendered on said September 1st against Sparks for $85 and some costs. Nothing further appears to have occurred in the case until the 13th day of October, 1897, which was more than 40 days after the rendition of the judgment. On that day the attorney for Sparks filed an affidavit in the justice's court, in which he stated that on August 28th he prepared an answer for Sparks, and put it into the United States mail on that day, addressed to the said Justice Rendon at Stockton, with a letter saying that he was about to take a trip East, and would not be back until October, and asking that the cause be set for about the 10th or 11th of that month; that he also on said day addressed to the attorney for the plaintiffs in said suit, at his residence in Stockton, a letter inclosing a copy of the answer, in which he also stated his anticipated absence, and asked that the case be not set until about the 11th of October; that he heard no more of the matter until the 4th of October, 1897, when he received a letter from the attorney for the plaintiffs notifying him of the judgment which had been rendered on September 1st, and asking him to have the amount thereof forwarded to him; and that Justice Rendon had left the state on the 24th of August, 1897, and did not return until the 5th of September, and that in the meantime Parker had held court for him, and that one Carroll, who was constable, had indorsed on the envelope containing the answer that it had been received at the office of the said justice on the 31st day of August, 1897. Some other facts not necessary to be noticed were stated in the affidavit, and it concluded with the prayer that the court would "stay the said judgment, and declare the same void and of no effect, and will refuse to issue process thereon, and recall all process and other proceedings taken upon said void judgment." This affidavit was filed October 13, 1897, and on the same day notice was given of a motion for orders staying the judgment, declaring it void, staying further execution, etc. These motions were heard on the 16th day of October, 1897, on which day the court granted the motion to stay judgment herein, declaring the judgment void, and ordering that the answer of Sparks be indorsed, "Filed nunc pro tunc as of the 31st day of August, 1897," and made an order fixing a future day for the trial of the cause. The affidavit of Justice Parker was also filed, in which he stated that on the 31st of August, at the request of plaintiffs' attorney, he made a careful search among the papers which had been filed in the office of Justice Rendon, and among the papers filed in said action, and searched for a letter in which an answer might have been inclosed, and also in the private room of said Rendon, which adjoins the court room, and could not find any answer or other paper filed by the defendant Sparks; that he repeated the search on the morning of September 1st, and before the hearing of the evidence in the action or the rendering of a judgment, but was unable to find any answer or other paper showing the appearance of Sparks; that after testimony had been taken and judgment rendered one Carroll delivered to him an open envelope, addressed to Justice Rendon, in which was found the letter and answer referred to in the said affidavit of the attorney for Sparks; that he did not know whether Carroll took the envelope from his pocket or from a private desk of Carroll in the private office of Rendon; and that "said Carroll was not a clerk of either the justice of the peace of the city of Stockton, or a clerk of the justice of the peace of Stockton township, and not the proper custodian of any pleading or record of said court or action, and had no authority whatever to file, or receive for filing, any paper in said action." The judgment rendered in the said case of the petitioners against Sparks was not void on its face, but was apparently in all respects a regular and valid judgment.

Upon the foregoing facts, we think that the orders above referred to made by the justice of the peace after the rendition of the said judgment were beyond the jurisdiction of the justice to make, and that the superior court erred in confirming the same. A justice's court cannot disturb or in any way interfere with its judgments, except in the manner provided by statute. In Winter v. Fitzpatrick, 35 Cal. 274, the court said: "In making the order of the 10th of February, vacating and setting aside the judgment of the 24th of January, the justice of the peace acted without jurisdiction. Inferior courts cannot go beyond the authority conferred upon them by the statute under which they act. They can assume no power by implication, but must keep within the power expressly given. Neither the practice act nor the statutes in relation to justices' courts in the city and county of San Francisco authorizes a review by the justice of his own judgment, except upon motion for a new trial." (At that time a justice of the peace was expressly given power to entertain a motion for a new trial by section 622 of the practice act.) The rule thus declared has never been since questioned, and has been frequently reaffirmed. And, so far as the question here involved is concerned, the provisions of the Code of Civil Procedure are the same as those of the old practice act. See Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849; Jones v. Justice's Court, 97 Cal. 523, 32 Pac. 575, and cases there cited. If the motion made in the justice's court to set aside the judgment was based upon the "mistake, inadvertence, surprise, or excusable neglect" of Sparks himself, then the court had no jurisdiction over it, because it was not made within 10 days after the judgment (Code Civ. Proc. § 859; Weimmer v. Sutherland, supra); if it was based upon the theory that the answer had been filed on the 31st of August, then it raised very serious issues of both law and fact, which the justice's court had no jurisdiction to hear and determine on such a motion. Whether or not the judgment could be set aside by a court of equity on a bill framed for that purpose is a question not now before us. We think that the orders reviewed on the writ should have been vacated by the superior court. The judgment appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

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6 Cal. Unrep. 358

REIS v. STATE. (Sac. 525.)[1]

(Supreme Court of California. Nov. 28, 1899.)

STATES—BONDS—LIABILITY—APPROPRIATION.

Act May 3, 1852 (St. 1852, p. 59), provided for the issuance of bonds to pay the expense of military expeditions, such bonds to be payable out of funds appropriated for that purpose by congress, with the condition that, if such appropriation was insufficient, the bonds would be a valid claim against the state. Congress, in 1854 (10 Stat. 576), appropriated an unapportioned amount intended to pay the military expenses of the state incurred under the act of May 3, 1852, and under prior acts, but such appropriation, while sufficient to cover the expense under the act referred to, was insufficient to pay the entire indebtedness for which it was appropriated, and interest coupons on such bonds held by plaintiff were unpaid. *Held* that, the liability of the state being conditioned on the failure of congress to make an appropriation sufficient to pay the bonds issued under that act, such appropriation being sufficient for that purpose, the state was not liable, though the appropriation was insufficient to cover another and prior indebtedness not mentioned in the act.

Department 1. Appeal from superior court, Sacramento county.

Action by John O. Reis against the state of California. From a judgment for plaintiff, the state appeals. Reversed.

Atty. Gen. Ford, for the State. J. D. Thornton and Freeman & Bates, for respondent.

VAN DYKE, J. This action is founded upon interest coupons detached from bonds issued under the act of May 3, 1852 (St. 1852, p. 59). The act is entitled "An act authorizing the treasurer of the state to issue bonds for the payment of the expenses of the Mariposa, Second El Dorado, Utah, Los Angeles, Clear Lake, Klamath and Trinity and Monterey expeditions against the Indians." The first section of the act reads as follows: "A sum not exceeding six hundred thousand dollars is hereby appropriated and set apart as an additional war fund, payable in ten years, out of any moneys which may be appropriated by congress to defray the expenses incurred by the state of California, and interest thereon at the rate of seven per cent. per annum, in the suppression of Indian hostilities, or out of the proceeds of the sale of any public lands which may be donated or set aside by congress for that purpose; and should no such appropriation or donation be made, or if an amount sufficient should not be appropriated or donated within the said ten years, then the bonds authorized to be issued by this act shall be good and valid claims against the state, and shall be paid out of any moneys in the treasury not otherwise appropriated, to pay the expenses of the expeditions mentioned in this act." The bonds issued under this act were in denominations of $100, $250, $500, and $1,000 each, payable in 10 years from the date of said act, with interest at the rate of 7 per cent. per annum, said interest being represented by coupons attached to said bonds, each coupon representing one year's interest. Said coupons were alike in general language, and differed only in number, amount, and date of maturity. The coupons sued upon in this case were coupon No. 2, for $70, detached from bond 33, and coupons No. 3, for $70 each, detached from 181 bonds, and coupons No. 4, for $70 each, detached from the same bonds, and coupons No. 5, for $46.66 each, detached from a like number of bonds; amounting, in the aggregate, to the sum of $39,902.12. The claims were presented to and rejected by the state board of examiners in November, 1894. Findings and judgment went for the plaintiff in the court below, except as to coupons No. 3, detached from bonds numbered 3, 10, 11, 12, and 13. In reference to these the court found in favor of the plea in bar, set up in the answer, of the judgment in the case of Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580. One of the contentions on the part of the state on the appeal is that the state never became liable on the coupons in question, for the reason that within the time specified in the act in which the bonds were issued congress did make an appropriation in an amount sufficient to discharge said bonds and accrued interest thereon. It being the duty of the general government to protect the state against Indian hostilities or insurrections, it was understood on all hands that congress would provide for paying or reimbursing the state for expenses incurred in suppressing said Indian hostilities; and this appears upon the face of the act of the legislature in question. It declares that the bonds are payable out of any moneys which may be appropriated by congress to defray the expenses incurred by the state in the suppression of said Indian hostilities, but, should no such appropriation be made, or if an amount sufficient should not be appropriated, within the 10 years, then the bonds should be good and valid claims against the state. And congress did make provision for paying such expenses incurred by the state. Section 9 of the act of congress of August 5, 1854, making appropriations for the support of the army, reads as follows: "And be it further enacted that the secretary of war be, and he is hereby, authorized and directed to examine into and ascertain the amount of expenses incurred and now actually paid by the state of California in the suppression of Indian hostilities within the said state prior to the 1st day of January, A. D. 1854, and that the amount of such expenses, when so ascertained, be paid into the treasury of said state: provided, that the sum so paid shall not exceed in amount the sum of $924,259.65, which amount is hereby appropriated out of any moneys in the treasury not otherwise appropriated." 10 Stat. 576. At the time this act was introduced in congress—in January, 1854—the amount therein specified was estimated to cover all the state's liability, both principal and interest, incurred in suppressing Indian hostilities covered by the act of 1852, under which the present action is brought, and the act of 1851. But at the time the act passed, to wit, August 5, 1854, interest had accrued on the bonds issued under said acts of 1851 and 1852, so that the amount appropriated by congress fell short of the total amount of principal and interest then due.

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[1] Reversed in banc. See 65 Pac. 1102, 133 Cal. 593.

Sawyer v. Colgan, supra, was an application for a writ of mandate to compel the controller of the state to issue a warrant upon the state treasury for the amount claimed to be due on a certain bond and on certain coupons. The bond was issued under the act of 1852, the same as the bonds from which the coupons in this case were detached. Some of the coupons in that case were attached to said bond 420. The other coupons were detached from bonds issued under the same act, and the remainder were detached from other bonds issued under the act of February 15, 1851. In reference to the bonds issued under the act of 1852, this court in that case said: "We think it is clear that the liability of the state upon the bonds thus provided for was conditional. They were conditioned upon the failure of congress to make an appropriation to pay them. Upon the failure of congress to do so, and not before, were they to become good and valid claims against the state. They were to be paid within ten years; and if congress within that time made no appropriation to pay them, they were to be paid out of money in the state treasury not otherwise appropriated. Congress did make an appropriation to pay these bonds,"—(citing the provisions of the act of congress of August 5, 1854, supra). "But it is said that subsequent acts of congress imposed conditions which were not in any way binding on the bondholders, and that, in any event, the condition was not complied with until the funds provided by the act of congress were paid into the state treasury. Neither of these contentions, we think, is sound." "The conditions therein provided were not unreasonable, but were merely such precautionary measures against imposition and fraud as congress had a right to take. The act of May 3, 1852, contemplated action on the part of congress, and the bondholders must have known when they accepted the bond that, if congress made an appropriation to pay it, some safeguard would be provided to prevent fraud or imposition." The court then calls attention to the act of congress of June 23, 1860, wherein the secretary of war was authorized to pay out of the unexpended balance of the appropriation on said debt of the state of California, and, answering some of the contentions of the petitioner, says: "It is not sufficient answer to say that this balance was insufficient to pay all the outstanding bonds and coupons. It is enough to know that petitioner's bonds and coupons would have been paid had they been presented at the proper time. * * * If any of these obligations are not paid by reason of erroneous rulings on the part of the officers of the department, it is sufficient to say that the result is not due to the fault of the state or any of its officers. The latter have the right to rely upon the acts of congress. The condition upon which the state was to be liable has not arisen. * * * The bond on its face provides for payment by the state, 'provided the same be not sooner paid from funds anticipated in said act, to be derived from the government of the United States.' It was understood that congress might pay the money over to the state, and in that event the bonds would be payable at the office of the state treasurer; but it was not unreasonable to suppose—and such was anticipated, doubtless—that the demands should be made payable by congress at the national treasury. * * * Our conclusion is that the state of California never became liable to pay bond 420, or its coupons, or any of the coupons in suit of the bonds issued under the act of 1852." In the same case the court held that the petitioner was entitled to the writ as to the coupons detached from the bonds issued under the act of 1851, on the ground of the difference between the two acts. Sawyer v. Colgan was heard in bank, and thoroughly discussed, and the conclusion therein arrived at is conclusive of this case. If, as there decided, "the state of California never became liable to pay bond 420, or its coupons, or any of the coupons in suit of the bonds issued under the act of 1852," it is too clear for argument that the state never became liable for any of the coupons sued on in this action. The coupons involved in that action were of the series No. 3, falling due January 1, 1855. Only one coupon of the series No. 2, for $70, is embraced in this suit. That series fell due January 1, 1854, and were embraced in the estimated expenses covered by the act of congress. The series of coupons No. 3 never ripened, the act of congress having been passed when they had only run seven months of the twelve. However, the amount appropriated by congress was more than sufficient to cover all the bonds matured or partly matured, together with their coupons; and whether, in addition thereto, it was insufficient to provide for other and prior indebtedness not mentioned in the act of 1852, makes no difference. By the act of 1852 it was expressly provided that the state would only be liable in case congress failed to appropriate an amount sufficient to pay that indebtedness, and that was done. As said in Sawyer v. Colgan, these "coupons would have been paid had they been presented at the proper time," and that they have not been paid "is not due to the fault of the state or any of its officers." The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; HARRISON, J.

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127 Cal. 67

ELDER v. GRUNSKY, County Clerk. (S. F. 1,991.)

(Supreme Court of California. Nov. 28, 1899.)

PROCESS—SERVICE—JUDGMENTS—DEFAULT—MANDAMUS.

1. Since a county clerk is not authorized to enter a default, unless proof has been made and filed that defendant has been served with the summons and a copy of the complaint, as prescribed by Code Civ. Proc. § 411, and service of a domestic corporation in the manner prescribed for service on a foreign corporation would not be valid, a county clerk was not authorized to enter a default judgment where the complaint alleged that the defendant was a domestic, and the affidavit of the process server showed service on defendant as a foreign, corporation.

2. Mandamus will not be granted to compel a county clerk to enter a default judgment in an action, where the court had declared the service of the summons to be insufficient.

3. In mandamus to compel a county clerk to enter a default judgment, the action of the court in setting aside service of summons cannot be reviewed.

In bank. Appeal from superior court, San Joaquin county.

Application for mandamus by Isaac Elder against Otto Grunsky, county clerk, etc., to compel the entry of a default judgment. Denied.

J. B. Webster, for petitioner.

HARRISON, J. Application for writ of mandate. The petitioner commenced an action in the superior court for the county of San Joaquin, May 27, 1899, against the Southern Pacific Company, alleging in his complaint that the defendant was at the date of the complaint, and at all the times therein mentioned, "a corporation incorporated, organized, and doing business in this state." A summons was issued upon the complaint on the same day, and on the 9th of June was returned to the clerk's office with an affidavit of M. Haynes indorsed thereon that he "personally served the within summons on the 29th day of May, A. D. 1899, on C. J. Jones, the managing and business agent at Stockton, Cal., of the defendant therein named, by personally delivering to said C. J. Jones personally, in said county of San Joaquin, a copy of said summons attached to a copy of the complaint in the action therein mentioned; that said defendant is a foreign corporation, doing business in the state of California." The respondent herein is the county clerk of San Joaquin county, and the clerk of said superior court; and on June 9th, after the return of the summons, the plaintiff demanded of him that he enter the default of the defendant in said action, which demand was refused. On the 6th of June, the defendant in the action had given notice to the plaintiff therein (petitioner herein) of a motion to set aside the service of said summons, and the court had made an order fixing June 8th as the time for hearing this motion; and on that day this notice, with the admission by the plaintiff of its service, together with certain affidavits offered on behalf of the plaintiff in answer to the motion, were filed with the clerk, and the hearing of the motion was continued until June 12th. On this last day the court made an order granting the defendant's motion to set aside and vacate the service of the summons. Thereafter the plaintiff made the present application to this court for a writ of mandate, directing the respondent to enter the default of the defendant in said action.

A writ of mandate to an officer will issue to compel the performance of an act which the law specially enjoins as a duty resulting from his office, trust, or station. The county clerk is not authorized to enter the default of a defendant unless proof has been made and filed that such defendant has been served with the summons, together with a copy of the complaint, in the manner provided by the Code. Section 411, Code Civ. Proc., prescribes different modes of service, according to the character of the defendant to be served; and a service that would be good upon a defendant belonging to one of the classes designated in that section would not be good as to a defendant belonging to another of those classes, or authorize the entry of a default as to such defendant. In the present case, the clerk was called upon to determine whether the defendant was a domestic or a foreign corporation, and he may well have hesitated to enter the default of the defendant upon the proof of service presented to him. The plaintiff had alleged in his complaint that the defendant was incorporated under the laws of this state, and the clerk was not authorized to disregard this allegation by reason merely of the affidavit of the process server that the defendant was a foreign corporation. If the defendant was, as alleged in the complaint, a domestic corporation, the proof of service was insufficient to authorize its default to be entered. But, irrespective of this, at the time the present application was made for the writ of mandate there was no obligation upon the clerk to enter such default. The superior court had by its order set aside and vacated the service of the summons, and so long as that order remained in force the clerk had no authority to enter a default against the defendant. The court had by its order declared that the very evidence of service upon which the plaintiff claimed the right to a default was insufficient to establish such service, and the clerk was required to observe and obey this order, as it was a part of the court's proceedings in the action. It was within the jurisdiction of the court to make the order, and when made, whether erroneous or not, so long as it was in force, it was binding upon the clerk as well as upon the parties to the action. Neither can the action of the court in setting aside the service be reviewed in this proceeding. The application for the writ is denied.

We concur: HENSHAW, J.; VAN DYKE, J.; GAROUTTE, J.; McFARLAND, J.

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127 Cal. 61

CARPENTER v. NUTTER et al. (Sac. 548.)

(Supreme Court of California. Nov. 27, 1899.)

MALICIOUS PROSECUTION—DISMISSAL OF INFORMATION—INSUFFICIENT COMPLAINT.

1. An allegation in a complaint for malicious prosecution alleging that plaintiff was discharged from custody, and informations dismissed, by a judge of the superior court, is insufficient, where it does not allege that such judge was judge of the court in which the informations were pending, or that the dismissal was in court, and not by the judge acting as an individual, which latter act would have been without authority.

2. A complaint for malicious prosecution is insufficient if it does not show that an alleged discharge and dismissal of the information against plaintiff in the prosecution on which the action was based were such as to finally end the same.

Department 1. Appeal from superior court, San Joaquin county.

Action by A. H. Carpenter against W. B. Nutter and others. From a judgment entered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Carpenter & Flack, for appellant. A. H. Ashley, H. Orr, and W. M. Gibson, for respondents.

COOPER, C. Action to recover damages for malicious prosecution. A demurrer was interposed to the complaint in the court below and sustained. Judgment was thereupon entered in favor of defendants. This appeal is from the judgment, upon the judgment roll, and for the purpose of reviewing the order of the court sustaining the demurrer. The complaint alleges, in substance, that at all times therein mentioned defendant Nutter was district attorney of San Joaquin county, and that defendant Parker was justice of the peace of Stockton township, in said county; that defendants Langford and De Vries were sureties on the official bond of defendant Nutter as such district attorney; that about the 18th day of January, 1898, the defendants Nutter, Weinberg, Parker, and Sapiro entered into a conspiracy to falsely and maliciously charge the plaintiff with the crime of grand larceny, and in pursuance of such conspiracy the said defendants last herein named filed two written complaints in the justice court of said defendant Parker, and with said Parker as justice of the peace; that upon said complaints warrants of arrest were issued, and plaintiff was arrested and taken in custody, and compelled to give bail to secure his release; that after an examination of witnesses, and upon the advice and at the request of defendant Nutter as district attorney, the defendant Parker, as justice of the peace, held the plaintiff to answer and appear before the superior court of said county upon two charges of grand larceny; that afterwards, on the 21st day of February, 1898, the defendant Nutter, as district attorney, filed two informations in the superior court of said county charging plaintiff with the crime of grand larceny in each case, said informations being based upon the commitments and orders made by said Parker as justice; that in all of said matters the defendants Nutter, Weinberg, Parker, and Sapiro acted maliciously and without probable cause; "that subsequently, and on the 1st day of March, 1898, the plaintiff was released and discharged from custody, and said informations dismissed, by the Hon. Joseph H. Budd, judge of the said superior court, on the ground that there was no evidence, cause, or probability that a crime had been committed, or that plaintiff was in any way connected with the crime of grand larceny, or any crime." There is no allegation in any way connecting defendants Langford and De Vries with the alleged malicious prosecution, unless the fact that they are sureties on the bond of the defendant Nutter as district attorney so connects them. All the defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The defendant Parker separately demurred to it upon the ground of misjoinder of parties defendant, and that several causes of action were improperly united, and upon other grounds. The demurrer was sustained as to all the defendants, and we think the ruling correct.

In actions for malicious prosecution, it must be alleged that the prosecution is at an end, either by alleging that defendant was acquitted of the charge, or by alleging facts showing the legal termination of the prosecution complained of, in favor of defendant, prior to the commencement of the action. 1 Chit. Pl. p. 680; Newell, Mal. Pros. p. 327, § 1; Holliday v. Holliday, 123 Cal. 31, 55 Pac. 703; Hibbing v. Hyde, 50 Cal. 206. The rule as above stated has always prevailed both in England and in this country. That it is a necessary rule, founded upon reason, is apparent to the legal mind. Proceedings in courts having jurisdiction of the person and of the subject-matter must be shielded from collateral attack. And in all cases where such proceedings have been regularly taken against a party, and sustained by the court in which it is pending, it is conclusively presumed, when collaterally assailed, to have been regular and valid, although in fact it may have been erroneous. If the rule were otherwise, the judgments of courts would have no efficacy, as they would be subject to impeachment wherever an attempt was made to enforce them, and would leave disputes between parties forever unsettled. Therefore, in this case the complaint alleging and showing that the plaintiff was legally examined and held to answer by a justice having jurisdiction of the person, and the right to examine into the question as to the probability of his guilt or innocence of the crimes charged against him, and that the district attorney of the county, being the person in whom the law has vested the power and duty of filing informations, has filed such informations in the superior court having proper jurisdiction of the subject-matter, it must, in the face of the demurrer, be conclusively presumed that the informations are still pending, unless it is made to appear by direct averment, or by a statement of facts which show the necessary legal conclusion, that the prosecution has finally ended and terminated in favor of plaintiff. There is no allegation that the plaintiff was acquitted of the charges contained in the informations. It might have been alleged that he was discharged by an order of the court in which the prosecutions were pending, but this was not done. It is not even alleged that he was discharged by any order of any court. The statement is that "he was discharged from custody and the informations dismissed by Hon. Joseph H. Budd, judge of the said superior court." There is no allegation that Joseph H. Budd is or was the judge of the superior court in which the informations were pending, but, even if it were so alleged, the judge, acting as an individual, and not in court, could not discharge the plaintiff or dismiss the informations. The powers of a superior judge at chambers are enumerated in the Code (Code Civ. Proc. § 166), and the authority to discharge a defendant or to dismiss an information is not among them. The general rule is that all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional, and does not exist unless expressly authorized by statute. Larco v. Casaneuava, 30 Cal. 565; Norwood v. Kenfield, 34 Cal. 332; Loomis v. Andrews, 49 Cal. 240. The court may of its own motion order an indictment or an action to be dismissed. Pen. Code, § 1385. But in cases of felony such discharge is not a bar to another prosecution. Id. §§ 1387, 999. The court may also direct another information to be filed. Id. § 997. If it had been alleged that the information was dismissed by the court, the facts would have to be alleged in such manner as to show that the dismissal was an end of the prosecution. It is an elementary rule that the allegations of a pleading will be most strongly construed against the pleader. In no case can the court, in face of a demurrer, presume any facts to exist except such as are stated in the complaint. If the plaintiff in this case was in fact discharged by an order of the superior court of San Joaquin county, and the order was such as to end and finally determine the prosecutions under the informations, he could have so alleged in his complaint. He has not done so under the law as we understand it. It becomes unnecessary to consider any other questions in the case. The judgment should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

126 Cal. 198

CALIFORNIA BANK et al. v. BROOKS et al.

(L. A. 569.)

(Supreme Court of California. Sept. 23, 1899.)

MORTGAGES—LIMITATIONS.

A first mortgagee cannot renew his mortgage note, and thereby extend limitations so as to affect the second mortgagee; but the latter may take advantage of limitations on the first mortgage debt, though the debtor does not.

Department 2. Appeal from superior court, Ventura county.

Foreclosure action by the California Bank and others against J. Marion Brooks and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

J. S. Chapman and F. M. Parter, for appellants. Blackstock & Ewing and J. M. Brooks, for respondents.

TEMPLE, J. The complaint avers that on the 12th day of March, 1891, J. Marion Brooks made a promissory note to one Weldon, for the California Bank, in the sum of $1,457; that prior to that time Brooks owed William Collins & Sons about $4,500, evidenced by a promissory note for $3,000, dated December 18, 1889, and due one year after date, and by a note for $350, dated February 7, 1891, payable 60 days after date; also, that on the 12th day of March, 1891, the indebtedness of Brooks to William Collins & Sons was secured by conveyance of certain real property by Brooks to said William Collins & Sons. On the same day Brooks executed to Weldon an instrument in writing by which it was, in substance, agreed that said property should be held by Collins to secure the debt due to the bank as well, and that Weldon might at any time pay the debt due to Collins, and then should be entitled to a transfer of the security to himself. To this agreement Collins assented in writing, accepting the obligations thereby imposed. On the 30th day of March, 1891, it is averred, Brooks executed to Weldon a mortgage on certain property, subject to the claim of William Collins & Sons. The mortgage is set out at large in the complaint. Assignments from Weldon to plaintiff Witmer are alleged, and also that Witmer holds the note and mortgage for the plaintiff bank. It is then charged that on the 13th of February, 1894, William Collins & Sons surrendered to the said J. Marion Brooks the promissory note for $3,000, and took in satisfaction and discharge thereof two other promissory notes, one dated February 3, 1894, and the other February 13, 1894, each bearing interest at the rate of 10 per cent. per annum, and payable one year after date. It is then alleged that "by reason of the transactions aforesaid the plaintiffs have a prior lien upon the remainder of the property in the hands of said J. S. Collins, as trustee, and conveyed to him by the said J. Marion Brooks, as aforesaid, for the payment of their said debt, and are entitled to payment in preference to the said William Collins & Sons, as to all their claim, except as to the said sum mentioned in the promissory note of February 7, 1891, for three hundred and fifty dollars," etc. Nonpayment of plaintiffs' debt is duly charged, and plaintiffs ask for a judgment decreeing the sale of the property held as security, and from the proceeds then to be paid: First, the note for $350 due Collins; second, the indebtedness from Brooks to plaintiffs; third, the remaining indebtedness of Brooks to William Collins & Sons; fourth, the remainder, if any, after deducting costs, to Brooks.

The answer denies that the $3,000 note was surrendered and discharged for the two notes, and the court so finds. The fact therefore is, as was admitted and found, that the new notes were taken as further evidence of the indebtedness of Brooks to William Collins & Sons, but there was no agreement that the former note should be thereby paid and discharged. Of course, as to plaintiffs, the debt was still evidenced by the first note. The first mortgagee could not renew the note, and thereby extend limitation of statute so as to affect the second mortgagee. He may take advantage of the statute of limitations, although the debtor does not. Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495; Barber v. Babel, 36 Cal. 11; Sichel v. Carrillo, 42 Cal. 493; Wood v. Goodfellow, 43 Cal. 185. In the last case above cited the mortgagor was out of the state, and, in reply to the plea of the statute by the second mortgagee in the suit to foreclose the first mortgage, it was contended that, by the terms of the statute itself, it did not run while the debtor was absent. The language of the statute was, "The time of his absence shall not be part of the time limited for the commencement of the action." But the court replied that it had been repeatedly held that, as against subsequent incumbrances, the mortgagor could not by stipulation prolong the time of payment, and said: "We see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the state." The theory upon which judgment was rendered in the trial court for respondent, and the argument of respondent here, really admit the proposition. Why does respondent deem it necessary to contend that the first note was not paid and discharged by his acceptance of the new notes? Only because he finds it necessary to contend that he may still sue on the first note, and because he realizes that he cannot otherwise maintain himself against the plaintiffs. All the rights of William Collins & Sons, as against plaintiffs, depend upon their right to maintain an action on the original note. But the right to maintain an action upon that note became barred December 18, 1894, which was before the commencement of this action. The action was brought to foreclose plaintiffs' mortgage. Perhaps it was unnecessary to set up the entire transactions as they have. All the facts alleged are either admitted or found, except that it is found that the note for $3,000 given by Brooks to William Collins & Sons was not paid by the new notes given for the same indebtedness. As the right of action upon the original note was barred before this action was brought, that was immaterial. Upon the facts alleged and found, plaintiffs are entitled to the relief they demanded. As to Brooks, it was competent to extend the period of the statute by the new notes. The cause is therefore remanded, with directions to set aside the judgment, and to enter in lieu thereof upon the findings a decree directing the sale of the securities, and that the proceeds be applied as follows: First, to the $350 note held by William Collins & Sons; second, to costs, including counsel fee, if any be allowed; third, to pay the indebtedness to plaintiffs; fourth, the remaining indebtedness of William Collins & Sons; fifth, residue, if any, to defendant Brooks.

We concur: McFARLAND, J.; HENSHAW, J.

127 Cal. 4

JOHNSON v. GOODYEAR MIN. CO. et al.

(Sac. 558.)

(Supreme Court of California. Nov. 20, 1899.)

CORPORATIONS—CONSTITUTIONAL LAW—SPECIAL LEGISLATION—SPECIAL LIABILITIES AND PRIVILEGES—EQUAL PROTECTION OF LAW—DUE PROCESS OF LAW.

1. A private corporation is a person within the meaning of the fourteenth amendment of the federal constitution, forbidding a state to deny to any person or class of persons within its jurisdiction the equal protection of its laws.

2. St. 1897, p. 231, requiring all corporations doing business in the state to pay their employés, at least once a month, wages earned during the preceding month, and declaring that violation of such requirements shall entitle an employé to a lien for his wages on the corporation's property, taking precedence of all other liens, except recorded mortgages or deeds of trust, and that such employé shall be entitled to an attachment and a reasonable attorney's fee in case of suit to collect such wages or enforce such lien, and that an unrecorded deed shall be no defense to such suit, is in violation of Const. art. 1, § 21, prohibiting the legislature from granting to any citizen or class of citizens special privileges or immunities.

3. The act is also in violation of the fourteenth amendment to the federal constitution, since it denies to corporations equal protection of laws.

4. It is also in contravention of Const. art. 1, § 13, subd. 1, as depriving corporations of their property without due process of law by interfering with their freedom to make contracts.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county.

Action by Andrew Johnson against the Goodyear Mining Company and others. Judgment for plaintiff, and defendants appeal. Reversed in part.

Frank R. Wehe, for appellants. Frank D. Soward, for respondent.

COOPER, C. This action was brought to recover from the corporation defendant for labor performed by plaintiff and for labor performed by others for defendant corporation, whose claims have been assigned to plaintiff. Judgment was entered in favor of plaintiff, and defendants appeal. The case comes here on the judgment roll. The findings show that the defendant corporation, while engaged in business in Sierra county, Cal., became indebted to plaintiff and some 20 others, who, before the commencement of this action, assigned their claims to plaintiff, for labor performed by the month at the instance of defendant corporation in its quartz mine in said county, and the same has not been paid; that $400 is a reasonable attorney's fee to be allowed to plaintiff for the prosecution of the action. As conclusions of law the court found that plaintiff was entitled to judgment against defendant corporation for the sum of $5,039.57 and for $400 attorneys' fees, and that the same is a first lien upon all the property described in the complaint, consisting of certain real estate, mining claims, and personal property consisting of mining materials, tools, engines, cars, wood, lumber, merchandise for mining, etc., and that all the said property, or so much thereof as might be necessary, be sold to pay the plaintiff's judgment, costs, and attorneys' fees. Judgment was accordingly entered. The action was brought to recover monthly wages and attorney's fees, and to have the amount declared a lien upon the property of the defendant corporation, under an act approved March 29, 1897 (St. 1897, p. 231). As the constitutionality of the act is the main question in controversy here, it will be necessary to give the sections of the act herein discussed in full. The sections material are as follows:

"Section 1. Every corporation doing business in this state shall pay, at least once a month, each and every employee employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employee during the preceding month: provided, however, that if at the time of payment any employee shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand.

"Sec. 2. A violation of any of the provisions of section one of this act shall entitle each of the said employees to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defense to such actions.

"Sec. 3. That on the trial of any action against such corporation for a violation of the provisions of this act, such corporation shall not be allowed to set up any defense for a failure to pay monthly any employee engaged in transacting or carrying on its business the wages earned by such employee during the preceding month, other than the fact that such wages were not earned, except a valid assignment of such wages, a set-off or counterclaim against the same, or the absence of such employee from his usual employment at the time of the payment of the wages so earned by him."

"Sec. 5. No corporation shall require, and no employee of such corporation shall make, any agreement to accept wages at longer periods than as provided in this act as a condition of employment.

"Sec. 6. All wages earned by any employee engaged in the service of any corporation in this state shall be paid in lawful moneys of the United States, or in checks negotiable at face value on demand.

"Sec. 7. Any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation, the same to be imposed by any court in this state having jurisdiction of offenses in which the penalty does not exceed a fine of one hundred dollars; said fine to be paid, by the judge or magistrate before whom a recovery may be had under the provisions of this act, into the general fund of the treasury of the county in which said conviction may be had."

The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the constitution of the state: (1) Subdivision 13, § 1, art. 1: "No person shall be deprived of life, liberty or property without due process of law." (2) Subdivision 21, Id.: "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." (3) Subdivision 11, Id.: "All laws of a general nature shall have a uniform operation." (4) Section 25, art. 4, providing that the legislature shall not pass local or special laws in the following cases: "Third. Regulating the practice of courts of justice." "Twenty-Fourth. Authorizing the creation, extension or impairing of liens." "Thirty-Third. In all other cases where a general law can be made applicable." (5) Fourteenth amendment to the constitution of the United States: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." In the decision of this case the constitutionality of the sections of the statute herein set forth is necessarily involved, and it is with a deep sense of the importance of the subject that we enter upon its discussion. We must determine whether the lawmaking power of the state has in this instance gone beyond the limits of the constitution adopted by the people. This is always a question of great delicacy, and one which this court approaches with reluctance, but one in which the duty of the court is plain, and which must be met squarely when presented. The same constitution that lays down the fundamental law of our state and prohibits legislatures from going outside the powers and limitations therein contained, created the courts, and provided that they should stand as the guardians of the people, and lay their restraining hands upon the legislature in all cases where it has plainly violated the provisions of the people's charter of rights.

It will be observed that the act in question applies only to two classes of persons: First, corporations doing business in this state, and not to corporations of any other class; second, to laborers performing labor for such corporations. It does not apply to the thousands of laborers who may be employed by individuals or co-partnerships in the many and varied industries of the state. The word "corporation" in the act means those artificial persons created and existing under the laws of this or some other state; but the word "corporation," as to the rights of defendants, must be treated as though it means the name of all the individuals who are members of the corporation. It has long been settled that the word "person," within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation. Douglass v. Steamship Co., 4 Cal. 306; City of Pasadena v. Stimson, 91 Cal. 248, 27 Pac. 604; Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; Pembina Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 189, 8 Sup. Ct. 737, 31 L. Ed. 650; Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Railway Co. v. Ellis, 165 U. S. 154, 17 Sup. Ct. 255, 41 L. Ed. 666. The rule is admirably stated in the Railway Tax Cases (C. C.) 13 Fed. 743, as follows: "Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state they are formed under general laws, and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Section 286. Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution an expenditure of large capital are undertaken by corporations. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think it is well established by numerous adjudications of the supreme courts of the several states that whenever a provision of the constitution or of a law guaranties to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents." The case was afterwards taken to the supreme court of the United States (116 U. S. 138, 6 Sup. Ct. 317, 29 L. Ed. 589), and on the opening of court, before argument, the chief justice said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." In discussing the provisions of the statute in question it will, therefore, be regarded as settled that the word "corporation" refers to the members who constitute the corporation, and that the rights of a corporation are to be measured by the same laws as the rights of a person. The law should be made for all alike,—for the rich as well as the poor, for the corporation as well as the laborer. In Cooley on Constitutional Limitations (6th Ed. p. 483) it is said: "But every one has a right to demand that he be governed by general rules; and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." In Wally's Heirs v. Kennedy, 2 Yerg. 554, it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have been passed." Applying these principles to this act, it is clearly unconstitutional. It gives a first lien to laborers for the amount due them from corporations doing business in this state upon all the real and personal property of such corporations, and does not even require any description of the property, or notice in any manner, in order to make such lien valid. It seems to give the laborer the right to an attachment against the property of the corporation without requiring him to make the affidavit and file the undertaking required of all other persons in order to procure such attachment. It does not give this lien to any other class of laborers. The thousands of laborers for individuals or co-partnerships in the like employment do not have the benefit of it. The laborer toiling at the same kind of labor felling the forest, tilling the soil, or digging in the bowels of the earth, has no such lien if he is not working for a corporation doing business in this state. The lien attaches to the property of such corporation, but not to the property of an individual under precisely the same circumstances. Under general law liens are given to all mechanics, artisans, laborers, or material men, and against all persons and corporations. Under the present statute a lien is given to laborers performing labor for the particular corporations named. All other persons in the state, after obtaining an ordinary money judgment, must enforce it by the writ of execution; but laborers for such corporations under this statute have the right to have the court declare the amount found due them a lien on all the property of the corporation, which shall take preference over all other liens except recorded mortgages and deeds of trust. The grocer who, perhaps, has furnished the corporation the food with which the laborer has fed his wife and children may have attached the property of the corporation for the purpose of securing himself, but the laborer's lien by the mighty hand of this statute at once sweeps it away. The material man or contractor who has furnished the material for or constructed a building for the corporation, and who has filed his notice of lien as provided in the Code of Civil Procedure, and who may have secured a judgment thereon, must stand by and see his lien destroyed by a decree of court in favor of laborers who performed labor for the corporation since his lien attached. The judgment creditor who has procured a judgment and had it regularly docketed, and who is resting securely under the provisions of the Code of Civil Procedure of this state making his judgment a lien upon all the real estate of the judgment debtor, is surprised to find his lien destroyed by a decree in favor of one who has performed labor for the corporation long since his lien attached. The corporation may have delivered a large amount of personal property by way of pledge to secure a loan, and the money may have been used in paying the laborers employed by the corporation; and yet under this statute the court must declare the amount due laborers a prior lien as against the pledgee who has actual possession of the property pledged. The statute gives the laborer a right, in case he recovers judgment, to recover attorneys' fees, which become a part of the judgment. No other class of laborers or persons are given the right to recover attorney's fees except by virtue of a contract or by virtue of a general statute. The corporation is prohibited from setting up any defense to the action except some two or three. Matters which might be pleaded as a defense by all other persons in the state are not allowed to be so pleaded by the corporation. If the legislature could deprive the corporation of some of the defenses which other litigants on like terms are allowed, it could, by a Draconian edict, deprive it of all of them, and say at once that the corporation should made no defense whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over 21 years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind, and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work 60 days and take the horse in payment.

Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. Not only this, but the corporation shall be subject to a fine of not less than $50 for each violation of the statute. A corporation employing 1,000 men, and sued by each, could not defend the suits without being limited in its defense to those named in the statute, and being subject to a reasonable attorney's fee in each case. In case it made a contract with the 1,000 men by which they agreed to work for it 3 months for $100 each, they could bring suit, and recover, before the end of the 3 months, and each recover an attorney's fee, making 1,000 attorney's fees, and the corporation would be subject to 1,000 fines of $100 each, making the modest sum of $100,000 in fines; or perhaps the magistrate might, in his discretion, make the fine $50 in each case, and thus reduce it to $50,000. We might enumerate many other infirmities in the statute, but the above are sufficient to destroy it.

It is probably unnecessary in this opinion to discuss separately the constitutional objections herein briefly pointed out. In Ex parte Kuback, 85 Cal. 275, 24 Pac. 757, 9 L. R. A. 482, it appeared that the petitioner had been arrested for the violation of an ordinance of the city of Los Angeles making it a misdemeanor for any contractor to make any agreement to pay any laborer for any labor in excess of eight hours in any one day. This court, in discharging the petitioner, said: "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business, and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful, or against public policy, or the employment were such as might be unfit for certain persons,—as, for example, females or infants,—the ordinance might be upheld as a sanitary or police regulation; but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day." Statutes similar to the one under discussion have been frequently passed by the legislatures of sister states, and as frequently declared unconstitutional by the courts. The legislature of Pennsylvania, in June, 1881, passed what was known as the "Store-Order Act," and under its provisions all laborers employed by firms, corporations, or persons engaged in the business of manufacturing must be paid in cash, and can make no agreement by which their labor shall be paid for in any goods or store orders. The supreme court of the state in Godcharles v. Wigeman, 113 Pa. St. 437, 6 Atl. 354, held the act unconstitutional, and in the opinion said: "The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, to prevent persons who are sui juris from making their own contracts. The act is an infringement alike of the right of the employer and the employé. More than that, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best,—whether money or goods,—just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." In 1887 the legislature of the state of West Virginia passed an act declaring that all persons engaged in mining coal or other minerals, or in manufacturing them, should not issue for the payment of labor certain orders therein described. The supreme court of the state in State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, declared the law unconstitutional, and in the opinion said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. * * * But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employé, even in this class of occupations. Much less in cases that are not impressed with a public trust or duty." This case was immediately followed by State v. Fire Creek Coal & Coke Co., 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, in which, on the same reasoning, a statute of the state making it unlawful for any person, firm, or corporation engaged in mining or manufacturing to sell goods to any employé at a greater per cent. profit than like goods are sold to others, was held unconstitutional. In the opinion it is said: "That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to some extent necessary and unavoidable in the conduct of business; privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens." The general assembly of Massachusetts passed an act providing that no employer should impose a fine upon or withhold the wages of an employé engaged in weaving for imperfections that may arise during the process of weaving. This act was pronounced unconstitutional in an able opinion of the supreme court of the state. Com. v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325. The Revised Statutes of Missouri in 1889 made it unlawful for any corporation, firm, or person engaged in mining to issue in payment of wages any order or check payable otherwise than in money, unless the same was negotiable or redeemable at its face value in cash or goods, at the option of the holder. The supreme court of the state in State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, held the statute unconstitutional. The legislature of the state of Illinois in 1883 passed a statute requiring that owners and operators of coal mines in the state should weigh the coal at the mines, and that all contracts with laborers by which the weighing of coal at the mines shall be dispensed with shall be void. The statute was held unconstitutional in Millett v. People, 117 Ill. 295, 7 N. E. 631. The same rule has been followed by the same court in regard to similar statutes as to "truck stores." Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492. As to an act for the weekly payment of wages by corporations, see Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 240. The legislature of Texas provided by statute that a railroad company refusing to pay an employé within 15 days after demand shall be liable to such employé in a sum equal to 20 per cent. on the amount due. The statute was held unconstitutional. Railway Co. v. Wilson (Tex. App.) 19 S. W. 910. In the opinion it is said: "If the legislature desires to interfere at all in the enforcement of labor claims, it must do so by laws equal in their operation, and protecting alike the interest of the employer and employé, for the law knows no favorites." The supreme court of Nebraska in Railroad Co. v. Baty, 6 Neb. 37, held unconstitutional a statute of 1867 giving to owners of live stock double the value of such property injured or destroyed on a railroad track. In Michigan a statute was passed in 1885 authorizing the taxing of an attorney's fee of $25 in actions against a railroad company for damages for cattle killed, and the supreme court of the state held it unconstitutional. Wilder v. Railway Co., 70 Mich. 382, 38 N. W. 289. And the supreme court of Arkansas held a similar statute of that state unconstitutional (Railway Co. v. Williams, 49 Ark. 492, 5 S. W. 883); and the same ruling was made on a similar statute by the supreme court of the state of Washington (Joliffe v. Brown, 14 Wash. 155, 44 Pac. 149), and by the supreme court of Ohio (Coal Co. v. Rosser, 53 Ohio St. 12–24, 41 N. E. 263, 29 L. R. A. 386). Cases almost without number could be cited to the same general effect. Among others, see Durkee v. City of Janesville, 28 Wis. 464; Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; Railroad Co. v. Morris, 65 Ala. 193; Railroad Co. v. Moss, 60 Miss. 641–652; Railway Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177.

This court in bank held that a statute of the state prohibiting bakers from following their vocation between the hours of 6 o'clock p. m. on Saturday and 6 o'clock p. m. on Sunday was a special law, and void. Ex parte Westerfield, 55 Cal. 551. And the same was held as to a similar statute in relation to barbers. Ex parte Jentzsch, 112 Cal. 469, 44 Pac. 803. The question is very ably considered, and would seem to be finally put to rest, by the supreme court of the United States in Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. The statute of the state of Texas allowing owners of stock killed by a railway corporation $10 attorney's fees as additional costs was held unconstitutional. In the opinion it is said: "The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. * * * They do not stand equal before the law. They do not receive its equal protection." The reasoning of the highest court in the land in the case cited applies to this case. There is no reason why a different rule as to defenses that may be pleaded and proven and as to the nature of the lien of a judgment should obtain against a corporation than that which applies to other litigants. In Cullen v. Water Co., 113 Cal. 503, 39 Pac. 769, and 45 Pac. 822, 1047, it was held that a part of the fourth section of the act generally known as the "Wright Act," which provided that in a proceeding to confirm the organization and bonds of an irrigation district "a motion for a new trial must be made upon the minutes of the court," was a special law regulating the practice of courts of justice, and unconstitutional. In City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604, it was held that section 870 of the municipal corporation act of 1883, requiring cities of the fifth and sixth classes to make an effort to agree before instituting condemnation proceedings, was unconstitutional. And so in the late case of the City of Tulare v. Hevren (filed Sept. 29, 1899), 58 Pac. 530, this court held that that portion of the general act of the state in regard to municipal corporations, by which it is provided that in municipal corporations of the fifth class courts shall take judicial notice of all ordinances of the municipality, was unconstitutional. It is claimed that corporations are a class, and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences either defined by the constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. Darcy v. City of San Jose, 104 Cal. 645, 38 Pac. 500; State v. Hammer, 42 N. J. Law, 439; Cooley, Const. Lim. (6th Ed.) p. 484. Arbitrary selection can never be justified by calling it classification. Railway Co. v. Ellis, 165 U. S. 159, 17 Sup. Ct. 255, 41 L. Ed. 666. In this case there can be no reason why a corporation doing business in this state should have its property subjected to a lien unless the property of other persons in the state under like circumstances is subjected to the same kind of a lien; or why such corporations should be prohibited from making defenses which all other persons in the state may make; or why such corporations should pay attorneys' fees or fines in an ordinary action at law, while all other persons under like circumstances are exempt from such attorneys' fees and fines; or why such corporation cannot create valid liens upon its property other than by a deed or mortgage duly recorded, while all other persons in the state may do so; or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employés, while all other persons in the state who are over 21 years of age, and not incompetent, may do so; or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid. It is said that, corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters, or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation, and while it exists, deprive it of the rights guarantied to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws. Railroad Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836; Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 490; Railroad Tax Cases (C. C.) 13 Fed. 754, 755; Detroit v. Detroit & H. P. R. Co., 43 Mich. 140–147, 5 N. W. 275.

But the act in question applies not only to the corporations existing under the laws of this state, but to all other corporations doing business in this state, and in no wise indebted to the state for their charters. Surely, the legislature of this state could not alter, amend, or repeal the charter of a corporation existing under the laws of another state. Counsel for respondent states that similar statutes have been upheld in Shaffer v. Mining Co., 55 Md. 74, Peel Splint Coal Co. v. State (W. Va.) 15 S. E. 1000, and Hancock v. Yaden, 121 Ind. 365, 23 N. E. 253, 6 L. R. A. 576. The statute upheld in Shaffer v. Mining Co. was one which provided that every corporation engaged in manufacturing, or in operating a railroad, in a certain county, and employing 10 hands or more, should pay its employés the full amount of their wages in legal tender money of the United States, and that every contract for the payment of such wages in any other manner should be null and void. The ground upon which the act was upheld was that the legislature had the right to alter or amend the corporate charter. It is evident, in view of the authorities hereinbefore cited, that the ruling upon such ground was clearly incorrect. The decision cannot be regarded as of much value as a contribution to jurisprudence, and an examination of the authorities therein cited does not support it. The case of Peel Splint Coal Co. v. State upheld the validity of two statutes of West Virginia, one prohibiting the payment of employés in paper redeemable otherwise than in lawful money, and the other prescribing a certain method for weighing coal at the mouth of a mine. The court consisted of four judges, and two of the four can affirm a judgment. The judgment was affirmed by two judges, and two dissented. The opinion of the two affirming the judgment, while lengthy, is not convincing. The decision appears to have been based upon practically the same reasoning as the Maryland case,—that, the corporation being a creature of the legislature, and having a license under the state, the legislature could practically deprive it of any rights. In view of the fact that the opinion is in direct conflict with the two previous decisions of the same state, and is the opinion of two judges as against two others of the same court, it cannot have weight here. It seems to us that any one reading the able dissenting opinions of judge English and Judge Brannon would be satisfied that the decision is wrong. Judge Brannon, in his dissenting opinion, says: "If, upon the suggestion of a supposed or real evil, always incident to the transaction of all business, the legislature can restrict lawful contracts in private business, government becomes not simply paternal but oppressive and tyrannical. The 'Scrip Act' would prevent the farmer, brick maker, or coal operator from giving to his hands for wages an order to any one for sugar, coffee, flour, or meat,—a great reversal in the right of contracts as used time out of mind." Hancock v. Yaden turned on the validity of a statute of Indiana which forbade the execution of contracts waiving the payment of wages in money. The court sustained the law, and the decision is the most direct authority in favor of plaintiff's contention of any he has cited. There is no authority cited in the opinion upon which it can legally stand. The court sustained the law upon the ground "that it protected and maintained the medium of payment established by the sovereign power of the nation." Even if this be so, it is self-evident that the legislature, in passing the act, did not have in mind the protection of the coinage. The policy of the law in protecting the coin of the country would justify stringent laws against counterfeiting or debasing it, but certainly could not justify a law that precludes persons from agreeing to receive payment of their debts in anything but money. Since the submission of this case, our attention has also been called by counsel for plaintiff to a decision of the circuit court of the United States for Ninth circuit, Northern California, in the case of Skinner v. Mining Co. (filed Sept. 6, 1899) 96 Fed. 735, in which this very statute was upheld. While we have the greatest respect for the able judge who wrote the opinion, yet it is not binding on us as a precedent, and the reasoning therein does not convince us of its correctness, nor, in our opinion, do the authorities therein cited support it. The learned judge refers to the case of Louisville & N. R. Co. v. Railroad Commission of Tennessee (C. C.) 19 Fed. 679. In that case the circuit court of the United States held unconstitutional an act of the legislature of the state of Tennessee creating a railroad commission, and making certain discrimination against railroads. In the opinion it is said: "Their general object [referring to the provisions of the fourteenth amendment] is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority to restrain all injurious legislation discriminating against persons and property; * * * to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to every one an equal right to invoke the remedies prescribed by law for the redress of wrongs done either to his person, reputation, or property." In the opinion of the learned judge it is further stated that the act of March 31, 1891 (St. 1891, p. 195), similar to the statute in question, relating to the payment of wages of laborers by corporations, has been construed in Keener v. Irrigation Co., 110 Cal. 627, 43 Pac. 14, and Ackley v. Mining Co., 112 Cal. 42, 44 Pac. 330, and that the act in question is directed to the same end as the statute of 1891. The act was under consideration, but not passed upon as to its constitutionality, in either case. In each case it was held that the laborers were entitled to an ordinary judgment such as is granted to other litigants, and in each of the cases the judgment of the lower court as to counsel fees and as to the judgment being declared a lien was reversed. In the case in 110 Cal. and 43 Pac. it is said in conclusion of the opinion: "That portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed." And in the case in 112 Cal. and 44 Pac. the same ruling was made and the same language used in reversing the portion of the judgment as to counsel fees and declaring the judgment a lien. The act of 1891 has, however, by this court in bank, been held unconstitutional, as special legislation in favor of a class, and making an arbitrary classification. Slocum v. Irrigation Co., 122 Cal. 555, 55 Pac. 403.

The court properly overruled the defendants' demurrer to the complaint. The allegation as to the assignment of the several causes of action, prior to the time of the commencement of the action, to plaintiff, was sufficient when attacked by general demurrer. That portion of the judgment in favor of plaintiff and against the defendant corporation for $5,039.57, with costs, should be affirmed. The portion awarding the plaintiff $400 attorney's fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation, and to have a commissioner appointed to sell the property, should be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, that portion of the judgment in favor of plaintiff and against the defendant corporation for $5,039.57, with costs, is affirmed. The portion awarding the plaintiff $400 attorney's fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation, and to have a commissioner appointed to sell the property, is reversed.

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127 Cal. 52

BARTHE v. ROGERS. (S. F. 1,793.)

(Supreme Court of California. Nov. 24, 1899.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—BURDEN OF PROOF—NONSUIT.

1. Under Code Civ. Proc. § 1500, providing that the holder of a claim against the estate of a deceased person cannot maintain an action thereon unless the claim is first presented to the executor or administrator, a holder of such a claim can recover only such portion thereof against the estate as has been so presented for allowance and rejected.

2. The burden of proof is on the claimant to establish a claim against a decedent's estate; and, if his evidence fails, defendant is entitled to submit the case on claimant's testimony, rather than move for a nonsuit.

Department 1. Appeal from superior court, city and county of San Francisco.

Proceeding by C. Barthe against Josephine Rogers, administratrix, etc., to establish a claim against the estate of one Marshall, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

John H. Durst, for appellant. A. Ruef, for respondent.

HARRISON, J. The plaintiff presented a claim to the defendant against the estate of her intestate, which was rejected by her, and thereupon brought the present action to establish the same. Judgment was rendered in his favor, and the defendant has appealed.

The claim presented by the plaintiff was for services of divers kinds rendered the deceased at different times from October, 1893, to the date of her death, March 29, 1897, and expenses incurred therein, and was made up of 14 separate items, to each of which a specific value was fixed, amounting in the aggregate to $778. In the complaint herein the plaintiff sets forth a copy of the claim so presented by him, and seeks to recover upon an indebtedness of $778 for services rendered the deceased at her request within two years before her death, and for money laid out and expended at her request. At the trial he disclaimed all right of recovery for any services except such as were rendered within two years prior to the death of the intestate, and the court allowed him $30 a month for that period, and found that the decedent was indebted to him in the sum of $720 "for services rendered to her by plaintiff within two years prior to her said death, at her request," and entered judgment accordingly. The appeal herein is maintained upon the ground that the evidence is insufficient to sustain this finding of the court, and that the judgment was rendered upon a different cause of action from that stated in the claim which was presented to the defendant.

Of the 14 items of which the plaintiff made up the claim which he presented to the defendant, 7 were for "expenses and services" in making trips from San Francisco to various parts of the state at request of deceased, for which $158 was claimed; and one item of $12 was claimed for "accompanying Mrs. Marshall six trips to Berkeley and San Leandro." There is no evidence in the record that the plaintiff ever made a trip in behalf of the deceased to any part of the state, and the only evidence in support of his claim for "accompanying" her to any place outside of San Francisco is that given by the witness Danier, who testified: "I knew that Barthe went different places in the country with her." Another item in the claim as presented is for $50 for "expenses and services about fifty trips to office of A. Ruef, attorney, and consultation with him on behalf of deceased, with her." The only evidence bearing on this item is that given by Mrs. Stencil, who testified that the deceased told her that Barthe took her once to some lawyer. One of the items in the claim presented is for $200 for "services rendered to deceased four or five times per week from October, 1893, to April, 1895." As she died March 29, 1897, the plaintiff could recover for only such services under this item as were rendered during the last two days in March, 1895. Another item in the claim as presented was $50 for "expenses and services in attending to various negotiations relating to sale of her real property, at her request." There is no evidence in the record tending to show that any such services were rendered.

The provision in section 1500, Code Civ. Proc., that the holder of a claim against the estate of a deceased person cannot maintain an action thereon unless the claim is first presented to the executor or administrator, is equivalent to a declaration that he cannot maintain an action upon any claim that he has not first presented for allowance, and that, in any action to establish the validity of a claim which has been presented and rejected, "he can recover only upon the claim which has been so presented and rejected, and is not entitled in that action to recover against the estate for any other cause of action." Lichtenberg v. McGlynn, 105 Cal. 45, 38 Pac. 541. In the present case the plaintiff's claim, as presented to the administratrix, was for certain specified services, for which he demanded certain specific compensation. At the trial he offered evidence in support of only a portion of these services, and offered no evidence of the particular value of such services. In the claim which he presented, his demand for compensation for those services of which he offered evidence was less than one-half of the amount for which the court gave him judgment; and the basis of computation upon which the court rendered its decision, viz. "thirty dollars a month for two years," had no foundation in the claim as presented. It may be added that the evidence of services rendered by him to the decedent within two years of her death does not equal the extent of services stated by him in his claim.

The contention of the respondent that the defendant should have moved for a nonsuit, rather than submit the case upon the plaintiff's testimony, is without merit. The plaintiff was not entitled to recover unless he produced evidence in support of his claim, and the burden was upon him to establish the claim which had been rejected. If his evidence failed in this respect, the defendant was entitled to ask for a judgment in her behalf. As was said in Lichtenberg v. McGlynn, supra: "It may be that the failure to make greater proof results from the statutory inability of the plaintiff to testify in his own behalf, but this does not relieve him from the necessity of producing sufficient evidence to establish his cause of action. His incompetency to testify may be his misfortune, but the defendant's obligation is not thereby varied, and she is entitled to demand such proof before she can be called upon to pay to the plaintiff the money which is in her hands as trustee for the beneficiaries of her intestate."

The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

127 Cal. 86

BERGEVIN v. CURTZ. (Sac. 664.)

(Supreme Court of California. Dec. 1, 1899.)

COUNTIES—SUPERVISORS — QUALIFICATION — ELECTION.

Const. art. 2, § 1, provides that every male citizen of the United States who shall have been resident of the state for one year next preceding an election, of the county ninety days, and of the election precinct thirty days, shall be entitled to vote. Act April 1, 1897, § 15 (St. 1897, p. 455), declares that each member of the board of supervisors must be an elector of the district which he represents, and must have been such elector for at least one year immediately preceding his election. *Held*, that an elector who has resided in the district he was elected to represent for one year immediately preceding his election as supervisor was eligible to the office, though he was not entitled to vote at such election for the reason that his name has not been entered on the great register of the county as directed by Pol. Code, § 1094.

In bank. Appeal from superior court, Alpine county.

Proceeding by Lewis Bergevin against H. W. Curtz contesting the latter's right to hold the office of supervisor. From a judgment for plaintiff, defendant appeals. Reversed.

P. M. Packard and Wood & Levinsky, for appellant. W. M. Thornburg, for respondent.

COOPER, C. Appellant was duly elected to the office of supervisor of supervisor district No. 1 of Alpine county at the November election, 1898. This is a proceeding by respondent, as an elector, contesting the right of appellant to hold said office solely on the ground that at the time of the election he was not eligible thereto. The court below rendered judgment against appellant, declaring that at the time of said election he was ineligible to said office, and by its decree annulled and set aside the election. The defendant has appealed from the judgment, and the case is brought here on the judgment roll.

It appears from the findings that appellant is a natural-born citizen of the United States, 27 years of age; that he has resided in the state of California all his life, in the county of Alpine ever since June, 1894, and in precinct No. 1 in superior district No. 1 since the 1st day of July, 1897; that appellant's name appears upon the great register of said county June 21, 1894, in precinct No. 2 in supervisor district No. 2, but that he removed from said last-named precinct and district into precinct and district No. 1 about July 1, 1897; that appellant's name remained upon said great register in precinct 2 and supervisor district 2 of said county until the 3d day of October, 1898, when, at his request, it was canceled upon the said precinct register No. 2, and placed upon the precinct register of precinct No. 1 in said supervisor district No. 1; that on the 8th day of November, 1898, the appellant was a duly-registered voter in said precinct No. 1, supervisor district No. 1, but had only been such since the 3d day of October, 1898, and was not a registered voter in said supervisor district No. 1 for one year next preceding the day of election. The court below, as a conclusion of law from the said findings, adjudged that appellant had not been an elector of district No. 1 for one year immediately preceding his election, and was, therefore, not eligible to the office at the time he was elected. This is the sole question to be determined in the case.

It is provided in section 15 of the county government act of April 1, 1897 (St. 1897, p. 455) that "each member of the board of supervisors must be an elector of the district which he represents, must reside therein during his incumbency, and must have been such elector for at least one year immediately preceding his election." In order to find the meaning and definition of "elector," we must look to the constitution of the state. An elector is a person possessing the qualifications fixed by the constitution. O'Flaherty v. City of Bridgeport, 64 Conn. 161, 29 Atl. 466. It is provided in the constitution (article 2, § 1) that every male citizen of the United States "who shall have been resident of the state one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." The findings of the court show that appellant was an elector of the district for which he was elected for more than one year immediately preceding the November election. He had been a resident of the state, county, and precinct for more than one year immediately preceding the election. He possessed all the qualifications of an elector as prescribed by the constitution, and, unless we should hold that he must have possessed some qualification other than that laid down by said instrument, he was, at the time of his election, eligible to the office. We do not think the legislature, even if it attempted to do so, could add any essential to the constitutional definition of an elector. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors, and who desire to vote, to show that they have the necessary qualifications; as by requiring registration, or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. These regulations must be reasonable, and must not conflict with the requirements of the constitution.

The legislature has required that all electors, as a condition of the right to vote, shall have their names properly and in due season entered upon the great register of the county. Pol. Code, § 1094. The section provides that in the register shall be entered the names of the qualified electors of the county, and "that any elector who has registered and thereafter moved his residence to another precinct in the same county thirty days before an election may have his registration transferred to such other precinct upon his application." The legislature has made no attempt to change or add to the qualifications of an elector, but has simply provided a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list. It was said by this court in Webster v. Byrnes, 34 Cal. 276, in discussing the right of a party to vote in a case where his vote was challenged: "The question here is: Is he a qualified elector of the precinct at which he voted, and was his name at the time upon the great register and poll list?" In the case of Welch v. Williams, 96 Cal. 367, 31 Pac. 222, it was said by the chief justice, speaking for the court in bank: "The object of the registration law is to prevent illegal voting by providing, in advance of election, an authentic list of the qualified electors." In the case of Sanford v. Prentice, 28 Wis. 362, it is said: "There is a difference between an elector or person legally qualified to vote and a voter. In common parlance they may be used indiscriminately, but, strictly speaking, they are not the same. The voter is the elector who votes,—the elector in the exercise of his franchise or privilege of voting,—and not he who does not vote." In this case the appellant would have been eligible to the office of supervisor of the district for which he was elected if his name had not been on the great register. He could not have voted at the election, and thus would have been deprived of voting for himself, if he so desired; but, having the constitutional qualifications, he was eligible to the office. The court below evidently was of the opinion that one must have his name enrolled upon the great register before he could be an elector, and this because of the reading of section 1083, Pol. Code. That section, after enumerating the constitutional qualifications of a voter, adds: "And whose name shall be enrolled on the great register of such county fifteen days prior to an election shall be a qualified elector," etc. The words "qualified elector" are used in the sense of elector who has the right to vote. It appears plain that the legislature recognized the fact that there might be electors who were not so qualified. The county government act does not provide, as a condition of eligibility to the office of supervisor, that the candidate must have been a qualified elector of the district which he represents for at least one year. We advise that the judgment be reversed, and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

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127 Cal. 103

In re MEALY et al. (L. A. 587.)

(Supreme Court of California. Dec. 7, 1899.)

INVOLUNTARY INSOLVENCY — PETITION — APPEAL—OBJECTIONS WAIVED.

1. Under St. 1895, p. 131, § 9, providing that an adjudication of insolvency may be made, on petition of creditors, when a debtor, being insolvent, has made an assignment or transfer of his property with intent to delay, defraud, or hinder his creditors, a complaint failing to allege that a debtor was insolvent when doing said acts does not state a cause of action.

2. Under St. 1895, p. 131, § 9, providing that an adjudication of insolvency may be made, on petition of creditors, when a debtor, "in contemplation of insolvency, has made any payment, * * * or transfer of his property with intent to delay, defraud, or hinder his creditors," a complaint alleging that debtors, "in contemplation of insolvency, have made a payment, and transfer of their property," with such intent, but failing to state when and to whom such payment and transfer were made, does not state a cause of action.

3. Where a bond in involuntary insolvency proceedings is insufficient, because not signed by all of the petitioning creditors, objection to the trial court's jurisdiction to render judgment will not be entertained when made for the first time in the supreme court.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Petition for involuntary insolvency by creditors of A. M. Mealy and Florence Weeks Stetson, partners as A. M. Mealy & Co., debtors. From a judgment rendered for petitioners upon the overruling of a demurrer to the petition, said debtors appeal. Reversed and remanded.

Leonard & Morris and E. R. Annable, for appellants. Tillan & Dunning and Curtis & Curtis, for respondents.

CHIPMAN, C. Involuntary insolvency. The petitioning creditors had judgment by default, upon demurrer to their petition being overruled, adjudging appellants to be insolvent. The appeal is from this judgment. The points urged on the appeal are (1) that the demurrer should have been sustained; and (2) that no sufficient bond was filed.

1. The demurrer was for insufficiency of facts, and on the further ground that the petition is uncertain and unintelligible, in that it does not state when the alleged assignment, sale, or transfer was made, and is ambiguous for like reason, and for the further reason that it does not state to

whom said assignment, transfer, sale, or conveyance was made. The allegation of the petition is "that said debtors reside and have their place of business in said county of San Bernardino, and made an assignment, sale, conveyance, and transfer of their estate, property, rights, and credits with intent to delay, defraud, and hinder their creditors; the said debtors, in contemplation of insolvency, have made a payment, and a grant, sale, conveyance, and transfer of their estate, property, rights, and credits." There is no allegation in the petition that the debtors are or were at any time insolvent, nor is there any allegation that they have assigned or transferred all their property, and there is nothing in the petition to show when the alleged assignment took place, or to whom or what property was transferred. So far as appears, the assignment may have been of some property of insignificant value; and it may have been assigned long before the passage of the act, and the debtors may have been solvent when and after they made the assignment. Section 9 of the insolvent act of 1895 (St. 1895, p. 131) provides that an adjudication of insolvency may be made on the petition of five or more creditors. Such petition must set forth "that such person [the debtor] is about to depart from this state, with intent," etc.; "or conceals himself to avoid the service of legal process; or conceals or is removing any of his property," etc. These are grounds for the adjudication, without regard to the solvency of the debtor. The act proceeds: "* * * Or being insolvent, has suffered his property to remain under attachment or legal process for three days; * * * or has made any assignment, gift, sale, conveyance or transfer of his estate, property, rights or credits, with intent to delay, defraud or hinder his creditors." In these enumerated acts of the debtor the adjudication depends upon the fact of his "being insolvent." Without an allegation that he did the acts "being insolvent," there would be no sufficient ground alleged for the proceeding, and the petition in the present case rests in part upon the ground last above stated and is copied from the act. The act proceeds: "* * * Or in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance or transfer of his estate, property, rights or credits." The complaint alleges "that said debtors, in contemplation of insolvency, have made a payment and a grant, sale," etc.; following the language of the statute. There is nothing to show that these transactions were different from those previously alleged, for in neither case is the time when made, the person to whom made, or the property assigned set forth, or any other means of identification stated; and, so far as the petition shows, these latter transactions may have occurred years prior to the filing of the petition. We think the petition should have shown, at least, that the transfer was made since the passage of the insolvency act under which the proceeding was brought, if a date no more definite could have been stated, and should have contained some statement of the payment made or property transferred, and to whom. In re Patton, 110 Cal. 33, 42 Pac. 459, presented a similar question, but is not in point; for the petition there very properly alleged the insolvency of the debtors, and also alleged the time when the transfer was made, to whom made, and the property transferred. The case of In re Close, 106 Cal. 574, 39 Pac. 1067, also relied on by respondents, was where the ground alleged was that the debtor had permitted his property to remain under attachment for over four days, and it was alleged that he was insolvent when the attachment was levied, and had ever since so been, and that he had no other than the attached property. We do not think the petition was sufficient, as against a general demurrer, and certainly was obnoxious to the special demurrer.

2. Appellants make the point that the bond was insufficient, and that the court had no power to enter the judgment, because the filing of the prescribed bond with the petition is jurisdictional. The petition was filed by certain four corporations and two copartnerships. The bond was signed by two sureties, and by P. M. Daniel, J. M. Johnston, and A. B. Cass. Appellants claim that the signers of the bond must be petitioners. It was held in Re Visalia City Water Co., 119 Cal. 561, 51 Pac. 856, that the "act contemplates the filing of the bond with two sureties and all the petitioning creditors as principals." The bond was therefore insufficient. The objection to the bond is made here for the first time. It was said in Creditors v. Lumber Co., 98 Cal. 318, 33 Pac. 196, where the same objection was made as here, that, "if the undertaking in this case was objectionable, in fairness to the other side the defects should have been pointed out, in order that they might have been remedied." The question is unlike that in Anderson v. Superior Court, 122 Cal. 216, 54 Pac. 829, where there was no bond at all. It is not necessary to decide whether or not the filing of an insufficient bond is jurisdictional, where no objection is made by the debtor to the bond as filed. In the present case there was a bond filed, and, while we think it was insufficient in the particular already pointed out, the defect was waived by failure to make objection to it at the proper time and place. It is advised that the judgment be reversed, and the cause remanded.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

127 Cal. 101

Ex parte KNAPP. (Cr. 597.)

(Supreme Court of California. Dec. 5, 1899.)

GAME — PROHIBITING TRANSPORTATION — UNJUST DISCRIMINATION.

1. A county ordinance making it a misdemeanor for one to transport, or offer to transport, from the county, game lawfully taken therein, is an unreasonable interference with the right of private property, and therefore void.

2. A county ordinance prohibiting the transportation of game from the county, which is intended to apply only to persons who are not sportsmen, is void, as an unjust discrimination.

In bank. Application by James Knapp for a writ of habeas corpus. Relator discharged.

V. G. Frost, for petitioner.

TEMPLE, J. This is an application for a discharge from custody made on behalf of James Knapp, who was arrested, tried, and convicted upon a charge of violating an ordinance of the county of Stanislaus. The ordinance declares, in effect, that it shall be a misdemeanor for any one to hunt, kill, or destroy certain game with intent to transport, or to cause the same to be transported, without the county, or to offer the same to any person for the purpose of shipping or carrying the same without the county. It also declares that every railroad or transportation company, their agents and servants, who shall transport such game without the county, shall be guilty of a misdemeanor. The prisoner was charged with willfully and unlawfully offering for transportation by Wells, Fargo & Co., from the town of Newman, in Stanislaus county, to San Francisco, two wild ducks which were killed in Stanislaus county.

Serious question has been made as to the power of any county board of supervisors to add either restraints or regulations to the right to take and kill wild game, to those made by the legislature. We do not find it necessary for the purposes of this case to decide that question. If such further restrictions upon the right to kill game may be made by county boards, such regulations must be reasonable, not oppressive to any class, and must not contravene any established policy of the state. Presumably the two ducks were lawfully taken by James Knapp in Stanislaus county. It is not charged that they were hunted or killed for the purpose of being transported without the county, though such fact, if it existed, would not have changed the result. Having taken the game lawfully, and at a time when it is lawful for any one to shoot ducks, the ordinance prohibiting their shipment is an unreasonable interference with the right of private property, and an unnecessary restraint of trade. The statutes of the state in regard to game prohibit the offering for sale of game during the time it is unlawful to kill such game. St. 1897, p. 90. The state regulations upon this particular subject seem complete, and restrict the rights of citizens so far as was necessary to prevent the unlawful killing of game.

It was stated on the argument, substantially, that the ordinance was aimed at "pot hunters." I understand this phrase covers all except sportsmen. Relatively a small part of the community only are sportsmen. A law or ordinance which would discriminate in their favor would not be a proper exercise of the so-called "police power." If that be the manifest or admitted purpose of the ordinance, it is void for that reason, also. The prisoner is discharged.

We concur: VAN DYKE, J.; HARRISON, J.

McFARLAND, J. I concur in the judgment.

BEATTY, C. J. I concur in the judgment on the first ground discussed by Justice TEMPLE. The people of the state being the owner of its wild game, it may be conceded that the state legislature could annex any condition it chose to the privilege of taking it; but a county ordinance forbidding all persons, under penalty, to transport game, lawfully taken, to the place where they desire to use or dispose of it, is violative of the right of private property, as defined and regulated by general law, and necessarily invalid.

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127 Cal. 90

In re UPHAM'S ESTATE. (Sac. 650.)

(Supreme Court of California. Dec. 4, 1899.)

WILLS—CONSTRUCTION—LAPSED DEVISES AND BEQUESTS—RESIDUARY LEGATEE—BEQUESTS TO CHARITIES—VALIDITY.

1. Civ. Code, §§ 1332, 1333, provide that devises of the residue of testator's real property and residuary bequests of personalty pass all of the testator's property not otherwise effectually disposed of by his will. *Held*, that under such sections both devises and bequests which lapse pass to the residuary legatee.

2. Testator devised the residuum of his estate to the trustees of an orphans' home organized by an unincorporated beneficial association. The purpose of the home was to care for orphan children, of whom it continuously accommodated about 200. The trustees of the home were not incorporated, but formed a continuous board, one-half of whom were elected every two years by the association. *Held* that, since the home constituted a charity, the gift was not void for want of trustees capable of taking the property, since, if the trustees were not capable of taking, the charity would not fail for that reason.

3. A charitable devise of the residue of an estate in trust for the use and benefit of minor children of an orphans' home was not invalid because the beneficiaries were not named with sufficient definiteness and certainty.

4. Where a testator willed the residue of his estate to trustees of an orphans' home for the use and benefit of its inmates, and by a subsequent clause directed that, if his estate should be more or less than sufficient to provide for and pay all bequests and legacies, they should be increased or diminished ratably, such clause did not destroy the operation of the residuary clause, but expressly referred to and recognized it.

5. Under Civ. Code, § 1322, declaring that a clear and distinct devise shall not be affected by any other words not equally clear and distinct, or by inference or argument from other parts of the will, a residuary devise to the trustees of an or-

phans' home for the benefit of its inmates was not affected by a subsequent ambiguous clause directing that, if his estate should be more or less than sufficient to provide for and pay bequests and legacies, they should be increased or diminished ratably.

Department 2. Appeal from superior court, Solano county.

Petition by Joseph M. Upham and another against the estate of E. I. Upham, deceased, for a partial distribution of property claimed to have been undisposed of by testator's will. From an order denying the petition, petitioners appeal. Affirmed.

Freeman & Bates, for appellants. J. M. Thompson and J. M. Walling, for respondent Good Templars' Orphans' Home. John Gregory, for respondent minor heirs. Geo. A. Lamont and F. C. Lusk, for respondent heirs.

McFARLAND, J. E. I. Upham died, leaving a will, which, on its face, purports to dispose of all his property. His brothers, Joseph M. and Lorenzo Upham, who are his next of kin and only heirs at law, filed a petition in the probate court for a partial distribution to them of certain parts of the estate, which they claim had not been disposed of by the will, and therefore went to them as heirs. The court held that the whole estate had been disposed of by the will, and that, as petitioners were not devisees or legatees, they were not entitled to partial distribution. The petition was denied, and from the order denying it the said brothers Joseph M. and Lorenzo appeal.

By paragraphs 1, 2, and 3 of the will a certain piece of land known as the "Vaccaville Orchard" and $10,000 in money are given to Martha Muzzy, a relative of testator, and also sufficient funds to take care of the family cemetery lot. By paragraph 4 the sum of $10,000 is given to Sarah Muzzy. By paragraphs 5, 6, 7, and 8 the sum of $5,000 each is given to certain named legatees. By paragraph 10 certain small sums of money are given to employés of the testator. And no objection is made in this case to any of the foregoing paragraphs. The contention of appellants is based upon paragraphs 9, 11, and 12. By paragraph 9, which is quite long, and somewhat complicated, $40,000, or, in lieu thereof, a quantity of land equal in value to that sum of money, is given to the executors of the will in trust for the use and benefit of the minor children of the appellants; and it is claimed by appellants that this trust, owing to certain provisions which it contains, is void, and that, therefore, the property mentioned in it is undisposed of by the will, and goes to them as heirs at law. Under our views of the case, however, it is not necessary to pass upon the validity of this trust clause, for, if the will creates a residuary devisee and legatee,—as we think it does,—then the latter takes the property described in any devise or legacy which for any reason fails or lapses, and the same does not go to the heir. Section 1332 of our Civil Code declares the rule above noticed as follows: "A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will;" and section 1333 is the same, except that it refers to a bequest of personal property, instead of a devise of real property. These sections abrogate the old common-law distinction between devisees of real property and bequests of personal property to the effect that a devise speaks from the date of the will and a bequest from the death of the testator, and according to which distinction it was generally held that property mentioned in a void or lapsed devise did not go to the residuary devisee. But, under the old authorities, before any change was made by statute, it was uniformly held that lapsed bequests went to the residuary legatee, and not to the heir; and our statutory provisions above referred to are so clear to the point that lapsed devises take the same course that further authorities upon the question seem needless. However, in New York the statutory law is that a will which in terms disposes of all the testator's real property shall be construed to pass all the real property which he was entitled to devise at the time of his death; and under that statute it has been uniformly held in that state that property mentioned in a lapsed devise goes to the residuary devisee, and not to the heir, unless a contrary intent is clearly expressed in the will. Riker v. Cornwell, 113 N. Y. 115, 20 N. E. 602; In re Benson, 96 N. Y. 499; Cruikshank v. Home for the Friendless, 113 N. Y. 337, 21 N. E. 64; Carter v. Board, 144 N. Y. 621, 39 N. E. 628; In re Bonnet's Estate, 113 N. Y. 522, 21 N. E. 139. And see, also, Floyd v. Barker, 1 Paige, 480; King v. Woodhull, 3 Edw. Ch. 79; King v. Strong, 9 Paige, 94; and Tindall's Ex'rs v. Tindall, 24 N. J. Eq. 512.

The main question in the case at bar, therefore, is whether or not a residuary devisee and legatee is created by the will. Such devisee and legatee is clearly created by paragraph 11 of the will, if the trust created by that paragraph is not void for other reasons. The paragraph is as follows: "(11) I give and bequeath to the legally qualified and constituted trustees or managers of the Good Templars' Orphans' Home of Vallejo, said county of Solano, in trust for the use and benefit of the orphan children of said institution, any residue and remainder of my estate after carrying out my hereinbefore legacies and bequests." It is contended by appellants that this trust is void for reasons, which are, substantially, these: (1) That the bequest is not charitable, because the beneficiaries are not named with sufficient definiteness and certainty; and (2) that there are no trustees named capable of taking the property. We do not think that either of these contentions can be maintained. It must be remembered that charities—both as to the trustees and the beneficiaries—are more liberally construed than are gifts to individuals. See 2 Story, Eq. Jur. §§ 1165–1167, et seq. That the gift here was for charity is beyond question. It was shown by the evidence—which was properly admitted, under section 1340 of the Civil Code—that the Good Templars' Orphans' Home at Vallejo had been in existence for a great many years, that its purpose was to take care of orphan children, that it accommodated about 200 of such children, and that about that number were usually and continuously maintained there. To sustain the proposition that this constitutes a charity within the legal meaning of the word, no further authority is necessary than that of People v. Coggswell, 113 Cal. 129, 45 Pac. 270; but the truth of the proposition is further illustrated by the numerous cases referred to in the opinion of the supreme court of the United States in Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397. It is contended, however, that the trust is void, because the parties named as trustees are incapable of taking the property. The trustees of the orphans' home, it is true, do not constitute a corporation. It was organized under the auspices of the Grand Lodge of the Independent Order of Good Templars of the State of California, which is a corporation, and it is under the management and control of a continuous board of trustees, consisting of eight persons, one-half of whom are selected every two years by the order. These trustees seem to be appropriate persons to take charge of this charitable fund, and manage it for the purposes of the trust; but, even if it should be held that in a strict legal sense they are not capable of taking, yet the charity would not fail for that reason. A court will not allow a charitable trust to fail for want of a legal trustee. Of course, in this country, courts of equity will not go so far in executing indefinite charities as the courts of equity went in England under the statute of 43 Eliz.; for there, if it could be discovered from a deed or will that anything in the nature of a charity was intended, however vague or indefinite, the chancellor would devote it to some sort of a charity. But in this country courts have been extremely liberal in construing charities, and under principles analogous to the doctrine of cy-pres have enforced trusts far more indefinite and inexact than the one here involved. The rule upon this subject is very fully laid down by the supreme court of the United States in Russell v. Allen, supra, as follows: "By the law of England from before the statute of 43 Eliz. c. 4, and by the laws of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and, indeed, must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead." In Schmidt v. Hess, 60 Mo. 591, a gift had been made to the "Lutheran Church," which was unincorporated, and in a suit brought by the trustees of the church they were permitted to show to what church the gift applied; and the court, among other things, said: "No doubt is entertained that the gift under consideration is a charity, and falls within the meaning of the rules of chancery. 2 Story, Eq. Jur. § 1164, and cases cited. And although, in consequence of the nonincorporation of the church for whose benefit the grant was made, there was no one in esse at the time of making the donation capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation,"—citing cases. See, also, Lilly v. Tobbein (Mo. Sup.) 15 S. W. 618. And in section 730, 2 Perry, Trusts, a number of instances are given of charities held to be good, which illustrate the principles which sustain the gift to the orphans' home here involved. The following is the language there used to which we refer: "It is well settled that the devise of a charitable use to church wardens, although not a corporation capable in law of holding and transmitting property, will be sustained; so to an institution neither established nor incorporated in the life of the donor; and so a devise to certain officers or their successors in office, or, if they are incapable of executing the trust, then to a corporation to be formed for the purpose, was held by the supreme court of the United States to be a good devise, and capable of being carried into effect. A gift to a corporation by a misnomer is good for a charitable purpose if the corporation can be identified; gifts in trust to voluntary associations for charitable purposes have been held good; and so of gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations. These bodies, or quasi corporations, have been considered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach." Therefore, under the principles of the authorities above noticed, the gift to the trustees of the orphans' home is a valid charity; and, this being so, a residuary legatee and devisee was thus created, to whom lapsed legacies go under the statutory provisions above quoted. There are no words in the will expressing a contrary intent, and the rule is that, "where the residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition, or other reason." Riker v. Cornwell, 113 N. Y. 115, 20 N. E. 602.

With respect to other objections made by appellants, it may be said that we see no reason why a court of equity cannot enforce this trust, or why there are no beneficiaries in whose interest it could be enforced. In the latter respect there is no difference between this case and any other case where the benefit is for an indefinite number of persons. We see nothing in the objection that it is not stated in the will whether the benefit is to be for orphans or half orphans. The will uses the word "orphan," and that has a legal meaning. If the clause creates a charity, it is not obnoxious to the law against perpetuities, and is expressly warranted by section 1313 of the Civil Code. No question is raised here as to the gift being for more than one-third of the estate. The contention that too much discretion is given to the trustees is answered by the citations and quotations from authorities hereinbefore given.

It is contended by appellants that paragraph 12 revokes, or annuls, or renders inoperative paragraph 11. Paragraph 12 is as follows: "If my estate should be more or less than sufficient, after paying my debts, to provide for and pay all the above-mentioned devises, bequests, and legacies, then all the said devises, bequests, and legacies shall be increased or diminished ratably, except the provisions for the said cemetery lot and the devise to Martha Muzzy of the parcel of land of sixty acres in Vacca valley, known as the 'Vaccaville Orchard.'" This paragraph, construed in the light of the whole will, may perhaps be considered as to some extent uncertain and ambiguous. Respondent contends that it simply provides for the possible contingency of the residue going to the orphans' home being greater than one-third of the estate. But, however that may be, it certainly cannot be construed as destroying, or as intending to destroy, paragraph 11. Paragraph 11 is one of "the above-mentioned devises, bequests, and legacies"; and how can a subsequent clause, which expressly refers to and recognizes as existing a previous clause, be held to revoke or destroy the latter, where there are no operative words to that effect, or which express any such intent? Moreover, it is a rule of construction of wills—declared by our Code (section 1322, Civ. Code)—that "a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will"; and, applying this rule to the case at bar, it is plain that the "clear and distinct" provisions of paragraph 11 are not revoked or destroyed by the language of paragraph 12, or by any "inference or argument from other parts of the will."

The foregoing facts make it unnecessary to consider the question whether, if paragraph 12 could be construed as revoking paragraph 11, it would not follow that paragraph 12 itself constituted as residuary legatees the other devisees and legatees whose devises and legacies were to be increased "ratably"; thus leaving appellants in no better position. On this point, however, it may be well to observe that, as said in Morton v. Woodbury, 153 N. Y. 243, 47 N. E. 283: "No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of the estate after payment of debts and legacies shall be taken by a person there designated." And where a testator gives all of his property remaining after the payment of specific gifts, though the fund be estimated in money, the gift of that which thus remains is not specific, but carries everything which has not been effectually disposed of by reason of lapses, or invalid and void devises or legacies. Hulin v. Squires (Sup.) 18 N. Y. Supp. 309; Bland v. Lamb, 2 Jac. & W. 399; Carter v. Taggart, 16 Sim. 423. In the case at bar there is no hostility or contest between the various devisees and legatees. They recognize each other's rights as expressed in the will, and stand together in defending it against the assaults of appellants.

The conclusions above reached are strengthened by the consideration that it was the clear intent of the testator, expressed in the will, that no part of his estate should go to appellants; and this consideration is given great weight in all the decided cases where questions similar to those arising in the case at bar were involved. We do not see how the disputed clauses of the will, which we hold to be good, can be overthrown without wrongfully applying to a charity those strict and technical rules which can be rightfully invoked only as against private trusts. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

127 Cal. 72

WELCH v. SARGENT et al. (STOCKTON SAVINGS & LOAN SOC. et al., Interveners. Sac. 681).

(Supreme Court of California. Nov. 29, 1899.)

CORPORATIONS — UNPAID SUBSCRIPTIONS — STOCKHOLDERS' LIABILITY—PAYMENT—CORPORATE DEBTS—EFFECT.

1. Where stockholders, knowing a corporation to be insolvent, voluntarily, without consideration and out of the ordinary course of business, transferred their unpaid stock to insolvent or irresponsible transferees, such transfers were void, as against corporate creditors, though one of the stockholders transferred his stock without intent to escape liability thereon.

2. A judgment against a stockholder in an action by a corporation to recover unpaid subscriptions is conclusive of the question of such stockholder's liability in a subsequent action by corporate creditors to enforce such liability.

3. Where, in an action by various corporate creditors against a stockholder of an insolvent corporation to recover unpaid subscriptions, the stockholder pleaded a release as to one of them, but the claims of the others amounted to more than the amount of the stockholder's liability, he was not prejudiced by a failure of the court to find on the issues raised by such release, since each creditor was entitled to a several judgment against each stockholder, their liability being several, and not joint.

4. Since Civ. Code, § 322, declaring that, if any stockholder pays his proportion of any corporate debt, he is thereby released from any further personal liability therefor, does not affect the stockholder's liability to the corporation for unpaid subscriptions, a stockholder's payment to a corporate creditor of the amount due on his unpaid subscription, in reduction of the corporation's debt, he knowing it to be insolvent, will not relieve him from liability in an action by other creditors to recover such unpaid subscription, in the absence of evidence of a corporate act authorizing such creditor to make such application of the amount due.

5. Where a creditor of an insolvent corporation obtained collaterals to secure its debt in good faith and in due course of buiness, it cannot be compelled to surrender such securities for the common benefit of all corporate creditors, nor can it share in other assets of the corporation until such securities have been exhausted.

6. Where a stockholder of an insolvent corporation paid a portion of the corporate indebtedness on which he was liable as surety, he was entitled to share the assets of the corporation ratably with other creditors to the extent of the payment so made.

7. A bill to enforce a stockholder's liability for unpaid subscriptions may be filed against a single stockholder or any number of stockholders indebted for unpaid subscriptions, and the fund realized distributed ratably among all the creditors of the corporation.

8. A finding, in an action by creditors against stockholders of an insolvent corporation to recover unpaid subscriptions, that its indebtedness exceeded such unpaid subscriptions, was sufficient, without specifying the amounts due such creditors, and was not inconsistent with a finding that the court could not definitely determine the amount due one of such creditors until securities held by it had been realized.

9. Whether a judgment is sustained by a finding of fact cannot be questioned on appeal from an order denying a new trial.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Charles M. Welch, administrator of the estate of C. E. Welch, deceased, against R. C. Sargent and others, and Stockton Savings & Loan Society and others, interveners, to enforce stockholders' liability for unpaid subscriptions. A decree was rendered in favor of plaintiff, and from an order denying motions for a new trial certain of the defendants appeal. Affirmed.

Ansel Smith and Gus G. Grant, for appellants. Minor & Ashley, for respondent.

CHIPMAN, C. This is an equitable action brought by a creditor of the Stockton Combined Harvester & Agricultural Works, a corporation, and to obtain a judgment against certain stockholders therein to the extent of the unpaid balance due from them on their subscription to the capital stock of said defendant corporation, and to have certain transfers of stock, alleged to have been fraudulently made, declared illegal, the transfers canceled, and that judgment be entered against the transferrors. General relief is also asked. The pleadings are multitudinous, and present many phases, all grouping around the defendant corporation, while all the pleaders seek some sort of relief from it and from each other.

Plaintiff's intestate, on April 28, 1894, became a judgment creditor of the corporation. Plaintiff alleges that at a time when the corporation was insolvent certain defendants, for the purpose of evading liability, transferred, without consideration, to certain other defendants, alleged to be then and now insolvent, specified shares of its capital stock. Defendant Houser pleads certain facts relating to the way he acquired his stock as exempting him from liability thereon; that he obtained his stock as fully paid up and unassessable; and that he had settled with the intervener the Stockton Savings & Loan Society, and had been by it released. Some of the defendants file cross complaints setting up that they are holden as indorsers on a certain note given by the corporation to the intervener the loan society for $60,000, of which $57,000 remain unpaid. These defendants allege that some of the stockholder defendants still owe 25 per cent. on their capital stock, and they seek to have the fund arising from such stock applied to said note. Defendant R. C. Sargent files a cross complaint, much the same as the last above defendants, and in a still further cross complaint avers that he and certain other defendants on March 17, 1892, executed to defendant J. P. Sargent their promissory note for $50,000, upon which the makers obtained that sum of money, and advanced the same to the corporation under an agreement that it would pay the note when due; that it paid all of said note except $16,069.68, for which unpaid balance the holder of the note has sued the makers. This defendant prays that the assets of the corporation may be applied to its indebtedness generally, including this note. Defendant Baldwin also files a cross complaint alleging that the corporation owes him and another attorney a fee, of which his share is $500, and prays that its assets may be applied to its debts, including this claim. The loan society, like plaintiff, has a judgment against the corporation, entered December 28, 1893, upon which, by complaint in intervention, it claims an unpaid balance of $153,034.27, and prays payment be made to the loan society, ratably with other indebtedness of the corporation, out of any sum found coming to the corporation from the stockholders. Plaintiff answers this intervention, and, among other things, alleges that the loan society holds securities given it by the corporation sufficient to pay this judgment, and that this intervener the loan society should not share the other assets of the corporation without delivering up its securities to the common creditors' fund. James A. Louttit, as executor, intervenes, setting up that his testatrix, on February 18, 1885, obtained a judgment against the corporation for $13,966.90, no part of which has been paid. He sets up substantially the facts as pleaded by plaintiff, and asks to have the fund derived from the unpaid stock applied ratably on this judgment. Executions on these several judgments were returned nulla bona. The foregoing will convey a general idea of the issues.

Certain, but not all, of the defendants appeal from the order denying their several motions for a new trial. There is no appeal from the judgment. The court found, as conclusions of law, that there is due from the corporation to plaintiff, the interveners, and certain cross complainants a sum largely in excess of the unpaid balances due on the capital stock of the corporation; that the court cannot fix the amount now due the loan society until the unpaid subscriptions are paid in, and the value of the securities held by the loan society is ascertained, and the securities are collected; that cross complainants R. C. Sargent and Baldwin are entitled to no credits by reason of the matters set forth in their cross complaints and answers; that, as to the equities claimed by certain other defendants and cross complainants, the court cannot entertain or consider them, but will do so when the amount due on the unpaid stock shall have been paid in, and until such payments said equities cannot be ascertained; that the several transfers of stock in the pleadings and findings mentioned, except as to defendant Fred. M. West, are fraudulent and void, and as to West's transfer it is void as against the creditors of the corporation; that judgment should be entered in favor of certain parties against certain named defendants in amounts named, being the amounts due on the unpaid stock of the corporation; that, there being divers persons interested in the fund to arise from said subscriptions to the stock of the corporation, it is necessary that a receiver be appointed to receive all sums paid under the judgments, to be held subject to the order of the court.

It is quite difficult, within any reasonable space, to fairly present the facts and the law upon the various conflicting interests involved. Avoiding unnecessary minutiæ, we will endeavor to dispose of the salient questions. It sufficiently appears from the evidence that the corporation was insolvent when the transfers of stock complained of were made as found by the court, and has been insolvent ever since, and that the transferrors knew the fact; and the evidence also sustains the finding that the transfers were made out of the ordinary course of business, were voluntary and without valuable consideration, and were made to insolvent or irresponsible transferees, and, except as to defendant F. M. West, with intent on the part of the transferrors to escape liability. This finding relates to the following defendants: R. C. Sargent, William Inglis, L. U. Shippee (defendant Tarbox's intestate), C. Grattan, F. M. West, Otis Perrin (defendant Kate M. Perrin's testate), Kate M. Perrin, W. H. McKee, and Frank Burton. The owners of shares when the action was begun, not embraced in the foregoing category, are: Daniel Houser, W. A. Shippee, B. F. Langford, C. H. Fairchilds, George A. McKenzie, F. T. Baldwin, P. B. Fraser, S. S. Littlehale, and George Inglis. There is no finding as to defendant and stockholder T. H. McCall, who owns 80 shares; for the reason that he has not appeared, and is beyond the jurisdiction of the court, being a nonresident. It was found that defendant and stockholder Fairchilds had been discharged of liability by insolvency proceedings. It was found that there remained unpaid on all the shares of the defendants above named a balance of 25 per cent., except on the 10 shares of Littlehale, which were fully paid up; and that the corporation had neglected and refused to levy any further assessments upon the shares owned by these defendants, or to collect the unpaid subscriptions.

Generally speaking, the law places no restriction upon the right of a stockholder of a corporation to transfer his stock, so long as the corporation is solvent. But, as was said by Mr. Justice Temple in National Carriage Mfg. Co. v. Story & Isham Commercial Co., 111 Cal. 531, 44 Pac. 157: "The American doctrine is that after the corporation has become insolvent, and the stockholder knows this, and especially if the corporation has ceased to do business, a shareholder cannot transfer his stock to an insolvent or to an irresponsible person, so as to relieve himself from liability;" and it is added: "I do not find from the cases that it is necessary to find, in addition to the above facts, that there was an actual intent to defraud." See the authorities cited in the opinion; 3 Thomp. Corp. § 3259. The questions presented in the present case relate mostly to the application of settled principles to the claims of the various parties. It becomes necessary, therefore, to consider the separate defenses made. The appellants are defendants Houser, R. C. and J. P. Sargent, McKenzie, William Inglis, W. A. Shippee, Grattan, F. M. West, Kate Perrin for herself and as executrix of Otis Perrin, McKee, Tarbox as administrator of L. U. Shippee's estate, and Langford. Neither the corporation nor the loan society appeals.

As to defendant Houser: When the third and last assessment of 25 per cent. on the stock of the corporation was levied, Houser refused payment, whereupon the corporation brought an action to enforce collection. In his answer he set up, at that time, the facts now pleaded by him in defense to plaintiff's action. It was held here that he was liable on his stock (Agricultural Works v. Houser, 109 Cal. 1, 41 Pac. 809); and, so far as the same facts are now pleaded, that case is conclusive against his present contention. In his answer to the intervention of the loan society, but not elsewhere in the pleadings, he alleges a full and complete settlement with the loan society, and a full accord and satisfaction of any and all claims it holds or held against him by reason of his ownership of said shares of the corporation stock. There was evidence that Houser paid $6,000 in compromise of the suit to collect the third assessment, and the witness testified that he understood the settlement to include all claims the loan society had against Houser, and that it included all judgments and all indebtedness. A receipt is in evidence showing what the $6,000 were paid for, and it refers only to the indebtedness the subject of the then litigation, and nothing in it points to a release from any unpaid balance on the stock which is the subject of the present action. It is very doubtful whether the evidence will justify the inference that the loan society intended to release Houser from its claim to any future liability on his stock as to which 25 per cent. remained unpaid, and the evidence went in upon the understanding that it did not affect the plaintiff. We may assume, however, that the evidence showed a full release as to the bank of every liability. The court found that there was due from Houser on his 400 shares the sum of $10,000, and made no finding as to the release pleaded. Houser now claims that it was error not to find upon the issue as to the release, and that he, in any event, was liable only for his proportion to satisfy the claims of plaintiff and intervener Louttit; and, as the findings show him indebted for the full sum of $10,000, for which judgment was rendered, this would require him to pay the full amount to the loan society if plaintiff and Louttit were paid by others, or if Houser were released by them or either of them. It is further objected that there was no finding as to the amount due the loan society, and that Houser was injured by failure to find this fact. The court found the amount due plaintiff and intervener Louttit. The president of the loan society testified: "It is impossible to name the exact amount now due the bank, as it depended upon our ability to collect the securities we hold." The court found that December 28, 1893, the loan society obtained a judgment against the corporation for $262,126.55; that the bank held divers securities therefor; "that said security, assets, and property the said intervener now has and holds; that the court does not now undertake to determine what is the value of said security, but finds that the said securities and properties so held by said bank are of great value, but the exact amount whereof is to be hereafter ascertained and determined." There was evidence that some payments had been made which left a balance still due the bank on this judgment of $118,806.93. There was evidence tending to show that the bank held judgments, as security, in favòr of the corporation, in what were known as the "Insurance Cases," for $90,000, upon which some small payments had been made; also held notes in favor of the corporation of the possible value of $7,000,—making somewhat less than $97,000 of collaterals, which, if collected, would still leave due on its judgment against the corporation about $21,000. As we understand the evidence, there is due the bank also the unpaid balance on the $60,000 note.

Plaintiff and intervener Louttit were entitled to several judgments against each stockholder, the liability being several, and not joint (Baines v. Babcock, 95 Cal. 590, 27 Pac. 674, and 30 Pac. 776); and their judgments exceed the amount due from Houser. No release from the unpaid balance due the corporation on the Houser stock is pleaded, and the evidence was that it is unpaid, and we have seen that Houser is liable therefor. The issue of a release from the bank is immaterial. Houser cannot be prejudiced at this time by failure to find upon it. If, upon the final hearing, nothing is found to be due from him to the bank, it will receive no part of the $10,000 paid in by him.

As to defendant William Inglis, the court found that there remained unpaid on his 180 shares the sum of $4,500. It appears that he transferred to his brother George 50 shares on December 7, 1892, and 130 shares on June 8, 1893. William was president of the corporation, which, while he was such president, executed its promissory note to the bank for $60,000, dated January 2, 1891, heretofore referred to. This note was indorsed by William Inglis and other stockholders of the corporation. Action was brought on this note by the bank, and it is now pending, for an alleged balance of $57,036.75 and interest. It appears that Inglis executed a joint and several note, with other stockholders, to J. P. Sargent, dated March 17, 1892, for $50,000, to raise money for the corporation, and it was paid to the corporation at the time upon the alleged agreement that it would pay the note. The corporation did pay all but an alleged balance of $16,069.88. Suit was brought by the holder of the note, and judgment was entered therein since this action was commenced. There is no evidence of its payment. On September 30, 1893, some months after he transferred his stock to his son George, William Inglis paid to the bank $4,500, to which at that time the corporation was largely indebted much beyond this sum. This payment was the exact amount due as unpaid subscription on his stock. George Inglis, William's transferee, was secretary of the defendant corporation at the time. He testified that the bank notified him of the payment, and that it was on account of the corporation indebtedness to the bank, and that he understood from his father that it was intended as the unpaid balance due on his shares. In the handwriting of the bookkeeper of the corporation is the following entry in the journal: "Stockton Savings & Loan Society, to capital stock, $4,500.00, for amount paid by William Inglis as full payment on one hundred and eighty shares of stock in the S. C. H. & A. Works, at twenty-five dollars per share." The ledger showed the loan society debited, and the corporation credited, this amount. It was not shown by whose authority these entries were made by the bookkeeper. The bookkeeper was not a witness. There was no corporate action, by resolution or otherwise, authorizing the payment or the entry, or subsequently ratifying the payment. There is in evidence a resolution passed by the bank reciting the receipt of this $4,500 payment, and that Inglis "has offered to pay to this corporation the sum of $25 per share on such stock so held by him, amounting to the sum of $4,500, and for full payment of his proportion as stockholder of said debt [referring to the liability of the corporation to the bank] other than, and exclusive of, a certain note [of said corporation] for $60,000, indorsed by said William Inglis and others, providing, in consideration of said payment, he, the said William Inglis, would be relieved from any further personal liability as such stockholder for such debt other than, and exclusive of, said note," etc. At this time the corporation was insolvent, which fact was known to Inglis and the bank.

The Code provides that "if any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt" (Civ. Code, § 322); and he may thus discharge his statutory liability as a stockholder without waiting to be sued, and payment, if bona fide, would be a bar to an action to collect anything further from the stockholder upon his statutory liability. The liability of the stockholder to the corporation for the unpaid balance of his subscription is a different matter altogether, and is an asset of the corporation,—is payable to the corporation, and no one else. Section 331, Civ. Code, provides: "The directors of any corporation * * * may for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof. * * *" Then follow sections directing when assessments may be levied, the manner of levying and collecting the same, etc. It is in evidence that no assessment had been levied by the corporation to enforce payment of the unpaid balance due on its outstanding shares. There was no authority given to Inglis by any corporate act of the corporation to make any payment to the bank in discharge of his liability to the corporation, without which we do not think he could relieve himself from his liability to it. If one stockholder of a corporation could take upon himself such authority, all could do so, and the directors would lose control of one of its principal sources of revenue. If the corporation were solvent, probably no question would be made by it or by creditors; but where it is insolvent, and a stockholder, knowing the fact, undertakes thus, without authority, to divert the assets of the corporation, we do not think he should be heard to plead such a payment in discharge of the liability. He could not set off his own debt against the corporation or its creditors on account of unpaid capital stock in an action such as this is. 1 Cook, Stock, Stockh. & Corp. Law, § 193. Why should he be permitted to do so indirectly by paying a corporate debt to the bank? We do not think it necessary to decide whether the unpaid balances on the stock constituted a trust fund in the hands of the directors which could not be disposed of by either a stockholder or by the directors for the benefit of any one creditor, but must be held by them in trust for the benefit of all the creditors, the corporation being insolvent. The trial court so held, and the point is much discussed in the briefs. We decide only that Inglis' voluntary payment to the bank was unauthorized by the corporation, and did not discharge him from his liability to the creditors of the corporation in this action.

Where the corporation is insolvent, and the directors neglect or refuse to make a call, courts of equity will disregard the formality of a call, and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors. Id. § 108; Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420. Stockholders may pay to the corporation the amount of their subscription at any time, and thus discharge their liability; but when the corporation is insolvent they cannot take upon themselves the authority of the corporation, and pay the subscription to one creditor to the injury of the other creditors.

Otis Perrin made a payment to the bank at the same time, and under similar circumstances and for the same purpose, as Inglis made his payment. What has been said as to Inglis applies to Perrin.

Certain stockholders defendants set up by cross complaint, as we have heretofore stated, that they are indorsers of the corporation note for $60,000, and that judgment has been rendered against them for an unpaid balance. Defendant R. C. Sargent set up that he and other stockholders are defendants in an action to enforce payment of a note made by them for the benefit of the corporation. Defendant Baldwin pleaded against his liability a claim due him from the corporation. These defendants ask that the unpaid balance due on stock subscriptions be applied ratably in payment of the debts for which they are liable. Intervener the loan society made a similar claim to share ratably with other creditors. As to intervener the loan society, the court held that its claim for the balance still due, after its securities are realized upon, ranks with plaintiff's and Louttit's claims, and must share ratably with them and other creditors. It was also held that the bank is not obliged to surrender its securities for the common benefit of all creditors. We see no error in thus holding. The securities came into the hands of the bank in due course of business, untainted by fraud, and no lack of good faith is alleged or proved. The corporation had a right to prefer the bank (Civ. Code, § 3432); and under Id. § 3433, the creditors, other than the bank, can compel the bank to first exhaust its securities before it can share the other assets of the corporation.

The court, we think, properly held that indorsers of the corporation note for $60,000 stand in the relation of ordinary creditors of the corporation to the extent of any payment made by them, and may share ratably the assets of the corporation. So, also, Baldwin, on making proof of his claim against the corporation. So, also, Inglis and Perrin, who paid some portion of the ordinary debt of the corporation; and, besides, they have some equities arising out of the agreement under which they paid this portion of the corporation debt to be adjusted between them and the bank, as also has Houser.

The finding as to the Sargent note is not questioned in the briefs, and we pass it without comment.

Ordinarily, the bill is brought for the benefit of all the creditors who choose to come in, but the action may be against a single stockholder or any number of them (1 Cook, Stock, Stockh. & Corp. Law, §§ 205, 206); and the fund realized from the suit in equity is distributed ratably among all the creditors (Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; 1 Cook, Stock, Stockh. & Corp. Law, § 193). See, also, Harmon v. Page, 62 Cal. 448; Insurance Co. v. Gulick, 102 Ill. 41; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776; Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

Appellants complain that the court failed to find upon the issue presented as to the $60,000 note of the corporation of which they were indorsers; that the court should have found the amount due intervener the loan society; and that there is no finding of a definite amount due from the defendant corporation greater than the sums due plaintiff and intervener Louttit, in all $17,542.15, while the aggregate of judgments against all the defendant stockholders is $51,200. It is claimed that the judgments against the appealing defendants, in all $20,575, are $3,035 in excess of all the debts found by the court to exist against the corporation. It may be that a court of equity would not order full payment by all stockholders of unpaid subscriptions, where it was clearly unnecessary to do so to meet the claims proved. However this may be, it appears from the evidence that the corporate debt is largely in excess of the unpaid subscriptions, and the court so found. We think this was a sufficient finding of the material ultimate fact upon the issues presented by plaintiff and interveners Louttit and the loan society, and was not inconsistent with the fact found that the court could not definitely determine the exact amount due the bank until the securities held by it were realized upon. There was some evidence of the tentative value of these securities, but not of their actual cash value. By far the largest security was an unpaid judgment against certain insurance companies. The remaining securities were promissory notes and book accounts of uncertain value. We think the court would not have been warranted by the evidence in determining the exact sum due the bank after deducting its securities, but there was sufficient evidence to justify it in finding that the debts of the corporation were largely in excess of the unpaid subscriptions. For the purposes of the decree, which was, in effect, only interlocutory, the findings are sufficiently responsive to the issues.

It is urged that a judgment was erroneously entered against the estate of Otis Perrin, deceased. The judgment was that the administrator pay in due course of administration, and payments were ordered to be made to a receiver, and to be subject to the further order of the court. The claims of plaintiff and intervener Louttit were duly presented to the representative of the estate. Whether the judgment is sustained by the finding cannot be questioned on an appeal from an order denying new trial (Brison v. Brison, 90 Cal. 323, 27 Pac. 186); and the findings, we think, are supported by the evidence. Besides, we think the judgment as entered was proper. It is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(127 Cal. 152)

BROUSE v. LAW, Judge. (Sac. 766.)[1]

(Supreme Court of California. Dec. 12, 1899.)

EXECUTORS AND ADMINISTRATORS—PUBLICATION OF NOTICE TO CREDITORS—RIGHT TO DESIGNATE NEWSPAPER IN FIRST INSTANCE.

Under Code Civ. Proc. § 1490, declaring that "every executor or administrator * * * shall cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to creditors * * *; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting,"—the power of the court to designate in its original order the newspaper in which such notice shall be published exists only when there is no newspaper published in the county.

Beatty, C. J., dissenting.

In bank. Appeal from superior court, Merced county.

Petition by Lillian May Brouse, executrix, against J. K. Law, judge of the superior court of Merced county, for writ of review of an order made by defendant. Order modified.

Jas. F. Peck, for petitioner.

HARRISON, J. After the superior court of Merced county had admitted to probate the last will and testament of Augustine Smith, deceased, and had issued letters testamentary thereon to the petitioner, it made the following order: "It is ordered that notice to the creditors of Augustine Smith, deceased, requiring all persons having claims against said deceased to exhibit them, with the necessary vouchers, to Lillian M. Brouse, executrix of the last will and testament of Augustine Smith, deceased, at her residence or place of business, to be specified in said notice, be given by said executrix by publication in the Merced Express, a newspaper printed and published in Merced county, state of California, once a week for four successive weeks. Done in open court this 9th day of November, 1899. J. K. Law, Judge of the Superior Court of Merced County, State of California." The executrix has petitioned this court for a writ of review of said order upon the ground that the superior court had no jurisdiction to designate the newspaper in which she should publish the notice to the creditors of the deceased, and upon her petition the writ was issued, and return made showing that the above order was made.

Section 1490, Code Civ. Proc., declares as follows: "Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting." The publication of this notice is a function which the statute declares shall be performed by the executor and administrator, and, like any other duty imposed upon that officer, unless some restriction is placed upon him, the manner and mode of its performance is, in the first instance, to be determined by him. The provision that, if there is no newspaper published in the county, the court is to designate the newspaper in which the notice is to be published, implies that the power of the court to designate the newspaper exists only in the case specified. The court does not derive any authority to designate the newspaper from the provision in the section authorizing it to direct additional notice to be given. This "additional notice" may be directed at the same time that the original order is made. Johnston v. Superior Court, 105 Cal. 666, 39 Pac. 36. But the order for such additional notice is distinct from the order directing the executor to cause a notice to be published. The use of the word "also" shows that the direction here authorized is for some notice to be superadded to that directed by the original order, since, under the phrase, "not less than once a week for four weeks," the court could, in its original order, direct that the notice be published with greater frequency, or for a longer period. Upon the application of the executor for a decree declaring that due notice to creditors has been given, the court will examine the character of the publication that has been made, and, if it shall then determine that its character and form have been such as not to give sufficient notice for the presentation of claims against the estate, it will refuse to make such decree. Johnston v. Superior Court, supra. This power does not, however, confer upon it the power to designate in its original order the newspaper in which the notice shall be published. The order of the superior court is therefore modified by annulling and striking therefrom the words "by publication in the

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[1] Rehearing denied January 8, 1900.

Merced Express, a newspaper printed and published in Merced county, state of California."

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.; VAN DYKE, J.

BEATTY, C. J. I dissent. Nothing is involved in this proceeding except the mere question of power to designate the newspaper in which notice to creditors is to be published. It is clear that the statute makes the judge of the probate court, and not the administrator or executor, the final judge as to what is sufficient notice, and I see no reason to hold that what the judge may order after notice by the administrator or executor may not be ordered in advance. Such a construction of the statute would conduce to expedition and economy, and subserve the policy of the law.

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127 Cal. 128

LOS ANGELES COUNTY v. SPENCER et al.
(L. A. 486.)

(Supreme Court of California. Dec. 11, 1899.)

In bank. On petition for rehearing. Denied, and judgment modified.

For former opinion, see 59 Pac. 202.

PER CURIAM. The petition for rehearing in bank is denied, but that part of the opinion which relates to the averment of the appointment of the commissioner by the board of supervisors, and holds the same to be defective, is stricken out. The demurrer is general, and does not raise that point. The judgment heretofore rendered herein is modified by striking therefrom the words, "With directions to the court below to permit the plaintiffs to amend their complaint to accord with the views expressed in the foregoing opinion."

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127 Cal. 128

In re MARRE'S ESTATE. (S. F. 1,899.)

(Supreme Court of California. Dec. 9, 1899.)

REVIEW—BILL OF EXCEPTIONS—ADMINISTRATOR'S ACCOUNT — OBJECTIONS — WAIVER — PRESUMPTION—LIABILITY FOR INTEREST.

1. The statement of facts proved by the evidence as shown by a certified bill of exceptions, not objected to below, will be treated as correct on appeal, though appellant claims that the facts were not established.

2. Where oral objections to an administrator's account were heard without raising the question that they were not in writing, it will be presumed that written objections were waived.

3. That an administrator, after his second account, was derelict, in failing to bring to trial a suit against him on the trial or settlement of which the final settlement of the estate solely depended, from the time of his first account, and delayed a settlement of the suit by a compromise arranged by the heirs at the time of the second account, does not justify charging him with interest from the time of his first account.

Department 2. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of G. B. Marre, deceased. From an order charging the administrator with interest, he appeals. Modified.

Thos. F. Bachelder, for appellant. Timothy J. Lyons, T. C. Judkins, and A. Ruef, for respondents.

PER CURIAM. The administrator appeals from an order charging him with interest, on settlement of his second account, from the date of the settlement of his first account. In his second account, which was filed February 16, 1898, after an order of the court had been made to show cause why he should not make the account, the administrator charged himself with $7,979.79 balance cash on hand from last report. The first account was settled July 28, 1891. In the second account, which is duly verified, the administrator makes a statement explanatory of his failure to close the estate,—that on January 18, 1891, an action was commenced against him, as administrator, in the superior court of the city and county of San Francisco, for an amount in excess of the funds in his hands belonging to the estate, and that the suit was still pending; that it had been several times set for hearing at his request, and at the time of filing the account was set down for hearing February 28, 1898. Some few items of expenditure since the settlement of the first account were allowed, and the account was settled, showing a balance of cash on hand of $7,637.21, and the court charged the administrator with legal interest on this balance from July 28, 1891, amounting to $3,430. When the account came on to be heard on February 28, 1898, the day fixed for the hearing, the attorneys for the heirs at law being present, the hearing was continued to March 14th and again to March 16th, on which last day the attorneys for the heirs made certain oral statements by way of objections to the account and report. They claimed that the administrator should be charged with interest from July 28, 1891, and in support of the claim stated that the first account as settled showed that all the debts and expenses and charges of administration had been fully paid, and that the only necessity for not closing the estate was the pendency of the lawsuit referred to above; that no proper efforts had been made by the administrator to bring the case to trial, which he could have done by due diligence, and that the continued excuse of the administrator of the pendency of said suit showed bad faith, and a desire to avoid the final settlement; that the report failed to show what, if anything, the administrator had done towards the investment of the money held by him, or to give any explanation for the long delay in bringing said action to trial. The bill of exceptions then shows that, upon the foregoing objections being made, the administrator, by his attorney, denied all intentional delay in the trial of said cause, and claimed that he had been making efforts to compromise the action; that the cause was set for trial February 23d, and had not been reached on the calendar; that he was not bound to make further explanation or report, or to do more than charge himself with the balance of the money in his hands, which he had done. The hearing was thereupon placed on the reserved calendar, to be restored for further hearing upon motion of the administrator or any of the heirs represented by their attorneys; and later, upon motion of the heirs, the hearing was fixed for November 23, 1898, and was regularly continued to December 5, 1898, when the account came on to be heard, all parties being represented by attorneys. The bill of exceptions then proceeds as follows: "The heirs, by their aforesaid attorneys, announced that they desired the account to be then and there finally heard, and the administrator's liability to the estate fixed and adjudicated. They thereupon showed to the court, by the records of said estate, and the matters and things which appeared to the court, as per settlement of the first account, and the administration thereof since said time, that upon the settlement of the first account there was no necessity for the further administration of said estate except the fact of the existence of the suit against the administrator aforesaid;" that the said suit had not been brought to trial by the administrator notwithstanding six months had elapsed since the last continuance of the hearing of this account; that during this intervening period the heirs had arranged a compromise of said suit with the plaintiff therein for the sum of $1,000, conditioned upon its immediate payment by the administrator, subject to the approval of the court; that the administrator was urged by the heirs to pay this amount; "that said administrator, in reply to the demands of said heirs, admitted (as he had previously thereto) that he had no money of said estate in his hands with which to pay said compromise sum of one thousand dollars;" that about July 3, 1898, said administrator had prepared a petition, which was in the hands of the heirs, praying the order of the court for authority to pay said sum in compromise of the suit, and that, after signing and verifying the petition, he asked that it be not filed for a few weeks, promising that within that time he would secure the money to compromise said suit; that he then left the state; that the heirs had written him, demanding the settlement of the suit and the settlement of his account, but that he has taken no action touching such matters; that the heirs are still able to compromise the suit for $1,000 if the administrator should be ordered to effect the compromise; that since the heirs made their objections at the hearing, March 16, 1898, the administrator had made no offer to change or modify his position then taken that he was not called upon to do so. The bill of exceptions shows that "the matter was submitted by the administrator and the heirs without further proceedings, no objections being made or suggested by any person."

1. Appellant now claims that the foregoing statements were not established by any evidence, but were nothing but statements made by the attorneys of the heirs at the hearing, and that there was no evidence whatever submitted to establish these statements. The bill of exceptions states that the heirs "showed to the court" by the records and "the matters and things which appeared to the court, as per settlement of the first account, and the administration thereof since said time," the facts which we have summarized. If there was no evidence to support these statements in the form they appeared, it was the duty of the administrator to object to their thus going into the bill. He complains that they were all inserted by way of amendments, and that the court had no right to include this matter, because they were but unsupported statements of counsel at the hearing. This should have been made to appear in the bill of exceptions if such was the fact. On the contrary, the judge certifies to the correctness of the bill as the administrator's bill of exceptions, and the hearing was had on what purports to be a summary of the evidence as now certified to us without objection. Under these circumstances we must treat the bill as correctly setting forth what occurred. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

2. Appellant further contends that the objections to the account cannot be considered because they were not made in writing, citing In re More's Estate, 121 Cal. 635, 54 Pac. 148; section 1635, Code Civ. Proc.,—where it was held that in contesting an administrator's account the contestant must file his exceptions thereto in writing, stating specifically the grounds of his objections, and at the hearing should be held limited to the exceptions so presented. The court laid down this salutary rule, while at the same time stating that it is the duty of the court to carefully examine the account, and reject all unjust or illegal claims, whether or not exceptions are filed. If appellant had objected at the hearing to the method of procedure allowed by the court, and had demanded that the contestants reduce their objections to writing, and file the same, and that the administrator be given time to answer, we do not doubt the court would have required contestants to comply with the rule of practice prescribed in the case cited. But he went into the hearing some time after the oral objections were made in his presence and in the presence of the court, and at no time objected on the ground now urged, and we must presume that he waived written objections.

3. The more serious question is whether the evidence justified the court in charging the administrator with interest from the date of his first account. "Whether, in any instance, the executor is chargeable with even simple interest, must be determined by the trial court from all the circumstances of that

case. It cannot be said, as matter of law, that interest is to be added to the value of the property that has been lost by his neglect." Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558 (at page 173, 92 Cal., and page 562, 28 Pac.). Again, it was there said: "The rule charging him with interest is, however, limited to cases in which it is either shown or presumed that the executor has himself profited by his acts, or has been guilty of such willful misfeasance as to justify the court in requiring compensation therefor." Looking to the bill of exceptions, which purports to bring up all the facts on which the court based its order, we find that at the time the first account was settled—July 28, 1891—the estate consisted entirely of money in the administrator's hands, and that there was pending against him, as such administrator, a suit demanding more than this amount on an alleged trust indebtedness of his intestate; that he had made efforts to bring the cause to trial several times in the interval between the filing of the first and second accounts. The facts submitted by the contestants were that, after the second account was filed, which was February 16, 1898, they made demand that he should urge this pending suit to trial, and that he neglected to do so; that during the period intervening between the filing of the second account and its hearing the heirs had arranged a compromise of the suit upon payment of $1,000, subject to the approval of the court, and the administrator was urged to pay this amount, but failed to do so, and said he had no money of the estate to pay said sum. It appeared, however, that he prepared a petition to the court asking authority to make the compromise, which was withheld, at his request, to give him time to get the money, and thereupon he left the state, and, although written to by the heirs, had failed to take "action touching said matters." There is no evidence tending to dispute the report of the administrator, under oath, that he had made efforts to bring the pending suit to trial, except as to his neglect after he filed his second account. There is no evidence tending to show willful neglect of duty during all the years following his first account commencing at its date. We do not see upon what principle or upon what facts shown he can be charged with interest from the date of his first account. Because he was derelict after he filed his second account, willful neglect and misfeasance cannot be presumed for the entire period of his administration after the first account was filed. It may be that the failure to bring to trial the suit pending against him was due to his fault or connivance in order to retain the use of the money in his hands, and that the delay in the settlement of the estate was due to his misconduct or negligent management of the estate; but, before he should be charged with interest for these earlier years of his administration, there should be some evidence to justify it. It was said in Re Sarment's Estate, 123 Cal. 331, 55 Pac. 1015: "An administrator is not charged with even simple interest upon the funds of the estate which may be in his hands, unless it is made to appear to the court that the estate, or the parties interested in it, have sustained loss by reason of his negligence or fault." There was fault somewhere and in some one for not sooner bringing to trial the suit against the administrator, and thus removing the only impediment to the final settlement of the estate, but we do not think the evidence fixes such fault upon the administrator at the date of his first account, or at any other precise date, so as to charge him with interest from July 28, 1891. There is evidence suggestive of the inability of the administrator to produce the money with which he charges himself. It may be that his conduct, when fully shown, will justify fixing upon him some liability beyond the funds he has received. That the matter may be fully investigated, it is directed that so much of the order as charges interest be reversed, and remanded for further proceedings, and as to the remaining portion of the order it be affirmed.

(6 Cal. Unrep. 363)

BECK v. PASADENA LAKE VINEYARD LAND & WATER CO. et al. (L. A. 596.)

(Supreme Court of California. Dec. 9, 1899.)

IRRIGATION PLANT—WATER RIGHTS OF INDIVIDUAL—DEPRIVATION BY CORPORATION.

Where a landowner is entitled to an undisputed right and easement in and to a certain proportion of water, which an association was entitled to take from a stream to supply its irrigating plant connected with his land, on payment of his proportionate share of the expenses of maintaining the plant, a corporation succeeding to the rights of the association and the rights of other individual owners takes its property subject to his easement, and cannot deprive him thereof, though it improves and extends the system, and changes open ditches to pipe lines.

Department 1. Appeal from superior court, Los Angeles county.

Action by George W. Beck against the Pasadena Lake Vineyard Land & Water Company and another. From a judgment for defendants, and orders denying a new trial and refusing to strike out the cost bill, plaintiff appeals. Reversed.

William H. Fuller, for appellant. A. R. Metcalf and Anderson & Anderson, for respondents.

PER CURIAM. This action was brought to establish by a decree of court that the above-named plaintiff was the owner of a $^1/_{1250}$ part of all the right, title, and interest of the Lake Vineyard Land & Water Association, as the same was originally conveyed to and owned by said association, in and to all the waters of a certain stream in Los Angeles county, known as the "Arroyo Seco," and that plaintiff was entitled to have his said water flow through the pipes of defendants into his own pipes, connected therewith, upon the payment by him of $^1/_{1250}$ of the costs and expenses incurred in tending and keeping in repair the pipes, reservoirs, and water plant of defendants. The plaintiff also asked for a perpetual injunction against defendants to prevent them carrying out their threat to shut the water out of his pipes, and discontinue supplying him with water. The evidence shows without conflict that the Lake Vineyard Land & Water Association was the owner of $^7/_{10}$ of all the waters of the Arroyo Seco, and that by mesne conveyances the plaintiff herein succeeded to $^1/_{1250}$ of said $^7/_{10}$ of said water as appurtenant to a certain 2 $^1/_{20}$ acres of land, and the right to take and use the same from the pipes and reservoirs of said association. It also appears that the said association, prior to 1887, had conveyed to various individuals all its interest in the waters of the said Arroyo Seco, together with a right and easement in and to its system of ditches, reservoirs, and water plant generally, to be used for the purpose of conducting and distributing said water by each of said transferees on the payment by him of his proportion of the expense of maintaining said system; the said association retaining the title, however, in and to the ditches, flumes, reservoirs, and pipes by means of which said waters were put to beneficial use by the grantees of said association and their successors in interest. The corporation defendant known as the Pasadena Lake Vineyard Land & Water Company was formed for the purpose of acquiring and controlling both the water that had originally belonged to the association and the system of ditches, reservoirs, flumes, and pipes above mentioned. The two corporations defendant seem to have been under the same management for a time, and a conveyance was obtained from the association to the new corporation, on the 15th day of February, 1888, of everything that the association had to convey. Nearly four-fifths of the water rights, originally in the association, were also conveyed to the new corporation, in exchange for stock therein, by the individuals owning such water rights. Upwards of one-fifth of the waters conveyed away by the association still remain vested in the individuals to whom they were conveyed. It seems that the plaintiff, among others, has refused to convey his interest in the water, or his rights in the plant or system of ditches, pipes, and reservoirs, to the corporation. The corporation has, however, fixed a uniform rate, which it charges its stockholders as well as those who refused to exchange their rights for stock in the corporation, and by this means the plaintiff finds himself in a worse position than he would be in if he had conveyed all his rights and interests to the corporation, for the stockholders are receiving, in addition to their proportion of the water, dividends, in which he is not allowed to share. The corporation refuses to furnish plaintiff with any statement of his proportion of expenses to be paid under the terms of the deed from the association to plaintiff's predecessor in interest, and threatens to deprive plaintiff of water altogether unless he pays the rates fixed by it as aforesaid. Since the conveyance to it from the association, the new corporation has changed its means of diversion from the open ditch, by which the water was formerly diverted from the arroyo, to a steel pipe, has cemented and lined the reservoirs, and has extended the system of pipes, and otherwise added to, repaired, and improved its water plant generally. The case was tried before the court without a jury. There is no finding as to whether the plaintiff is the owner of the water which he alleges ownership in in his complaint or not. This was a material issue, and plaintiff was entitled to a finding addressed directly to the ownership of the water that he claimed to own; and on the undisputed evidence, briefly stated herein, that finding should have been in plaintiff's favor. Plaintiff was also entitled to a decree that he was the owner of $^1/_{1250}$ of $^7/_{10}$ of the waters of the said arroyo. There was no conflict in the evidence on this question. The court found that plaintiff was not "entitled to the use and flow of said waters so purchased as aforesaid upon paying to the Pasadena Lake Vineyard Land & Water Company his pro rata share or proportion of the costs and expenses in tending and keeping in repair said pipes, flumes, and reservoirs in which said water is stored and conducted to the lands and supplied to plaintiff," and dissolved the temporary injunction theretofore granted, and dismissed the action. We think this action of the court erroneous. The evidence of plaintiff's rights in the water and in the water system was to be found in the deed from the association to the Wilsons. Plaintiff had regularly succeeded to the rights, privileges, and easements granted by that deed, so far as they appertained to the 2 $^1/_{20}$ acres of land claimed by him, and which were included in said deed. We think it beyond any question, and it seems to be admitted in the argument, that the deed to the Wilsons conveyed, not only the water claimed here by plaintiff, but the right and easement in the plant of the association to run the water through it, and have it delivered to them on the land, a part of which now belongs to plaintiff. The easement in these ditches, reservoirs, and pipes was a property right, and the plaintiff succeeded to it by the same instruments through which he deraigns title to his land, and his title in such easements is just as effectual as his title to the land; and when the new corporation received its deed from the association it took the property therein described charged and incumbered with the easement to which it was subjected by the previous deed to the Wilsons. The new corporation could not, by improving or extending its system, or changing the open ditches to pipe lines, acquire title to the water which belonged to others, nor could it thereby deprive others of any beneficial interest or right which they had in the system. We think that on the undisputed facts in the case the plaintiff and appellant was entitled to the perpetual injunction which he sought. On this view of the case it follows that the defendants were not entitled to judgment for costs, and therefore let the costs of the former trial abide the result of a new trial. The judgment and orders denying a new trial and refusing to strike out the cost bill are reversed.

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127 Cal. 137

DENIGAN v. HIBERNIA SAVINGS & LOAN SOC. et al. (FREESE, Intervener. S. F. 1,737).

(Supreme Court of California. Dec. 12, 1899.)

GIFTS—SUFFICIENCY OF EVIDENCE.

Where a wife deposits money, her separate property, in a bank, the account in the pass book being opened in favor of F. D. or E. D., F. D. being her husband, and there is no evidence of the purpose for which the deposit was made other than its form, or of any intent to part with the title to the money, or of a delivery of the pass book to the husband with that intent, the facts are insufficient to constitute a gift.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by James Denigan against the Hibernia Savings & Loan Society. The special administrator of Francis Denigan was, on motion, joined as a party defendant. Thereafter A. C. Freese, as administrator of the estate of Ellen Denigan, intervened. From a judgment in favor of the intervener, plaintiff appeals. Affirmed.

Geo. D. Collins and James Gartland, for appellant. Tobin & Tobin, John O'Gara, and J. D. Sullivan, for respondents.

HARRISON, J. July 6, 1886, Ellen Denigan deposited with the Hibernia Savings & Loan Society the sum of $1,700, and received from the bank a pass book entitled, "No. 133,269. Frank Denigan or Ellen Denigan in Account with the Hibernia Savings & Loan Society." There is no evidence of the form in which the account was opened upon the books of the bank, but it is assumed that it was opened in the same form in which it was entered upon the pass book. February 27, 1888, an additional deposit of $1,300 was made with the bank, and entered upon the pass book. Frank Denigan was the husband of Ellen, and at the times of the above deposits the moneys so deposited were the separate property of Ellen. She died July 3, 1896, and at the time of her death the moneys so deposited, together with $56.25 interest that had accumulated thereon, remained with the bank to the credit of the above account. October 19, 1896, her surviving husband caused $2,413.33 to be transferred upon the books of the bank from this account to a new account, and received from the bank a pass book entitled, "No. 212,145. Francis Denigan or James Denigan in Account with the Hibernia Savings & Loan Society." James Denigan was the nephew of Francis, and the reason assigned for this transfer was so that on the death of Francis the nephew could distribute the amount then in bank to himself and his two sisters. November 28, 1897, Francis gave to one M. D. Connelly the pass book last named, with an order in writing directing the bank to pay to Connelly, out of said deposit, the sum of $1,000, and upon the presentation of this order with the pass book that amount was upon the next day paid to him. Francis Denigan died November 29, 1897, and this payment was not made until after his death. Thereafter James Denigan, the plaintiff herein, presented the pass book to the bank, and demanded the payment of the amount of said account, without any deduction for the amount paid to Connelly, and, upon the refusal of the bank, commenced the present action to recover from it the sum of $2,463. After the death of Francis Denigan, the court appointed a special administrator of his estate, who thereupon notified the bank that he claimed the money held under this deposit, and at the instance of the bank was made a party defendant, and filed an answer setting forth the claim of the estate to the money. Letters of administration upon the estate of Ellen Denigan were issued to A. C. Freese, the public administrator, and he filed a complaint in intervention claiming the money in behalf of his intestate. The cause was tried by the court, and findings of fact made by it to the effect that the money originally deposited by Ellen was her separate estate, and that her husband never acquired any title or interest therein; that the transfer by her husband of said deposit to the account of himself and the appellant herein was without any right or authority; and that said transfer was without any consideration moving from the appellant. The court found that the sum of $1,463.33 of said deposit still remains in the possession of the bank, and that it was the separate property of Ellen, and an asset of her estate, and that the intervener was entitled to recover the same. Judgment was thereupon rendered in favor of the intervener for this amount against the bank, and that neither the plaintiff nor the estate of Francis Denigan had any right to any portion of said money. From this judgment and an order denying a new trial, the plaintiff has appealed.

The plaintiff's right to the money depends entirely upon the title or right which Francis Denigan had thereto. The plaintiff gave no consideration therefor, and can sustain his right to this money only by showing that Francis had acquired a title thereto superior to that of the personal representatives of Ellen. As it was conceded at the trial that at the time the money was deposited by Ellen it was her separate property, it was incumbent upon any one setting up a claim thereto against her personal representative to show that he had in some way acquired her title. There is nothing in the record herein showing any declarations or conversation respecting the purpose of making the deposit in the form in which it was made, or the circumstances under which the deposit was made. Both of the parties to the transaction are dead, and the only fact that is urged in support of the plaintiff's claim that Ellen parted with her title to the money is the form in which the account was opened and in which the pass book was issued by the bank. The claim by the appellant that she thereby made a gift of the money to her husband is untenable. It is not shown that the husband had any possession of the bank book until after the death of his wife, and the authorities which hold that, under certain circumstances, the delivery of a savings-bank book is a constructive or symbolical delivery of the money represented by it, and which are cited by the appellant in support of his claim that there was a gift to the husband, are inapplicable. Possession of a bank book may be a circumstance in determining the ownership of the money represented by it, but is not of itself determinative of that fact, in the absence of any evidence as to how the possession was obtained. Possession is not the equivalent of delivery. There may be possession where there has been no delivery, but there cannot be a valid delivery of a chattel unless it is accompanied by possession, actual or constructive; and, as it was not shown that the bank book was ever delivered by Ellen to her husband, one of the essential elements of a gift is wanting. There is no presumption in favor of a gift (Grey v. Grey, 47 N. Y. 552; White v. Warren, 120 Cal. 322, 49 Pac. 129, and 52 Pac. 723); and in the present case the idea of a gift is inconsistent with the retention by the wife of the right in herself to withdraw the whole of the money from the bank. A valid gift goes into immediate effect, and has no reference to the future. It devests the donor of his title, and requires a renunciation on his part of all claim and interest in the subject of the gift.

The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time as she might need it, and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary purpose. In re Ward, 2 Redf. Sur. 251; Orr v. McGregor, 43 Hun, 528; Shuttleworth v. Winter, 55 N. Y. 624; Marshal v. Crutwell, L. R. 20 Eq. 328; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403; In re Bolin, 136 N. Y. 177, 32 N. E. 626; Flanagan v. Nash, 185 Pa. St. 41, 39 Atl. 818. When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift. De Puy v. Stevens, 37 App. Div. 293, 55 N. Y. Supp. 810; Whalen v. Milholland (Md.) 43 Atl. 45, 44 L. R. A. 208. Upon the evidence before it, the superior court properly held that the title of Ellen to the moneys in the bank had not been devested at the time of her death, and that the administrator of her estate was entitled to judgment against the bank for the recovery of these moneys.

The appellant urges, in further support of his appeal, that the bank was not authorized to make the payment of $1,000 to Connelly, and that the judgment in favor of the bank to that extent is erroneous. As we hold, however, that the appellant has no interest in the moneys that were deposited with the bank by Ellen, he is not in a position to question the correctness of the judgment. The administrator of the estate of Ellen has not appealed from the judgment, and, as between him and the bank, the action of the court is not open to review. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(127 Cal. 142)

DENIGAN v. SAN FRANCISCO SAV. UNION et al. (FREESE, Intervener. S. F. 1,826).

(Supreme Court of California. Dec. 12, 1899.)

GIFTS—DEPOSIT IN BANK—SURVIVORSHIP—JOINT TENANCY.

1. Where a wife deposits money, her separate property, in a bank, the account being opened in the names of the husband and wife, "payable to either," that fact alone does not import a gift to the husband; there being no evidence tending to show a purpose or intention on the wife's part to pass the title.

2. A deposit in a bank, made by the wife, of money which is her separate property, in the names of the husband and wife, "payable to either," does not give the husband such a joint interest in the deposit as to enable him, as survivor, to maintain a claim thereto against the wife's administrator.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by James Denigan against the San Francisco Savings Union. The administrator of the estate of Frank Denigan was substituted as defendant, and A. C. Freese, as administrator of the estate of Ellen Denigan, intervened. Judgment for intervener. From an order granting a new trial, intervener appeals. Reversed.

J. D. Sullivan and John O'Gara, for appellant. Geo. D. Collins and James Gartlan, for respondents.

HARRISON, J. The questions presented upon this appeal are similar to those involved in the case of Denigan v. Society (S. F. 1,737, just decided) 59 Pac. 389. Ellen Denigan died July 3, 1896, and at the time of her death there was on deposit in the San Francisco Savings Union certain money standing upon the books of the bank in the names of herself and her husband, Frank Denigan, payable to the order of either of them. It was admitted at the trial that this account originated in a single deposit of $3,000, made by her in this form February 27, 1888, and that at the time of the deposit it was her separate property. October 19, 1896, Frank Denigan caused the sum of $1,400 to be transferred upon the books of the bank from this account to a new account entitled, "Frank Denigan or James Denigan," with directions to the bank from both Frank and James to pay to the individual order of either. Frank Denigan died in December, 1897, and after his death the plaintiff brought the present action to recover from the bank the amount of the deposit. Under an order of the court, the administrator of the estate of Frank Denigan was substituted as defendant in place of the bank, and the bank was permitted to pay into court the amount of the deposit, and was thereupon discharged from liability therefor. The administrator of the estate of Ellen Denigan filed a complaint in intervention claiming the deposit as a part of her estate. The cause was tried by the court, and findings made to the effect that the money was the separate property of Ellen, and that her husband never had any interest therein other than as agent to withdraw the same for her and for her benefit; that the withdrawal by him of the $1,400, and the opening of the new account with the bank therefor, was without right; that the plaintiff herein paid no consideration for said transfer and had no right to said money. Judgment was accordingly rendered in favor of the intervener for the amount that had been paid into court. Subsequently the court set aside its decision, and granted a new trial. From this order the intervener has appealed.

The record does not show upon what grounds a new trial was asked, or upon which the court set aside its decision, and no error of law is assigned in the bill of exceptions, but it is stated therein that the evidence is insufficient in certain particulars to justify the decision. The particular in which it is suggested upon the appeal that the decision is not sustained by the evidence is that in its decision the court found that at the death of Ellen, and for a long time prior thereto, the deposit stood on the books of the bank "payable to either Ellen Denigan or Frank Denigan," whereas it appears from the evidence that the deposit stood upon the books "in the names of Frank Denigan and Ellen Denigan, his wife, and payable to the order of either of them." Although the finding upon this point is not as extensive as the evidence, it cannot be said that so far as it is made it is not sustained by the evidence. It is, however, stated in the brief for the appellant that the decision was set aside by reason of the fact that the deposit made by Ellen in the names of herself and her husband, payable to either, indicated an intention to give to him one-half of the deposit. The respondent, moreover, contends that by this form of the deposit a joint interest therein was created in favor of both, and that by virtue of the husband's survivorship he became vested with a right to the entire deposit.

What has been said in the opinion in Denigan v. Society, in reference to the proposition that by the deposit Ellen made a gift to her husband is applicable here. As therein shown, there is nothing, aside from the form in which the deposit account was opened, to show any intention on her part to part with her interest in the money, or to establish any of the elements of a completed gift. The only difference between the forms of the deposits in the two cases is that in the present case the account was opened in the name of "Francis and Ellen Denigan, payable to either," whereas in the other case the account and pass book were entitled, "Frank Denigan or Ellen Denigan in account with the Hibernia Savings & Loan Society." This difference in the form of the deposit or of the account does not, however, change the rule governing the rights of the parties to the money deposited. At the time of the deposit in each case the money was the separate property of Ellen, and, in the absence of any evidence tending to show a purpose or intention on her part to part with the title, it remained her separate property at the time of her death, notwithstanding its deposit in this form. The burden was upon the plaintiff to show that it had ceased to be her separate property, and in the absence of any evidence tending thereto, his claim must be denied. In Taylor v. Henry, 48 Md. 550, the deposit stood upon the books of the bank, "Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either." The money was the property of Joseph Henry at the time it was deposited, and upon his death his sister Margaret claimed it by virtue of this form of the account. The court held that she was not entitled to it, saying: "The whole question depends upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank book and all the circumstances surrounding the deceased at the time;" and, after holding that the words, "and the survivor of them," did not import a gift, said: "Here the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus retained the power to draw out the money, the deceased did not devest himself of dominion and control over the fund. He could have drawn out every dollar after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the supposed gift of the brother; and the only evidence relied on to support the factum of the supposed gift is the form of the entry in the bank book. But, as will be observed, there are no terms in the entry that import of themselves an actual present donation by the brother to the sister, and the dominion retained by the brother over the fund enabled him to displace and utterly destroy all power conferred upon the sister in respect to the fund." The same principle was afterwards maintained in Gorman v. Gorman, 87 Md. 338, 39 Atl. 1038. In Schick v. Grote, 42 N. J. Eq. 352, 7 Atl. 852, a deposit had been made in the following form: "Bank for Savings in account with August Grote and wife, Edvina, or either." The money was the property of Mr. Grote, and after his death it was claimed in a suit for the same by his wife, that by depositing it in this form he had made her a gift of it. The court held otherwise, saying: "The form of the account in which the deposit was made is not evidence of gift to the wife." In Noyes v. Institution, 164 Mass. 583, 42 N. E. 103, it was held that a deposit by Annie M. Pike, under an account headed, "Annie M. Pike and Mary L. Hewett, payable to either or the survivor," remained the property of the original depositor, and that after her death her executors were entitled to the same. The cases cited by the respondent do not contravene the rule held in the above cases. In Mack v. Bank, 50 Hun, 477, 3 N. Y. Supp. 441, cited by him, there was testimony before the court tending to show that after the deposit had been made the depositor came to the bank with his mother, and had the account changed to their joint names, and afterwards made a gift of the deposit to her. In Bank v. Murphy, 82 Md. 315, 33 Atl. 640, the only question presented for determination was the liability of the bank upon its contract. At the time the deposit was made there was written at the head of the account in the bank book, at the request of the depositor, an agreement that at the death of either the balance should belong to the survivor. After his death the bank paid the balance to the other. In an action by his executors against the bank to recover the deposit, judgment was given in favor of the bank upon the ground that in making the payment to the survivor the bank had merely carried out its contract, and could not be required to pay the same again.

The respondent's claim that Francis became vested with Ellen's title to the deposit by virtue of his survivorship is equally untenable. Title by survivorship exists only when the estate is held in joint ownership, and, unless the deposit was owned by Francis in the lifetime of Ellen jointly with her, there was no joint interest therein to which the incident of survivorship could attach. We have seen that she did not part with her title to the deposit by reason of the form in which it was made, and, as the title of Francis depends entirely thereon, it is evident that he had no joint interest with her in the moneys so deposited. Joint interests or estates are such as are acquired at the same time and by the same title. Section 683, Civ. Code, declares: "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." The proposition of the respondent that this section applies only to real estate is without support. There is no limitation of this character in the section, and, as it is found in the title headed "Ownership" and the chapter thereof which treats of "Interests in Property," irrespective of its character, it must be held applicable to all kinds of property. The money deposited by Ellen was up to that time her separate property, and it cannot be said that she then acquired any interest therein; and, if it could be assumed that by reason of the form in which the deposit was made Francis acquired any interest therein, it was acquired at a different time and by a different title from that of Ellen. There was no declaration that the money should be held in joint tenancy, and the words, "payable to either," placed in the account, take away the claim of a joint interest. In Gorman v. Gorman, supra, the entry of the deposit made in the book was "Theresa McConnell and her niece, Maggie S. Gorman, joint owners, payable to the order of either or the survivor." The money was the individual property of Theresa, and the account was changed upon the books of the bank into this form at her request, and the entry was signed by her and Miss Gorman. The court held that, although the words "joint owners" were employed, the deposit did not become the joint property of both. In Taylor v. Henry, supra, the court refused to sustain the claim of the sister by virtue of her survivorship, upon the ground that the gift was not perfect and irrevocable during the life of the donor. The same rule was observed in Milholland v. Whalen (Md.) 43 Atl. 43, 44 L. R. A. 205.

The respondent further urges that upon the deposit in the bank the money became the property of the bank, and that by virtue of the transaction then effected a chose in action resulted wherein a joint liability was created on the part of the bank in favor of Ellen and her husband, which, upon the death of Ellen, survived to the husband, and in support of this proposition cites section 1431, Civ. Code, which provides that a right created in favor of several persons is presumed to be joint and not several, and that this presumption can be overcome only by express words to the contrary. This provision has reference, however, merely to the relation between the parties in whose favor the right is created and the party against whom it is created. It is correlative to the obligation incurred by the party against whom the right exists, but does not purport to determine the interest of the parties in whose favor the right exists as between themselves. As Ellen did not devest herself of her property in the money by the form in which she made the deposit, she retained the same interest in this property represented by the chose in action or right resulting from the obligation thereby assumed by the bank. Her husband acquired no right to the money which he might obtain upon this chose in action as against her. While the bank would have been authorized to pay all or any portion of it to him in her lifetime, he could have been compelled to account to her for what he might thus receive; and, in an action against the bank wherein the claim of each is presented for adjudication, the court is authorized to render a judgment according to their respective rights. The right of action on a bond held by two joint obligees, or on a promise for the payment of money to two joint promisees, vests in the death of one in the survivor (1 Pars. Cont. 31), but the right of the deceased obligee or promisee is not extinguished by his death. The survivor will hold the security and the proceeds as trustee to the extent of the interest of the deceased joint obligee or promisee in the debt or fund, and, if the survivor had no interest in the fund, he will hold the whole thereof for the benefit of the estate of the deceased. Mulcahy v. Bank, 89 N. Y. 435. Mr. Freeman, in his treatise on Co-Tenancy and Partition, says (in section 16): "The loan of money, for which a mortgage is given, is not regarded as a transaction which would ordinarily raise the presumption that the parties thereby intended to create a joint ownership in the thing lent, with the benefit of survivorship." In Blake v. Sanborn, 8 Gray, 154, an action to foreclose a mortgage given to four persons to secure a note payable to them was held to be properly maintained by the survivors, but the court said: "If the conditional judgment is discharged by payment, they will, of course, be answerable over to the administrator of the deceased mortgagee for one-fourth of the note; if the mortgage is foreclosed, they will hold the land in trust for all concerned in the mortgage." See, also, Burnett v. Pratt, 22 Pick. 556; Story, Eq. Jur. § 1206; Bliss, Code Pl. (3d Ed.) § 62. Counsel for respondent cites in support of his claim Sanford v. Sanford, 45 N. Y. 723, where the husband loaned certain money and received therefor a promissory note payable to himself and his wife, and in which it is said in the opinion: "Taking this note in the name of himself and wife shows that the husband intended thereby to give it to her in case she survived him, and a delivery to her was unnecessary to perfect the gift." But we are compelled to coincide with Judge Redfield, who, in commenting upon this in Re Ward, 2 Redf. Sur. 251, said that this language "seems to run directly counter to all settled notions of the law in respect to such gifts, and seems not to have been fortified by the learned judge who delivered that opinion by any authority." The language above quoted is to be regarded rather as dictum than as authority, since, after stating that the note belonged to the wife as the survivor, it held, for other reasons, that the maker owed it to the estate of the husband, and not to the wife, and reversed a judgment in her favor, upon the ground that she was not the real party in interest. We hold, therefore, that Francis Denigan had no interest in the deposit during the lifetime of his wife, and did not upon her death become vested with any interest therein as against the claim of her administrator, and that, as the evidence incorporated in the bill of exceptions would not have authorized a judgment in favor of the plaintiff, the court erred in setting aside its decision. The order granting a new trial is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

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127 Cal. 134

MERCED BANK v. IVETT. (Sac. 600.)

(Supreme Court of California. Dec. 11, 1899.)

BANKS AND BANKING—LIQUIDATION—PREFERRING CREDITORS—CORPORATIONS.

1. The fact that the board of directors of a bank had resolved to go into liquidation does not render invalid an agreement afterwards made by which it preferred a certain creditor.

2. Civ. Code, § 3432, providing that a "debtor" may prefer creditors, includes corporations as well as partnerships and individuals.

Department 1. Appeal from superior court, Merced county.

Action by the Merced Bank against Sophie A. Ivett to recover collateral securities. From a judgment for plaintiff, defendant appeals. Reversed.

P. J. Hazen, for appellant. J. W. Knox, for respondent.

GAROUTTE, J. Merced Bank, a corporation, passed resolutions resolving to go into liquidation. At this time the Bank of British Columbia was its creditor, holding collateral in the form of promissory notes as security for the debt. One Ivett was also a creditor of the Merced Bank to the extent of about $20,000. The Bank of British Columbia was threatening to realize upon its collaterals, whereupon the Merced Bank entered into a contract with Ivett whereby he was to pay off the claim of this bank, take up these collaterals, and hold them as security for the money advanced, and also as security for his claim of $20,000. This contract was carried out. At this time it may be conceded the Merced Bank was insolvent. Some eight months after this transaction the Merced Bank was thrown into liquidation under the banking act of this state by a decree of court, and thereafter it brought this action against this defendant as successor in interest of Ivett, in claim and delivery, to recover the possession of these collaterals, having first paid her the amount theretofore advanced to the Bank of British Columbia. To sustain its claim, plaintiff relies upon the proposition that it was insolvent at the time the contract was entered into with Ivett, and therefore had no right to prefer him as a creditor. There are various questions discussed by counsel incidental to the main one, but we pass them by without consideration.

We attach no importance to the fact that this bank had resolved to go into liquidation. This was a purely voluntary action upon its part, and in no way changed the relative status of itself and its creditors. The board of directors that resolved the bank into liquidation at the next regular meeting had the same power to resolve it out of liquidation. Indeed, it is not an unusual practice for solvent banks to resolve themselves into liquidation. This court held in the very recent case of Lanz v. Bank (Cal.) 58 Pac. 63, that a voluntary liquidation upon the part of a bank does not change its status as to creditors, and that the doors of the courts still remain open for them to secure their rights in the usual and ordinary channels. It has been held in this state in Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439, that the directors of a banking corporation may not prefer themselves as creditors, but the question as to the preference of one ordinary, common creditor over another has never been decided. Indeed, it is apparent, at a glance, that the position occupied by directors of an insolvent corporation, when creditors, is widely variant from that occupied by the ordinary creditor.

There is a wide conflict of authority upon the question as to whether or not insolvent corporations may prefer one creditor above another; and this conflict of authority largely presents itself between the text writers upon the one side, and judicial decisions upon the other. As opposed to the doctrine of preference, we find Tayl. Priv. Corp. §§ 668–759; Mor. Priv. Corp. § 803; Wait, Insolv. Corp. § 162; and Thomp. Corp. § 6492 et seq. As opposed to the views of these text writers, we find the following statement made in that excellent work, the American & English Encyclopedia of Law (volume 7, p. 742): "In most jurisdictions, however, this doctrine is repudiated, and it is held that in the absence of charter or statutory restrictions, and in the absence of actual fraud, every corporation, though insolvent, and though it has ceased or determined to cease doing business, may prefer certain creditors over others, whenever a natural person can do so." Then follows a citation of cases supporting the text of the author, taken from 26 different states. This long list of authorities may be supplemented by the very recent case of Grand De Tour Plow Co. v. Rude Bros. Mfg. Co. (Kan. Sup.) 55 Pac. 848, where the subject is ably treated. The same general doctrine is also indorsed by the supreme court of the United States in the late case of Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. We also find that at the present time the states of Michigan, New York, and a few others have express statutory provisions prohibiting corporations from preferring creditors. This legislation seems fairly to indicate that the law in those states was deemed otherwise prior to the enactment of such statutes.

It would seem that in this state we are not directly concerned as to the general principles of law governing cases of the class here presented. Beyond question, the whole matter is one under legislative control, and the legislature of this state, recognizing that fact, has dealt with it accordingly. Section 3432 of the Civil Code provides: "A debtor may pay one of the creditors in preference to another, or may give to one creditor security for the payment of his demand in preference to another." The term "debtor" is a broad one, and must include corporations likewise with individuals and partnerships. We know of no principle of construction which would justify this court in holding that the word "debtor," as here used, does not include corporations. Upon the contrary, we are satisfied there is none. The conclusion is irresistible that this statute gives corporations, equally with individuals, the right to prefer one creditor above another. If the policy of such a law is unsound, the remedy is with the state legislature. For the foregoing reasons, the order denying a new trial is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J

127 Cal. 122

KRAMM v. BOGUE et al. (Sac. 676.)

(Supreme Court of California. Dec. 8, 1899.)

SCHOOLS—RIGHT TO PRIVILEGES—PLEADING—REGISTRATION—ANNEXATION OF SCHOOL DISTRICT—EXTINGUISHMENT OF OLD DISTRICT—DEMURRER.

1. In an action by a father against the board of education of a city, a complaint alleging that plaintiff is a resident of the city school district, and that defendants had refused to permit the son to attend the schools of such city, is not defective in not alleging that the son has been prevented from attending a public school, as, if they are residents of the city school district, the child had a legal right to attend the schools in that district, and it will not be presumed that by some special arrangement he was permitted to attend a public school in a district in which he did not reside.

2. In an action by a father against the board of education of a city, which had denied plaintiff's son the privileges of the public schools of the city, where it is alleged that the father is a resident of the city school district, the child is prima facie entitled to the privileges of the school, and any reason which would justify the board in refusing the child such privileges is a matter of defense, and need not be negatived in the complaint.

3. Under Pol. Code, § 1683, providing that pupils must be admitted to the schools in the order in which they are registered; and section 1617, subd. 14, which makes it the duty of the board of education to keep a register, open to the inspection of the public, of all children applying for admission, and entitled to be admitted, into the public schools, and to receive such children in the order in which they are registered,—the teacher must receive the pupils registered by the board of education in the order in which they are registered, and not in the order of the applications to the teacher.

4. Pol. Code, § 1576, provides that whenever a city shall be incorporated the board of supervisors of the county may annex thereto, for school purposes only, the remainder, or any part of the remainder, of the district or districts from

which such city or incorporated town was organized, whenever a majority of the heads of families residing therein shall petition for such annexation. A city was reincorporated, and added to its territory a part of the territory of an adjoining school district. Subsequently the board of supervisors of the county, by an order made pursuant to a petition signed by a majority of the heads of families in the district, annexed the part of the school district not included in the city by the reincorporation to the city for school purposes only. *Held* that, as section 1576 applies to cities already incorporated, a resident of the part of the old district not included in the city territory, but annexed thereto for school purposes, is entitled to the privileges of the city's schools.

5. Such annexation for school purposes of the territory not already incorporated as a part of the city operated to extinguish the old school district.

6. In an action by a resident of the part of a school district which had been annexed to a city for school purposes against the board of education of a city, which had denied plaintiff's son the privileges of the city schools, an allegation that he is a resident of the N. district (that being the name of the old district) will be construed as an allegation that he is a resident of the territory formerly composing N. district, where another paragraph of the complaint alleged that said N. school district, ever since the date of annexation, has been, and is now, a part of the city school district.

7. Ambiguity in a pleading cannot be taken advantage of by a general demurrer.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county.

Action by Philip Kramm against A. R. Bogue and others, constituting the board of education of the city of Stockton, to have it adjudged that plaintiff's son is entitled to the privileges and benefits of the public schools of said city. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Nichol, Orr & Mutter, for appellant. E. R. Thompson and J. G. Swinnerton, for respondents.

HAYNES, C. The defendants constitute the board of education of the city of Stockton, and this action was brought to have it adjudged that plaintiff's son, Frederick W. Kramm, aged 11 years, is entitled to the privileges and benefits of the public schools of said city, and to require the defendants to admit him thereto. Defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff electing to stand upon his complaint, judgment was entered against him, and from that judgment he appeals.

An outline of the facts shown by the complaint may be briefly stated as follows: Prior to the reincorporation of the city of Stockton, in 1870, there was a school district, adjacent to the city, known as "North School District." By the act of reincorporation, a portion of said district was added to, and became part of, the city; the added territory including certain real estate, the property of said North school district. In 1872 an act was passed "to provide for the settlement of the value of school property in the several school districts that were adjacent to the city of Stockton, and which was, by act of the legislature approved January 26, 1870, included within the limits of said city." St. 1871–72, p. 530. In March, 1882, the trustees of said North school district conveyed to the board of education of the city of Stockton its school property, described as the south half of block 147, in said city, "in consideration that the residents of all that territory known as 'North School District,' in said county, shall forever have all the rights and privileges of the public schools of the city of Stockton," said property to be held in trust for the use of the public schools of said city. In said conveyance, said North school district further agreed that all the school money thereafter apportioned to said North school district should be paid to said board of education. The property so conveyed is alleged to have been then of the value of $10,000, and now of the value of $30,000; that the school funds apportioned to said district have been ever since paid to the board of education; that on said land so conveyed there was at that time a school house in which was conducted the public school of said district, and from that time, until the exclusion of plaintiff's son, the children of the residents of said North district enjoyed the privileges and benefits of the city schools. The plaintiff further alleged that on April 5, 1897, a petition was duly made and presented to the board of supervisors of the county of San Joaquin, praying that all that part of said North district which was not included in the corporate limits of the city of Stockton be annexed to said city for school purposes only; that said petition was signed by a majority of the heads of families residing in said portion sought to be annexed, and that said board of supervisors, at a regular session held on said 5th day of April, 1897, by an order duly adopted, made, and passed, did annex to said city, for school purposes only, all of said remainder of said North district, and that the same ever since has been, and is now, part of the school district of the city of Stockton; that on October 24, 1898, plaintiff applied to said defendants for the admission of his said son to the schools of said city, and that his said application was refused, for the alleged reason, and none other, that this plaintiff and his said child did not reside within the corporate limits of the city of Stockton; and that his said child has ever since been excluded from said schools, wrongfully and unlawfully, for the reason aforesaid, and not otherwise.

Respondent contends that it does not appear that plaintiff's child has been deprived of any school privileges, in that it does not appear "that he has been prevented from attending a public school." If, as alleged, the plaintiff and his son reside in Stockton school district, plaintiff had a legal right to have his child attend the schools in that district, and it will not be presumed that by some special arrangement he was permitted to attend a school in a district in which he did not reside. Besides, the refusal of defendants to admit him to the Stockton schools was not based upon any such reason, but was based upon the ground that he was not a resident of the city of Stockton; but if, being a resident of Stockton district, any reason existed which justified the refusal to admit him, it was a matter of defense, not proper to be anticipated in the complaint.

It is also contended that no proper application to be admitted is shown by the complaint to have been made; that the application must be made to the teacher of the school; that the scholar must be registered, and admitted in the order in which applications are made. Pol. Code, § 1683, is cited to this point. That section only provides that "pupils must be admitted to the schools in the order in which they are registered." It does not provide that the application shall be made to the teacher; but the Political Code defines the powers and duties of trustees of school districts and of boards of education in cities, and makes it their duty "to keep a register, open to the inspection of the public, of all children applying for admission and entitled to be admitted into the public schools, and to notify the parents or guardians of such children when vacancies occur, and receive such children into the school in the order in which they are registered." Id. § 1617, subd. 14. It is the pupils thus registered by the board of education which the teacher must receive "in the order in which they are registered."

It is not necessary now to consider or decide whether the contract of March 27, 1882, contained in the conveyance made by the trustees of North school district to the board of education, was within the power of said trustees and board, either under the general statute or under the act of 1872. If the action of the board of supervisors in adding the remainder of said North district to the city for school purposes was authorized and regular, the plaintiff was entitled to the relief prayed for, whether the same right existed under said contract or not; but if it be assumed that said contract was invalid, and conferred no legal right upon the inhabitants of that portion of the original district which is now outside of the corporate limits of the city to send their children to the city schools, it nevertheless furnished a strong equitable ground for the action of the board of supervisors in annexing it to the city for school purposes. That, however, is not sufficient to sustain their action, if such annexation is not authorized by law. Section 1576 of the Political Code, so far as material here, is as follows: "Every city or incorporated town, unless subdivided by the legislative authority thereof, shall constitute a separate school district, which shall be governed by the board of education or board of school trustees of such city or incorporated town; provided, that whenever a city or town shall be incorporated the board of supervisors of the county may annex thereto, for school purposes only, the remainder, or any part of the remainder, of the district or districts from which such city or incorporated town was organized whenever a majority of the heads of families residing therein, as shown by the last preceding school census, shall petition for such annexation. * * *" Respondent contends that "this section does not, in terms, apply to cities already incorporated." This construction is too narrow. North school district was wholly outside of the incorporated city of Stockton until said city was reincorporated, with enlarged boundaries, which included a part of said district. As to the added territory, it was a new corporation then first formed. It is obvious that a division of a school district, by adding a portion of it to an adjacent municipality, produces precisely the same conditions which would be created by the incorporation of a new city or town, which divided the same district in the same manner. The conditions being the same in each case, the remedy is appropriate. This provision of the Code, as well as all others, "are to be liberally construed, with a view to effect its objects and to promote justice." Civ. Code, § 4. "The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used." Suth. St. Const., § 348. The case of School Dist. v. Linscott, 99 Cal. 25, 33 Pac. 781, cited by respondent, has no application here. It involved no question as to the power of the board of supervisors to annex territory for school purposes. This action of the board of supervisors was not a change of boundaries of school districts, under section 1577, Pol. Code, as suggested, and the provisions of the Code relating thereto do not apply.

It is also said that the trustees of North school district are not alleged to have consented to the application of plaintiff's son to attend the schools of Stockton school district. All that remained of North district having been annexed to the city for school purposes, there was thereafter no North district nor any trustees of it. Under the allegations of the complaint, the plaintiff, when he made the demand that his son be admitted to the Stockton school, was a resident of Stockton school district. It is true, as said by respondent, that in the second paragraph of the complaint it is said that the son, Frederick, during said time and is now residing in North school district. The evident meaning is that he was and is now residing in what was North school district. Afterwards, in the tenth paragraph, after alleging the said action by the board of supervisors, it is alleged that "all of said remainder of said North school district ever since has been and is now a part of the said school district of the city of Stockton." No one, we think, could be misled by said allegations, or misunderstand the plaintiff's case. Such faults in pleading are not reached by a general demurrer. I advise that the judgment appealed from be reversed, with directions to the court below to overrule the demurrer to the complaint.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to overrule the demurrer to the complaint.

127 Cal. 155

STEVENS v. TRUMAN, Treasurer.

(S. F. 1,973.)

(Supreme Court of California. Dec. 13, 1899.)

MANDAMUS—COMPLAINT — MUNICIPAL CORPORATIONS—CLAIMS—STATUTES—CONSTITUTIONAL LAW—REPEAL.

1. The failure to allege, in a complaint for a peremptory mandate to a city treasurer requiring defendant to pay a certain order, that there was money in the treasury out of which to pay the order, or that defendant was able to comply with the writ, is not reversible error, where, at the trial, defendant admitted there were funds in the treasury to the credit of the general fund greatly in excess of plaintiff's claim, and the case was tried upon the theory that the condition of the various funds was at issue, and no objections to the findings touching the amounts to the credit of those funds were urged.

2. It is not necessary to the payment of a claim against the city and county of San Francisco that it be presented to and audited by its auditor.

3. It is not necessary to the validity of an order on the treasurer of the city and county of San Francisco, given by its superior court to the phonographic reporter of such court for his services, that it should have designated the fund out of which to make payment, since Code Civ. Proc. § 274, directs payment in such cases to be made "out of the treasury of the county in which the case is tried, upon the order of the court."

4. Code Civ. Proc. § 274, which provides that when, in criminal cases, the testimony has been taken down and transcribed upon the order of the court, the fees of the reporter shall be certified by the court, and upon its order paid out of the treasury of the county, or city and county, in which the case is tried, does not contravene article 3, § 1, of the constitution, in that it confers legislative power upon the judicial department of the government.

5. Act March 21, 1885 (St. 1885, p. 218), which attempts to amend Code Civ. Proc. § 274, by undertaking to make the phonographic reporter a salaried officer of the court, and to give the judge of the court the power to fix his monthly salary, is unconstitutional, in that it delegates to the judge the legislative power to fix a monthly salary for future services to be rendered.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Application for writ of mandamus by Joseph P. Stevens against I. J. Truman, as treasurer of the city and county of San Francisco. From a judgment granting such writ, defendant appeals. Affirmed.

I. J. Truman and J. H. Dickinson, for appellant. Geo. D. Collins, for respondent.

CHIPMAN, C. Appeal from a judgment for a peremptory writ of mandate ordering appellant to pay to plaintiff $117 for services as the regular phonographic reporter in department 12 of the superior court in and for the city and county of San Francisco. Plaintiff was duly appointed the phonographic reporter of the above-named court. He performed services as such, under order of the court, in certain felony cases, and transcribed the testimony, the value of which services was found to be the above amount. Thereafter, to wit, on April 8, 1899, he served upon defendant an order of the court, duly given and made, accompanied by a certificate of said services and their value, directing defendant to pay the said amount, which defendant refused to do. The matter was heard before Judge Carroll Cook, who gave judgment for plaintiff, and ordered the writ to issue, commanding defendant to pay plaintiff the amount claimed "out of the treasury of the said city and county of San Francisco." Appellant attacks the judgment upon the following grounds: (1) By demurrer, for insufficiency of the complaint; (2) section 274, Code Civ. Proc., as passed in 1880, is unconstitutional; (3) the order appointing plaintiff as the regular official reporter of the court is void, as the power to appoint was taken away from the court by the act of March 21, 1885 (St. 1885, p. 218), amending said section 274; (4) the order of April 8, 1899, was not audited by the auditor of the city and county; (5) the order did not designate the fund out of which payment should be made; (6) there was no money in the treasury, because the fund out of which payment could be made was exhausted.

1. The point upon demurrer is that the petition does not state that there was money to pay the order, or that the treasurer had the ability to comply with the writ; citing Redding v. Bell, 4 Cal. 333. There was no duty put upon appellant, as treasurer, to pay the order, unless he had funds in his control applicable to that purpose; and whether he had the ability to comply with the order ought to have been shown. The rules of pleading in seeking the extraordinary aid of a mandamus require the petitioner to show a clear prima facie case to warrant the alternative writ. There should be sufficient facts stated in the petition to show that the defendant is under legal obligation or duty to perform the required act. High, Extr. Rem. §§ 449, 450; Wood, Mand. p. 18; Redding v. Bell, supra. The complaint failed to allege that there was any fund out of which plaintiff could be paid, and, was, therefore, insufficient. The defendant, however, alleged, in his answer, that there were no funds in the treasury out of which he could pay plaintiff; but at the trial defendant admitted that there were funds in the treasury to the credit of the general fund greatly in excess of plaintiff's claim, and no objection was then made to evidence being introduced upon that point, and no objection is now made to the findings of the amount of money in the treasury to the credit of that fund. The cause was tried by both parties

upon the theory that the condition of the various funds was an issue in the case, and no objections to the findings are now urged as to the facts found touching the amounts to the credit of those funds. Under such circumstances we do not think that the judgment should be reversed for the failure to allege that there was money in the treasury out of which plaintiff could have been paid.

2. It was not necessary to the payment of the claim that it should have been presented to the auditor. Ex parte Reis, 64 Cal. 233, 30 Pac. 806. See, also, Society v. Reis, 71 Cal. 627, 12 Pac. 796; McAllister v. Hamlin, 83 Cal. 363, 23 Pac. 357.

3. Nor was it necessary to the validity of the order of the court that it should have designated the fund out of which to make payment. The Code directs the payment to be made "out of the treasury of the county in which the case is tried, upon the order of the court." The duty is devolved upon the court, after having fixed the compensation to be paid, to make the order upon the treasury of the county. It is made the duty of the treasurer to "receive and safely keep * * * all moneys belonging to * * * the treasury." Section 79, Consolidation Act. The term "treasury" includes all the moneys of the municipality under the control of the treasurer, whether belonging to a designated fund or not. The act declares that "the general fund consists of all moneys in the treasury not designated and set apart to a specified use, and of the over-plus of any special fund remaining after the satisfaction of all demands upon it." Section 76. If there were no other specially designated funds, the general fund would constitute the treasury. Section 71 provides that "the general fund shall be applied and used for the payment of all sums authorized by law to be paid out of the general fund and not otherwise provided for in this act." St. 1866, p. 436. The order of the court upon the treasury, therefore, was an order for payment out of the general fund. The fact that a fund had been designated for the payment of phonographic reporters could not in any way affect the provisions of section 274, Code Civ. Proc. (amended 1880), by which it became the duty of the court to make the order upon the treasury. The board of supervisors could not defeat the law by creating a special fund, which might be inadequate to meet the payment of such claims as this, or, indeed, might be so limited as to seriously affect the administration of justice by the courts. City of San Francisco v. Broderick, 111 Cal. 302, 43 Pac. 960. The evidence is, and the court found, that when the order was presented the special fund to which moneys had been transferred for payment of such claims was exhausted, but there remained unappropriated, in the general fund, $205,757.42. We think this fund was applicable to the payment of the order of the court. Ex parte Reis, supra, and other cases cited, supra.

4. The principal point relied upon is the unconstitutionality of section 274, Code Civ. Proc., as it was enacted by the act of April 1, 1880 (St. 1880, pp. 54, 55), which reads: "* * * In criminal cases, when the testimony has been taken down or transcribed upon the order of the court, the fees of the reporter shall be certified by the court, and paid out of the treasury of the county, or city and county, in which the case is tried, upon the order of the court." This section was amended by act of March 21, 1885 (St. 1885, p. 218), in which it was undertaken to make the reporter a salaried officer of the court, and to give the judge of the court the power to fix the monthly salary. The amendment of 1885 was in some particulars held to be unconstitutional, and appellant contends in all other particulars it must stand, and therefore works the repeal of the section as it stood in 1880. Just what effect this contention, if sound, would have upon the case here, need not be considered, for we are clearly of the opinion that the amendment of 1885 has no longer a foot to stand upon. Smith v. Strother, 68 Cal. 194, 8 Pac. 852; James v. McCann, 93 Cal. 513, 29 Pac. 49; Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159. See, also, City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. We do not think the section, as amended, is susceptible of division so as to preserve the portion not distinctly held to be unconstitutional, and the court has so intimated in the cases supra. We must deal alone with the section as amended in 1880. City of Los Angeles v. Pomeroy, supra. It is attacked as violative of section 1, art. 3, of the constitution, as conferring legislative power upon the judicial department of government. The court has frequently had this section of the Code before it, and has found in it authority both to appoint a reporter, and fix his compensation for services rendered, and order payment either by one or both of the parties, if in a civil action, or by giving an order on the treasury of the county if in a criminal case. As to the latter class of cases, see Ex parte Reis, 64 Cal. 233; People v. Lon Me, 49 Cal. 353; McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357. As to civil cases, see Rhodes v. Spencer, 68 Cal. 199, 8 Pac. 855; Barkly v. Copeland, 86 Cal. 493, 25 Pac. 3; James v. McCann, 93 Cal. 513, 29 Pac. 49; Taylor v. McConigle, 120 Cal. 123, 52 Pac. 159; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. It is not reasonable to suppose that the court of last resort in all these cases unwittingly lent its aid to the enforcement of statutes which violated the constitution. It is more reasonable to assume that the court treated the statutes as constitutional. However this may be, we think the question here presented has been directly passed upon, as will be noticed later. Substantially the same legislation was put in force as early as 1861 (St. 1861, p. 497), and has been in force ever since. The section of the constitution of 1849 is identical with the section of the constitution of 1879 relied upon. While, perhaps, not conclusive, the fact that

the courts have exercised the power under the old and new constitutions for nearly 40 years gives a practical construction of these instruments which ought to have great weight in determining the question if any doubt exists. Cooley, Const. Lim. p. 81 et seq. Some of the various statutes which have been passed on this subject will be found in the opinions of Justices McKinstry and Thornton in Ex parte Reis, 64 Cal. 233, and need not be recapitulated here.

The official or phonographic reporters of superior courts are authorized to be appointed by the judge or judges of such courts under part 1, Code Civ. Proc. (sections 268–274), as the law was enacted April 1, 1880 (St. 1880, p. 53. See pp. 54, 55). The compensation to be paid reporters, except where otherwise provided by the county government act of April 1, 1897 (St. 1897, p. 452), is regulated under the amendment of 1880. As to the city and county of San Francisco, and the counties of certain 16 other classes, the county government act makes no provision whatever for appointing or fixing the compensation of court reporters. In all these the act of 1880 apparently is the only law in force. In some of the other classes the county government act gives the judges the power to appoint, but the act fixes the compensation by a monthly salary in some cases and by per diem in others; but in four of these counties the provision is that the reporter "shall receive as compensation such fees as are now allowed by law." In classes 48 and 49 the county government act makes a provision still different from all the others, by which, in certain cases, the boards of supervisors may fix the compensation. The utter lack of uniformity in the law in providing for the appointment of reporters and fixing their compensation shows that the legislature has regarded these persons as a part of the machinery of the courts, rather than as officers of government in any sense. As expressed by Mr. Justice Thornton in Ex parte Reis, supra: "In view of the lawmaking power, these reporters were regarded as official adjuncts of the courts of justice," or as "ministerial officers of the courts." The reporter is not among the enumerated county officers (Pol. Code, § 4103); and, while the legislature could create the office of official reporter, and make it a county office, it has not done so in the city and county of San Francisco. The legislature has simply authorized the judge of the court to employ a person to take down and transcribe shorthand notes of court proceedings, who shall be known as "phonographic reporter of the court." In civil cases his duties cannot be said to be public in any sense. In criminal cases they may be so regarded in a limited sense, inasmuch as the services are paid for out of public funds. But rendering services for the public does not of itself make him a public officer. We do not think that the fixing of the salary of a person who performs some service for the public, nor the fact that such person is required to take an oath that he will faithfully discharge his duties, would necessarily make such person a public officer, or his employment an office.

The provisions of section 869, Pen. Code, confer powers upon the magistrate similar to those found in section 274, Code Civ. Proc. In McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357, section 869 was held to be constitutional; and it was also held that the magistrate, in fixing the compensation of the reporter, acts in a judicial, and not in a legislative, capacity.

The amendment of section 274, Code Civ. Proc., by the act of 1885, was held unconstitutional in the case of Smith v. Strother, 68 Cal. 194, 8 Pac. 852, for the reason that the act undertook to confer powers upon the judge which were legislative in their nature, and could not be delegated—namely, to fix the monthly salary of the reporter for future services to be rendered. The court said: "The act of 1885 amending section 274, Code Civ. Proc., is different from the section as it stood before amended. Under the section as it stood before it was amended, the amount to be paid the reporter was fixed, on valuation of the services rendered, by the court or judge, after they have been rendered. The court or judge, under that section, acted on a case which had transpired before any action was taken. The difference between the two is plain and palpable." The court disclaimed any intention to decide that the mode provided under the act of 1880 is constitutional. We think, however, that upon the authority of McAllister v. Hamlin we must hold the act to be constitutional. It is advised that the judgment be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

127 Cal. 261

PORTER v. LASSEN COUNTY LAND & CATTLE CO. et al. (Sac. 459.)

(Supreme Court of California. Dec. 22, 1899.)

CORPORATIONS—BOARD OF DIRECTORS—VOTE —INTEREST—VACANCY — MORTGAGES — RATIFICATION—CONSTRUCTION—PLEADING.

1. Civ. Code, §§ 290, 305, 308, provide that the minimum number of directors of a corporation shall be five. Defendant corporation, which was organized with a board of five directors, executed a mortgage at a time when a vacancy in the board reduced it to four. After the vacancy was filled the mortgage was ratified by the whole board. *Held*, that the subsequent ratification of the mortgage by the full board validated it.

2. A mortgage was executed by a corporation when the number of its directors was reduced by a vacancy to less than that required by law. Subsequently, at meetings of full boards, the mortgagee was required to make further advances on the security of the mortgage, and a second mortgage was directed by a resolution expressly recognizing the validity of the previous one. *Held* sufficient to constitute a ratification of the previous mortgage.

3. Proof of ratification of an invalid mortgage is admissible under a plea alleging execution of the mortgage.

4. That a resolution of a corporate board of directors to purchase a director's interest in certain property was voted for by such director does not invalidate the resolution, where the other directors voting for it constituted a majority of the board.

5. A mortgage, after reciting the principal consideration for which it was given, contained the following clause: "Also, to secure the repayment to said party of the second part of such further advances as may be made by him to or for the use and benefit of the party of the first part, and authorized and requested by it, * * * not exceeding $30,000." Following was a provision that the mortgagee would compromise any hostile claim against the property, the costs thereof to be covered by the mortgage. *Held*, that the mortgagee did not promise to make a further advance of $30,000 upon simple demand, but agreed to advance such sum within that limit as might be required to compromise any hostile claim to the property.

6. That a large part of land conveyed by a mortgagee to a corporation at the date of the mortgage already belonged to the corporation is insufficient to show a failure of consideration for the mortgage, where it was given in consideration of previous advances made by the mortgagee to the corporation, and not in consideration of the land conveyed.

In bank. Appeal from superior court, Lassen county.

Action by B. F. Porter against the Lassen County Land & Cattle Company and others. There was a judgment for plaintiff, and defendants appeal from an order overruling their motion for a new trial. Affirmed.

Spencer & Raker, for appellants. A. E. Bolton, for respondent.

BEATTY, C. J. This is an action to foreclose a mortgage alleged to have been executed by the corporation defendant. The findings and judgment of the superior court were in favor of the plaintiff, and the defendants appeal from an order overruling their motion for a new trial. The main controversy in the case is in regard to the execution of the note and mortgage, and in support of their appeal the defendants contend that the decision of the superior court holding that the note and mortgage were duly executed is not only contrary to the evidence, but is against law, because it appears by the findings of the court, as well as by the uncontradicted evidence, that the resolution of the directors of the corporation purporting to authorize the mortgage was passed at a time when there was a vacancy in the board reducing the number of directors from five to four. The entire contention of the appellants upon this point is based upon the proposition that a single vacancy in the board of directors renders it impossible for the remaining members to bind the corporation by their unanimous vote, however regular their proceedings may be in other respects. They further contend that, even if it should be held that a board of four directors was competent to act, the mortgage in question was invalid because given to secure the personal obligation of one of the four directors who voted for the resolution authorizing its execution. Some of their other principal contentions are that there was a lack or failure of consideration for the note which the mortgage was given to secure, and that the plaintiff induced the execution of the mortgage by making a promise which he never performed and never intended to perform, viz. that he would make further advances to the corporation to the extent of $30,000. All these propositions are contested by respondent, and, with respect to the execution of the mortgage, he contends that, even if its execution was not originally authorized by a competent board, it was nevertheless rendered valid by the subsequent ratification of a full board, and that independent of such ratification the corporation is estopped to deny its validity. For the purpose of considering these and other grounds of the appeal, it will be convenient to state in a general way the principal facts disclosed by the evidence: The articles of incorporation of the Lassen County Land & Cattle Company are not contained in the record, but from the minutes of its proceedings it appears to have been organized at some time prior to the year 1885, and to have adopted by-laws declaring that the corporate powers of the company should be exercised by a president, vice president, and board of five directors, including the president and vice-president, of whom a majority should constitute a quorum for the transaction of business. The capital stock of the company was divided into 100,000 shares, of which 29,624 shares remained unissued. Of the issued stock, 69,795 shares were held by C. A. Merrill, and 581 shares stood in the names of other persons. It is very evident, not only from the distribution of the stock of the company, but from all the facts in the case, that Merrill and the corporation were substantially identical. The corporation, in other words, was a form under which Merrill transacted business. The property of the company, or of Merrill, consisted of lands, water rights, ditches, flumes, a sawmill, etc., of which Merrill appears to have had the control and management, either as president of the company or in his own right,—it is not very clear or very important which. In January, 1885, when we get a first view of its affairs, the company seems to have been in lack of funds to carry on its ordinary business or care for its property, and after several meetings of its directors, at which these matters were fully discussed, it was finally resolved at a meeting held on the 5th of February, 1885, to close its office at 324 Pine street, San Francisco. Merrill, its president, was directed to sell the office furniture and to take charge of the proceeds, and he agreed to assume all responsibility for rent and other expenses in connection with the company's business. The minutes of this meeting were then written up, read, approved, and signed by the secretary and directors present. It is not stated that the board then adjourned sine die, but such seems to have been the case; for it does not appear that they ever met again until the 28th day of April, 1889, at which date Merrill presented a report of what he had been doing in the meantime. By this report he showed that he had expended in the management and improvement of the company's property about $2,700, borrowed in his own name from B. F. Porter, the plaintiff herein. To secure this indebtedness he had conveyed to Porter all the property which he had formerly conveyed to the corporation. At the same time he entered into a written contract with Porter, a copy of which was attached to the report, by which Porter agreed to purchase other lands for Merrill's benefit, and upon repayment of all his advances, with interest, to convey to Merrill such additional lands, together with the property then conveyed to him by Merrill. All these things Merrill reported that he had done in his own name, but in the interest and for the benefit of the corporation. He reported, further, that Porter, in pursuance of the contract, had purchased 4,400 acres of land, and had advanced about $35,000. The report of Merrill upon these matters was approved, and his agreement with Porter (somewhat modified) was ratified and adopted by unanimous vote of the three directors present; but, as Merrill himself was one of the three, this attempt to ratify was clearly a failure. Afterwards, however, on October 17, 1891, there was a meeting of the stockholders at which a full board of directors was elected, by whom a president and other officers were chosen; and, having thus effected a thorough reorganization, the Porter transaction was again taken up, and negotiations were resumed for the purpose of securing a conveyance from him to the corporation of the property conveyed to him by Merrill, and the additional property purchased by him under his contract with Merrill. Pending these negotiations, at a meeting of the directors of the company November 30, 1892, one of the directors resigned, but that fact was not communicated to Porter. Several other meetings of the directors were held without filling the vacancy in the board, and, finally at a meeting held January 20, 1893 at which, according to the minutes, there were present four directors, including Merrill, the president, a preamble and resolution were unanimously adopted, wherein it was recited that the corporation was indebted to Benjamin F. Porter in the sum of $65,820.60, being the amount paid out and expended by said Porter in the development, improvement, and acquisition of title to the lands and property of this corporation in Lassen county; that the legal title to said property was vested in said Porter; that it was deemed advisable by the board to have the legal title vested in the corporation, and payment of the sums due to Porter secured by note and mortgage, etc., wherefore it was resolved that Porter be requested to convey said lands, etc., to the corporation, and that the corporation execute its note for said amount, and a mortgage of all said property, to Porter. The preamble and resolution are set out at great length in the minutes. They give the precise terms of the note and mortgage which the president and secretary were authorized and directed to make and deliver in behalf of the company, including a full and particular description of the property to be conveyed to the company and mortgaged back to Porter. In this list of property was contained a large amount of land which the corporation had never before had any claim to, except such claim as arose out of the contract between Merrill and Porter above mentioned, and also the land, water rights, etc., which had been conveyed by Merrill to Porter at the date of that contract, and which, it seems, had been previously conveyed by Merrill to the corporation. Upon the adoption of this resolution a copy was handed to Porter, with the following certificate attached: "I, R. J. Creighton, secretary of the Lassen County Land and Cattle Company, do hereby certify the foregoing to be a full, true, and correct copy of a resolution of the board of directors of said Lassen County Land and Cattle Company adopted at a special meeting of the board of directors, held at the office of the company, pursuant to due notice (a full board being present), on the 28th day of January, 1893, and that the mortgage hereunto annexed and note therein recited are full, true, and correct copies of the note and mortgage in said resolution referred to, and the said mortgage hereunto annexed is the original mortgage, the execution of which is therein and thereby authorized. Robert J. Creighton, Secretary of the Lassen County Land and Cattle Company. [Corporate Seal.]" This certificate of the regularity of the proceedings of the directors was required by Porter before he would consummate the transaction, and upon receiving it, and in reliance upon it, he executed the conveyance as requested; and the president and secretary at the same time executed and delivered to him a note and mortgage, duly acknowledged, in the precise form prescribed by the resolution of the board of directors. Thereupon the corporation entered into the possession of all the property in question, and so continued down to the trial of this action. Not only did the corporation take over from plaintiff all the real estate included in his conveyance, to a large portion of which it had no previous claim, and upon all of which he had made large expenditures under his agreement with Merrill above mentioned, but after the vacancy in the board had been filled the directors, from time to time, demanded additional advances on the security of the mortgage; and such advances were made by the plaintiff, who also paid taxes assessed to and payable by the corporation on the mortgaged premises. Said full board of directors also authorized a second mortgage of the same property to a third party, and in their resolutions expressly recognized plaintiff's mortgage as a valid and subsisting lien; and they have always claimed and retained possession of the property conveyed by Porter, together with all the advantages of his large expenditures for its care and preservation. With this preliminary statement of the principal facts of the case, we may proceed to consider the questions discussed in the briefs:

1. Can a corporation perform corporate acts, such as the mortgaging of its real property, while there is a vacancy in its board of directors? Section 305 of the Civil Code provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of not less than five nor more than eleven directors, and that whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board. Section 308 provides that a majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is a valid corporate act. Section 290 provides that the articles by which the corporation is formed shall set forth, among other things, the number of its directors or trustees, which shall not be less than five nor more than eleven. The by-laws of this corporation, and, I suppose, its articles of incorporation, provided for a board of five directors, and the question is whether during a vacancy in one of these directorships the four remaining directors could lawfully assemble for the transaction of any business except the filling of such vacancy. Counsel have not cited any case decided in this state or any other of the United States in which this question has been directly decided. In England, under a statute which is somewhat different from ours, it has been held in several cases that a corporation cannot enforce a forfeiture of shares for nonpayment of a call by a board reduced by vacancies below the minimum number of directors prescribed by the deed of incorporation. Bottomley's Case, 16 Ch. Div. 681, and cases therein cited. These

cases may, however, be distinguished from the case under consideration upon two grounds: In the first place, the English statute differs from ours in an important particular. It does not require, as ours does (Civ. Code, § 290), the deed or articles of incorporation to specify exactly the number of directors who are to manage the corporate business, but permits the corporators to designate a maximum and minimum number who may act. The shareholders (that is to say, either by the deed of incorporation or by subsequent resolution) may declare that the corporate business shall be conducted by a board of not more, for instance, than seven, nor less than five. Such was the Bottomley Case, and the board of directors had been reduced by resignations and bankruptcy to four members. It was held that the remaining four directors could not make a call upon the shareholders, or enforce it by a forfeiture of the shares. Sir George Jessel, however, in order to reconcile his decision with previous decisions of the English courts, was obliged to make a distinction between the case in which there was a maximum and minimum number of directors prescribed by the deed of incorporation, and one in which there was a mere number of directors stated, with power in a lesser number to act, and in this connection he says: "When the mere number of directors is stated, and then there are provisions showing that the directors are to meet during vacancies to fill up the number, and that they may transact business with a less number, and so on, it is obviously meant that the larger number shall be the number of directors as the normal number, but not that the business shall not be carried on with a less number; but that has no application when you find a clause that the number shall never be less than a certain number." This passage from the opinion, which is followed by more in the same line of argument, with various illustrations (pages 688, 689), is really and in effect a construction of our statute adverse to the contention of appellants; for section 305 of the Civil Code, in declaring that the corporate powers, etc., must be exercised by a board of not less than five nor more than eleven directors, adds nothing to the effect of section 290, which requires the articles of incorporation to state the number of directors of the corporation. All the provisions of the statute taken together mean this, and nothing more: That each corporation must have a fixed and definite number of directors, not less than five nor more than eleven in number, of whom a majority shall constitute a quorum for the transaction of business. The decision in Bottomley's Case, therefore, so far from being an authority for the proposition that a California corporation cannot transact business pending a vacancy in the board of directors, is more nearly an authority against it. Another distinction between that case, with the whole line of decisions upon which it is based, and the case before us, is that they all relate exclusively to attempts to forfeit shares for nonpayment of calls. It is no doubt true that directors owe to their constituents the duty of keeping the board full, by promptly filling vacancies as they occur; and this for the reason that the shareholders are entitled to the benefit of the experience and advice of all the members of a full board in the transaction of its business. When the directors violate this duty there may be sound reasons for holding that they should not be allowed to take any advantage, as against the shareholders, of acts or resolutions passed when a full board was not in existence. But when the corporation is dealing with a stranger, who, acting in good faith and in ignorance of the existence of a vacancy in the board of directors, parts with his property on the faith of what he is induced to believe is a valid corporate obligation, the case is certainly very different in its substantial merits, if not in point of strict law.

Appellant cites the case of Moore v. Rector, etc., 4 Abb. N. C. 51, as a case directly in point; but it is not in point. There was an attempt to mortgage a church by the rector, one of the wardens, and four vestrymen. The act under which the church was incorporated required an annual election of eight vestrymen, as an essential part of the board of trustees, and declared that no board should be competent to transact business without the presence of a majority of the vestrymen. It was contended that, since there were three vacancies in the vestry, four were a majority; but the court, construing the act, held that it meant a majority of the full vestry. Our statute requiring a majority of the trustees to form a quorum should receive the same construction, but in this case four directors were present,—more than a majority of a full board,—and the resolution to mortgage was adopted by a unanimous vote of the four. Respondent, as bearing on this point, cites several cases in which the courts of New York and Pennsylvania have held valid the election of boards of directors or trustees of corporations less in number than the charters prescribed; and since these decisions necessarily involved the assumption that such boards, though curtailed in number, could carry on the corporation business, they are pretty direct authority to the effect that a board of directors is competent to act notwithstanding an existing vacancy. See In re Union Ins. Co., 22 Wend. 599; Wright v. Com., 109 Pa. St. 560, 1 Atl. 794. In the latter case it is said, "The power of a board is never suspended by vacancies unless the number be reduced below a quorum." It is not necessary to go to this extent in the present case. It would be sufficient, in order to sustain the validity of this mortgage, to say that the votes of a majority of a full board may authorize a corporate act, although there may be a vacancy in the board. I am of the opinion that this is a sound proposition, but it is not even necessary, though entirely proper, to decide the point here; for, conceding that there was a lack of power in the board of directors, as constituted on the 28th day of January, 1893, to mortgage the company's property, there was no such lack of power at subsequent meetings of full boards at which the plaintiff was required to make additional advances on the security of his mortgage, and when a second mortgage was directed by a resolution distinctly and expressly recognizing the existence and validity of plaintiff's mortgage. This was, in my opinion, a full ratification of the mortgage, and made it valid, if it was not valid at the date of its execution. Appellant cites section 2310 of the Civil Code against this conclusion, but it does not sustain him. The manner of directing the execution of a corporation mortgage is by resolution of the board of directors, and here by resolution of the board the mortgage is recognized as valid, and its benefits claimed in behalf of the corporation. It is not necessary, in order to ratify, to do so in express and formal terms. Anything is sufficient which clearly and necessarily implies a recognition of the obligation. It is objected that ratification was not pleaded. It was not necessary. A mortgage executed by the corporation was pleaded, and, to support the allegation of a mortgage, proof of a subsequent ratification was just as pertinent as proof of a prior authorization.

2. Another objection of appellant to the validity of the mortgage is based upon the fact that Merrill participated in the meeting of directors at which it was authorized, and voted in favor of the resolution. It is contended that he could not transfer his personal obligation to the company. Considering that Merrill was, as we have seen, practically the whole corporation, this objection has not much substantial merit; but, since there were a few shares of stock held by other persons, it must be considered. And it is not disposed of, like the last objection, by what was done in subsequent meetings of the directors, when all vacancies in the board had been filled; for Merrill continued to be director and president, and took part in those subsequent meetings. But in the first meeting three directors—a majority of a full board, exclusive of Merrill—voted for the mortgage, and in the subsequent meetings four members, exclusive of Merrill, voted for the resolutions recognizing its existence. The adoption of none of these resolutions depended on Merrill's vote. The votes of the other three directors were sufficient to bind the corporation, and his own vote, while expressing his assent to the arrangement, and binding him so far, had no effect in invalidating a resolution good without it.

3. Appellant contends that the mortgage was rendered invalid by the alleged fraud of plaintiff in procuring its execution by a promise to advance $30,000 in addition to the sums previously advanced,—a promise which he has never performed, and never intended to perform. The superior court finds that no such promise was made, but this finding is assailed as contrary to the evidence. The evidence cited against it consists altogether of two clauses contained in the mortgage, as follows: "And also to secure the repayment to said party of the second part of such further advances as may be made by him to or for the use and benefit of the party of the first part, and authorized or requested by it by resolution of its board of directors, not exceeding the further sum of thirty thousand dollars, exclusive of interest, over and above the amount of said above-recited promissory note; and all such further advances shall be deemed to be due and payable to the party of the second part at the maturity of said promissory note, and shall bear interest at the same rate. * * * If at any time during the existence of this mortgage there shall be made or asserted any claim against the lands and premises herein described, or any part thereof, or if any suit or action therefor or affecting the same or any part thereof, shall be commenced or threatened, the party of the second part hereby agrees that he will, and he shall have the power, and is hereby authorized to, settle and compromise the same upon such terms as may be authorized by the party of the first part, and that the moneys paid in such settlement or compromise, and for all expenses and counsel fees, shall be repaid to the mortgagees and his assigns by the party of the first part, and shall be a lien upon said lands," etc. It is perfectly clear that the plaintiff did not promise or bind himself in either of these clauses of the mortgage to make a further advance of $30,000 upon the mere demand of the corporation. The utmost that can be claimed is that he agreed to advance such sum, within the limit of $30,000, as might be required to compromise any hostile claim to the mortgaged property, when duly requested so to do by the corporation. Conceding that he made such agreement, the corporation would have no ground for complaint unless it appeared that he had refused to advance money to carry out a compromise of a conflicting claim which had been regularly approved by its board of directors. But this is not alleged. All that is said with reference to this matter in the answer filed by the corporation is that the directors had, before the commencement of the action, demanded a further advance of $30,000, and that plaintiff had refused to advance the same or any part thereof. It is true that at the trial the defendants made an offer to prove that the corporation had demanded an advance of $9,000 to carry out a compromise approved by them of a hostile claim asserted by one Marker, but this evidence was properly excluded upon the objection of the plaintiff that such matter had not been pleaded. It does not appear, therefore, that the plaintiff violated any agreement contained in the mortgage.

But, even if it had been alleged and proved that he did refuse to advance money required to carry out a compromise duly approved by the directors of the corporation, the result would not have been to render the mortgage wholly invalid and incapable of enforcement. In the absence of any rescission or attempt to rescind, the defendant would only have been entitled to recoup for the damages caused by the breach of this stipulation of the contract, and it is nowhere alleged or shown that the corporation sustained any damage by the failure to compromise the Marker claim. There was evidence admitted in the course of the trial showing that plaintiff, prior to the execution of the mortgage, had promised to advance to Merrill $3,000, to be expended in the care and preservation of the mortgaged property; and the court finds upon sufficient evidence that fully that sum was so advanced to Merrill, or upon his order. An attempt was made to show that a considerable portion of it was used for purposes foreign to the business of the corporation. But the plaintiff's promise was only that he would advance the money to Merrill, and it was Merrill's business to see that it was properly applied. As to this matter, I cannot see that the corporation has any ground of complaint, either technical or substantial.

4. The claim that there was a lack or failure of consideration for the mortgage rests upon the fact that Merrill had conveyed to the corporation a portion of the property subsequently conveyed by him to plaintiff, and by plaintiff conveyed to the corporation at the date of the mortgage. Appellant argues that since the conveyance by plaintiff was the consideration of the note, and since a large portion of the property which plaintiff assumed to convey was already the property of the corporation, there was, to the extent of the value of such property, no consideration. Here, again, the whole substance of appellant's complaint rests upon the ability of Merrill, the individual, to distinguish himself from Merrill, the corporation. But the objection is easily answered in its technical aspect. The consideration of the mortgage was not the land which plaintiff conveyed or assumed to convey, but the money he had advanced for the care and preservation of property belonging to the corporation and the acquisition of other property which he had purchased for Merrill under a contract of which the corporation desired to have the benefits. In all these matters Merrill had been acting in his own name, but for the benefit of the corporation, during the long period when it lay dormant,—from 1885 to 1889. When it came to life again, and began to act in its corporate capacity, it simply assumed Merrill's obligations incurred in the preservation of its property and the protection of its interests, at the same time appropriating to itself the benefits of what he had bargained for in his own name. As to the amount of plaintiff's advances, and the extent of Merrill's obligations thus assumed by the corporation, there is no question. His accounts were submitted to Merrill and the other directors, and their correctness was never disputed.

5. Appellants present a number of minor points in their brief, relating to rulings of the superior court upon objections to evidence, but they all depend upon the propositions above discussed, and fall with them. At least, it may be said that none of the rulings complained of could have been substantially injurious to the defendants, even if some of them may have been technically erroneous. The order appealed from is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; VAN DYKE, J.; TEMPLE, J.; McFARLAND, J.; HENSHAW, J.

(127 Cal. 217)

SACRAMENTO COUNTY v. SOUTHERN PAC. CO. et al. (Sac. 586.)[1]

(Supreme Court of California. Dec. 19, 1899.)

COUNTIES—CONTRACTS—ESTOPPEL.

1. A county agreed with a railroad company to pay it $30,000 to construct a public roadway on its railroad bridge, and $15,000 was paid when the work was commenced. The roadway was completed by the railroad in good faith, according to the terms of the contract, turned over to the county, and used by it. *Held*, in an action to recover the money paid on the ground that the contract was void because entered into without statutory authority, that the county, having permitted the railroad to construct the roadway in good faith, and accepted the benefits thereof, was estopped from recovering the money paid therefor.

2. County Government Act, § 8, providing that when any board of supervisors shall, without authority of law, pay out any money, the district attorney shall sue to recover the same, does not authorize a suit by the county to recover moneys paid under a void contract, which it is otherwise estopped to recover, where the other party to the contract has completed it in good faith, and the county has accepted the benefits thereof.

Department 1. Appeal from superior court, Sacramento county.

Action by the county of Sacramento against the Southern Pacific Company and another. From a judgment for plaintiff and from an order denying a new trial defendants appeal. Reversed.

A. L. Hart, for appellants. Frank D. Ryan and J. Charles Jones, for respondent.

GAROUTTE, J. This is an action to recover $15,000, and 20 per cent. in addition thereto as damages, from the aforesaid defendants. Judgment was rendered for the amount claimed, and an appeal is now taken from that judgment and from the order denying a motion for a new trial.

The facts, in substance, are these: The California Pacific Railroad Company contemplated building a railroad bridge across the Sacramento river at Sacramento city, connecting the counties of Sacramento and Yolo. The construction of this bridge would result in the demolition of the old railroad bridge between the two counties, which also was used by the public for travel in vehicles, on foot, etc., and would necessarily prevent travel from one county to the other. The board of supervisors of Sacramento county, hearing of the contemplated improvement, entered into negotiations with the California Pacific Railroad Company, whereby it was agreed that the county should pay to it $15,000 upon December —, 1893, and $15,000 upon the completion of the structure. In consideration of the aforesaid agreement upon the part of the county, said railroad company promised "to construct and maintain in connection with said new railroad bridge an overhead or separate roadway, to be maintained by the California Pacific Railroad Company for free public highway purposes, and to be independent of either tracks or trains." The company further agreed in consideration of the aid extended in the form of this $30,000, to prosecute the work with diligence, and finish the construction before December 31, 1895. It was also stipulated that, if the work was not completed by the aforesaid time, the company was to receive nothing from Sacramento county, and also refund the payment already made. At this stage of the proceedings the district attorney of plaintiff advised the board of supervisors that it had the power to enter into such a contract with defendants, and further advised the board that the respective action taken at that time by the county and the railroad company, in the form of written offers by the company and resolutions passed by the board, amounted in law to a legal, valid contract between the parties. Thereafter the first payment of $15,000 was made to the company, and the work of construction begun. In October, 1895, the county of Sacramento, upon the claim that it had never entered into a valid, binding contract with defendants to pay the aforesaid $30,000, brought this action to recover the sum of $15,000 already paid, with 20 per cent. additional as damages in the form of a penalty, the basis of this claim being that the money was paid without authority of law, and could be recovered at the suit of the district attorney of the county. The contract is claimed to be void by reason of the fact that it was entered into contrary to the statutes, which call for plans and specifications, notices, bidding, etc., as conditions precedent to the building of a bridge by the county. The bridge was completed in December, 1895.

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[1] For opinion in bank, see 59 Pac. 825.

Among other defenses relied upon, an estoppel is set out, and upon this question of estoppel the court made the following finding of fact: "It is true that said overhead roadway upon said new bridge was fully constructed and opened to the public on the 16th day of December, 1895, and that ever since that time the same has been used by the inhabitants of Sacramento and Yolo counties for travel to and fro between said counties, with immunity from contact with their trains or tracks; and that said public has had the exclusive use of said overhead roadway without toll or charge; and that no railroad track has been laid thereon; and that said overhead roadway has been constructed and maintained in a good and substantial manner." This is, in substance, an action to recover money had and received, and this character of action is based upon the principle that one party has money which, in equity and good conscience, belongs to another. In the face of the facts quoted, we are at a loss to see how this money, in equity and good conscience, belongs to Sacramento county. If the plaintiff had lived up to its contract to the letter, and paid the entire sum of $30,000 to defendants, and if at some future time defendants had closed this overhead roadway, we can readily imagine that the county of Sacramento would have at once asked and obtained relief from the courts, any question of ultra vires contract or defective contract to the contrary. Certainly, under such circumstances, the county would be entitled to relief, for defendants would not be in a position to raise any question as to the invalidity of the contract under which the money was paid to it. With the money jingling in their pockets, they would be absolutely estopped, upon every principle of common justice, from casting a single speck upon the binding force of the contract which had been entered into with the county, and upon which it had received the money. The rule works equally well the other way, and we are satisfied that this plaintiff is estopped from securing a return of the money. There is no claim that the county was defrauded. There is no claim that the benefits accruing to the county were not equal to the expenditure made. In this transaction the county was the agent of the public, and by the transaction the public have secured an exclusive right of way over the bridge of defendants as long as that bridge remains. It may be said that the easement of right of way over the bridge, with the annexed covenant to keep in repair, is far more valuable than a perfect title to the bridge itself; for the public have all the benefits of the bridge without any of the burdens accompanying its ownership.

Many legal complications arise in the building of a bridge across a stream forming the boundary line between two counties. Neither county is able to deal with the question alone. It appears that the consent of both is required. It is extremely doubtful if the statutes bearing upon the course to be followed by boards of supervisors in building bridges within the county are applicable to the building of bridges over streams dividing two counties. Legislation upon the question is lacking, and, what little there is, most indefinite. Possibly in this case the law was not carried out. Possibly the defendants, aside from any question of estoppel or ratification, could not have recovered either installment of the $30,000 to be paid. But still the all-important fact remains that these parties entered into the contract in the utmost good faith. The advice of the law officer of the county was taken, and he advised that the contract was a lawful one, and was sufficiently evidenced. The work contracted for was done. The money was paid for the work. The party paying the money received full value for it, and still enjoys the benefits received from the contract. Under such circumstances a plain example of estoppel is before us, and by reason of that estoppel the plaintiff is forever barred from recovering the money involved in this litigation. If a party contract to erect a bridge, or a poor house, or a court house for a county at a reasonable price, and the structure erected, the contract price paid, and possession of the structure taken, we believe, in an action by the county for the return of the money, based upon the invalidity of the contract, no court would be found to declare that in equity and good conscience the money should be returned. And this, too, notwithstanding the widest departure from the statute may have been practiced in the making of the contract. The case at bar in principle differs but little from the illustration given.

There is nothing so sacred about a municipality that an estoppel may not be raised against it by its acts. In equity and good conscience, like individuals, it is bound to treat its neighbors fairly and justly. In City of Los Angeles v. Cohen, 101 Cal. 373, 35 Pac. 1002, this court, in order to do justice, held that the acts of the city were such as to estop the public from questioning the title of the defendants in that action to a strip of land claimed by the city to be a portion of a public street. The question of estoppel between a county and an individual involves no such grave difficulties. The doctrine of estoppel against municipalities is universally applied. In the early case of Argenti v. City of San Francisco, 16 Cal. 266, this court said: "The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner and to the same extent as the latter. There is no difference, in this respect, between public and private corporations; for in matters of contract a public corporation is regarded merely as a legal individual, and treated in all respects as a private person." It thus appears that there is no substantial difference in the application of the doctrine as between private and public corporations. Indeed, the whole history of estoppel, as involved in this case, is strongly and convincingly stated in Brown v. City of Atchison, 39 Kan. 33, 17 Pac. 465, in the following language: "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of want of power on the part of the corporation to make it, or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all of the benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit." In the case of Commissioners v. Aspinwall, 21 How. 544, 16 L. Ed. 208, it is said: "Citation of authorities to this point is unnecessary, as the whole subject has been recently examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced." From these authorities, and many others which can be cited, it is apparent that public corporations, like individuals, are bound to act in good faith, and deal justly; that they cannot be allowed to enter into contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because the statutory steps have not been pursued in the letting of the contracts.

This action is largely based upon authority claimed to be found in section 8 of the county government act, wherein it is provided: "Hereafter, whenever any board of supervisors shall without authority of law order any money paid as a salary, fees, or for other purpose, and such money shall have been actually paid, * * * the district attorney of such county is hereby empowered, and it is hereby made his duty, to institute suit in the name of the county against such person or persons to recover the money so paid, and twenty per cent. damages for the use thereof." This statute was never intended to have the effect, and cannot now be construed as having the effect, of nullifying the principle of law we have been considering, known as an "equitable estoppel." Money paid "without authority of law" means money paid out by the board of supervisors upon claims based upon a subject-matter not within the scope of the powers of the board. In other words, it is the application of the moneys of the county to a purpose not within the general powers of the board. But the power of a board of supervisors to construct bridges, to build and lay out roads, to secure easements in the form of rights of way for public travel, are matters within the jurisdiction of the board of supervisors. Again, by subdivision 8 of section 25 of the county government act the board has the power to purchase or lease real or personal property necessary for the use of the county. The county could buy a bridge or lease a bridge. As already suggested, in substance this transaction was a purchase of this overhead roadway. The county is the owner of everything pertaining to the bridge that is valuable, with the single exception of the old lumber and iron when decay overtakes it. If a county may buy a bridge, or rent a bridge, it may purchase the exclusive right of way over a bridge. We need not split hairs in giving a technical name to the interest which the county has in the bridge, but it is apparent to every one that it has a substantial interest therein, and, in the absence of some claim or showing to the contrary, we may assume that such interest is full value for the money expended. We are not now passing on the validity of the contract entered into between the parties to this litigation. It is not material here. We are not intimating but that at the instance of a taxpayer in the early history of these negotiations the entire transaction may not have been judicially killed. All that we have said bears upon the single question of estoppel, and is said in view of the conclusion arrived at by the court that an equitable estoppel against plaintiff should be held in this case. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN DYKE, J.; HARRISON, J.

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127 Cal. 226

In re SILVANY'S ESTATE. (L. A. 802.)

(Supreme Court of California. Dec. 19, 1899.)

WILLS—CONTEST—UNDUE INFLUENCE—EVIDENCE.

The principal devisee under a will had persistently urged the testator to make the will, and took him to the home of the devisee's mistress, against the protests of testator's physician and nurse, when he was dangerously ill. Testator had resisted previous importunities of such devisee to make a will in his favor, and had once expressed a wish to be taken away, saying that they were robbing him. The devisee accused the testator of ingratitude, and, though such devisee could not speak English, he testified that the dying testator executed and published the will exactly as required by law. The only persons present were the beneficiaries, devisee's mistress, and the executor, a saloon keeper, whom the testator exempted from giving bond, and who otherwise could not have qualified. The will was drawn by a lawyer at devisee's instance, who did not consult the testator, but submitted the will to the devisee after preparing it. *Held*, that a verdict finding that the will was the result of undue influence was not against the weight of the evidence.

Department 2. Appeal from superior court, Los Angeles county.

Contest of the will of Stephan Silvany, deceased. The will was admitted to probate on petition of Francisco Quijada, after which petitioners instituted proceedings to set the same aside. From a judgment in favor of petitioners, Quijada appeals. Affirmed.

Z. Montgomery and J. W. McDonald, for appellant. W. A. Harris, Harris & Garrett, and Augustus Montaño, for respondents.

TEMPLE, J. Stephan Silvany died January 10, 1898, and on the 28th of January, 1898, the superior court of Los Angeles county admitted to probate what purported to be his last will, being dated January 8, 1898. It was probated upon the petition of Francisco Quijada. The petitioner and his illegitimate son, Jesus Quijada, were the sole beneficiaries under the will, and one L. C. Flores was named therein as the executor. Within one year thereafter, but precisely when does not appear, certain parties inaugurated a contest in the superior court by filing a petition alleging that the decedent left a will dated March 6, 1891, in which certain of the petitioners were named as executors. In that will all the property of the testator, except $500, was left to Francis Mora in trust for the erection and maintenance at Los Angeles of a Catholic female orphan asylum. In that petition the probate of the other will was averred, but it was charged that it was in fact never published or executed by Silvany, but was fraudulently concocted in pursuance and furtherance of a scheme to defraud the estate of Silvany out of all the property owned by Silvany. It was also charged that at the time of the alleged making and publishing of said will of 1898 the testator was of unsound mind, and subject to undue influence from said Francisco Quijada. An answer was interposed to the petition, and a contest had. The due execution of the will of 1891 was not really disputed. As to the will of 1898 several special issues were submitted to the jury, to only one of which response was made. That was as follows: "Did the deceased, Stephan Silvany, subscribe the contested will himself? Ans. No." Upon this verdict the court made an order setting aside the probate of the will of 1898, and revoked the letters issued to Flores, and admitted to probate the will of 1891.

The appellant makes here but the single point that the evidence does not justify the verdict. The proposition is urged with great force and earnestness, and we have carefully read and considered the evidence in connection with the argument. We cannot say that there was not sufficient evidence to justify the verdict. It is not a case where admittedly a will was made, which the alleged testator intended to make, but which it is charged he was induced to make through fraud or undue influence. The verdict is to the effect that Silvany did not make the will at all. It must also be borne in mind that it is within the province of the jury to determine the credibility of the witnesses. The jury doubtless believed the testimony of Juan B. Sanchez and Gonzales, notwithstanding the assaults made upon their credibility, and disbelieved the counter statements of Quijada and others. This court will not ordinarily review the conclusion of the jury upon that subject. Upon that basis there certainly were reasons to doubt the honesty and fairness of Quijada and Flores in the matter. Quijada persistently and even indecently urged and insisted that Silvany should make a will in his favor. The sick man was taken, against the protests of his physician and nurse, to the home of the former mistress of Quijada, the mother of the only other beneficiary of the contested will, when he was so ill that the removal was imprudent and dangerous; but still Silvany resisted the importunities of Quijada to make a will in his favor. Quijada twice brought persons to the house for the purpose of preparing the will. Both times Silvany declined to make the will and once expressed a wish to be taken away from there, saying that they were robbing him, while Quijada accused Silvany of ingratitude for his refusal to make a will favorable to him. Silvany always said he had given his property to the orphans. And then there is Quijada's statement of how the will was prepared and executed, notwithstanding Silvany's persistent refusal to comply with his importunities. On January 7th, "about four o'clock, my compadre said that he was very sick, and he wanted to make a will." He also told Quijada that he would give certain land to his son Jesus, and the balance of his estate to Quijada, and asked if he liked Flores as administrator, to which Quijada assented, and then Silvany said, "We will put him as administrator and at the same time without bonds." They agreed upon that, and Quijada went to a lawyer and asked him to prepare the will. The lawyer said he would prepare it and meet him with it the next day at Flores' saloon. The next day the lawyer met him at Flores' saloon, and read it to Quijada, to see if it was as Silvany ordered, and said: "Here is Jesus Quijada with a house, and all the rest is for you. Here is also Flores, administrator." The next day Silvany, being very sick, sent for Flores and Quijada's son Severiano. Assembled at the house there were, besides Silvany, Francisco Quijada, his mistress, Flores, and Severiano. Then Silvany asked Flores to read the will, which he did in Spanish and English. Then Silvany said: "That's my will. You sign my name to it." Then Flores wrote something, and took the paper and a pen to Silvany, who took the tip of the pen, and a cross was made. Then "my compadre told Mr. Flores to write his name as a witness to the will," which was done. "Then my compadre called Severiano, * * * and told him that was his will, and to write his name as a witness to it," which was done. "My compadre told Mr. Flores to hand the paper to me, which he did, and my compadre told me to take care of it; that that was his will." The dying Silvany, uninstructed and without prompting, went through the entire ceremony of the execution and publication of the will just as a lawyer, if present, would have directed, not only omitting no requisite, but everything is done in due order; and it was no small feat for the witness, who has long resided at Los Angeles, but cannot speak English, to recite it so completely and in order. And it was thoughtful on the part of Silvany, who, according to the witness, had consulted no one in regard to the will, of his own motion to suggest that no bond be required of Flores. Otherwise, Flores would not have been able to qualify. But, while we can but wonder that all these things were so well done by those from whom we should least have expected it, we are unable to compliment the attorney who drew the will in the same way. He received his instructions as to writing the will solely from one who was practically to get the entire estate under the will. It does not seem to have occurred to him that it would be a proper thing for him to see the proposed testator, to make sure that he wanted to make a will at all, or such a will. And after the will was prepared he did not think it necessary that he should read and explain it to the testator, to satisfy himself that it expressed the real wish of the testator. This was quite out of the ordinary course. But the attorney by appointment went to a saloon, kept by the person who was named as executor without bonds, to read it to the devisee to whom practically the whole estate was left by the will, to learn from him whether it was such a will as the testator wished. For all this, the will may have been an honest will, but if it had been designed to force its execution upon Silvany, or to forge a will, the course taken was the precise course which might have been adopted. If Silvany was alive, and desired to make the disposition of his property, it is strange that the attorney did not ask permission to see him, and was not asked to attend to the execution of the will. There are other circumstances as much relied upon by the contestants, but these considerations are sufficient to show that the verdict cannot be set aside for lack of evidence. The order and judgment appealed from are affirmed.

HENSHAW and McFARLAND, JJ., concur.

127 Cal. 248

PEOPLE v. BLACKMAN. (Cr. 531.)

(Supreme Court of California. Dec. 22, 1899.)

CRIMINAL LAW—MOTION FOR NEW TRIAL—DETERMINATION—TRIAL—PRESENCE OF JUDGE — EMBEZZLEMENT — EVIDENCE — ACCOUNT BOOKS.

1. A motion for a new trial in a prosecution for felony, based on the judge's absence from the court room, must be determined on the affidavits filed, and not on his belief as to the length of time he was absent.

2. On a trial for felony the conduct of the trial judge in going from the court room into his chamber, closing the door, and remaining there about 10 minutes, while the state's attorney was arguing the case to the jury, was prejudicial error, although he could hear the argument.

3. The fact that it was defendant's duty, as secretary of a corporation, to know the contents of its books, which had been falsified while in his custody, to enable him to commit the crime of embezzlement or conceal it, did not make them admissible against him to show receipt of the money, and that he falsified them, without first showing that he was responsible for their condition.

Department 2. Appeal from superior court, Los Angeles county.

W. R. Blackman, convicted of a felony, appeals. Reversed.

W. H. Shinn, F. G. Finlayson, and Earl Rogers, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Defendant was convicted of a felony. Upon the hearing of the motion of defendant for a new trial two affidavits were read in its support, made by two different persons, who were present at the trial. In substance, they deposed that, after the court had instructed the jury, and while the district attorney was addressing the jury, the presiding judge left the bench and the court room, and went into another room, closed the door behind him, and was absent from the court room about 10 minutes, during which time the district attorney proceeded with his argument to the jury upon the facts of the case. No affidavit disputing these facts or explaining the absence of the judge was made by any one. Defendant's affidavits were filed with the notice of motion for a new trial, and when the motion came on to be heard, and the affidavits were read, the court made the following remark: "What! What! The court knows of its own knowledge that it was not absent any such time, or in any such manner, and was not out of hearing of counsel while arguing said cause at any time, and that the door of my chamber was open at that time, and even when the door is shut I can hear all that is going on in the court room." The attorney general cites Southern California Motor-Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316, 34 Pac. 711, in which the court quotes from a Nevada case "that in all motions before a judge during the progress of the trial he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others." The motion in both these cases was for transfer of the place of trial upon the ground that the judge was interested in the cause, and in the case in 100 Cal. 316, 34 Pac. 711, the affidavit was not to the fact that the judge was disqualified by reason of interest (giving the disqualifying facts), but it was that, as affiant was informed and believed, the judge had said he considered himself disqualified. It has been held here recently that a motion to transfer a cause on the ground of the bias of the judge must be decided on affidavits (People v. Compton, 123 Cal. 403, 56 Pac. 44), so that the above rule does not apply in that kind of a case; nor do we think it would apply where the facts as shown clearly disqualify the judge as interested in the cause of action. The judge's belief cannot overcome the legal conclusion to be drawn from the facts. The attorney general also claims that the statement of the judge from the bench must be received as a refutation of the facts set forth in the affidavits. We are not called upon to decide whether the statement of the court is to be received as the equivalent of an affidavit in all cases, or whether the rule in the case of People v. Compton, supra, applies, as is claimed by defendant. The facts stated in the affidavits were not, in their nature, better known to the judge than to others in the court room,—the sheriff, the clerk, counsel, and bystanders. If the statements were untrue, the fact could have been easily so shown by affidavit. But the statement of the judge, treated as an affidavit, and given its full effect as such, does not controvert the affidavits presented with the motion in all their essential facts. In People v. Tupper, 122 Cal. 424, 55 Pac. 125, the court said: "The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law." In State v. Beuerman (Kan. Sup.) 53 Pac. 874, cited in the above case, it was said: "He [the judge] cannot even temporarily relinquish control of the court or the conduct of the trial. * * * It is especially important that he should be visibly present every moment of the actual progress of a criminal trial, where the highest penalty of the law may be imposed. * * * If the presiding judge abandons the trial, or relinquishes control over the proceedings, the accused has good cause to complain,"—citing numerous cases. Admitting all the judge said to be true, there is not in the statement sufficient to disprove the fact. Indeed, it inferentially concedes that he relinquished control of the case for the time. Something more is required of the presiding judge than that he should be within hearing. That might be true if he were on the street, and the windows of the court room open; and it may be true in this case, as the judge stated, that when in the adjoining room, with the doors shut, he "can hear all that is going on in the court room," but it must be obvious that he would be in no position to have control of the proceedings, and certainly would not be presiding in the cause when in an adjoining room, with the door open or shut. If any misconduct took place in the court room during such absence, there would be no judge present to whom defendant's counsel could make complaint, or to determine what occurred in his absence. Upon the authority of People v. Tupper we must hold the conduct of the judge to be prejudicial error.

Objections were made to the introduction of the books of the corporation,—that the evidence was mere hearsay, and was incompetent; that it was not made to appear that the defendant had ever seen or knew of the entries offered, and the evidence was incompetent to establish any fact against him. A great many entries made in a great many books were offered and received, over the objection of defendant. It appeared that some of the entries were in the handwriting of defendant, and others were not. They were introduced, not only to show the receipt of money by the defendant, but also to show forced balances, and thereby to raise the presumption of guilt. The bookkeeper was not sworn as a witness, but they were merely shown to be books kept by the company. Bolton, the bookkeeper, at about the time the shortage was discovered, had committed suicide. The position of the learned judge of the trial court was stated by him: "This is one of the books of the company. He is charged by the by-laws and the custom of the company with the keeping of the books. This book was presumably in his custody, and under his control. I don't care who kept it. If there is anything wrong about it, that is for the defense." As a matter of course, this view is not insisted upon here. The presumption of innocence would overcome all the presumptions of knowledge and control, if they existed; and it was for the prosecution to show that the defendant was responsible for the condition of the books, and in a criminal proceeding it is not enough that it was his duty to know of their contents, and that in a civil action they would be competent evidence against him on that ground. He cannot be held for the crime of embezzlement because he has negligently performed his duty as secretary of the corporation, but such consequence might result under the rulings of the court. Most of the books were in the handwriting of Bolton. It was not shown that defendant examined them to see that they were correct, or, save by the presumption mentioned, that he knew anything about them. Books kept by the collectors were also introduced, without any evidence as to their correctness, and that defendant ever saw them; and the same is true as to the books of the bank showing what deposits were made. The books were certainly not admissible as shop books. The receipt of such books in evidence is an exception to the general rule, and they are admitted for a limited purpose only. This case is clearly not within the exception. 1 Greenl. Ev. § 120b. Aside from shop books, kept by one of the parties to an action, "regular entries made in the course of business" are sometimes received. Id. § 120. Such entries must be made in pursuance of some system which is a part of the business, should be nearly contemporaneous with the event, and made by one who knew the fact, and had no interest in making a false entry. In short, the motive for making the entries must be solely to record the truth, and not to misrepresent. The illustrations given by Greenleaf are entries made by "one sending orders or bills, by a notary sending protests, a cashier sending notices of nonpayment, a marine inspector certifying to a vessel's condition, an attorney keeping a book of proceedings, an asylum officer keeping a weather record, records of baptism or marriage by priest or minister." In all these cases the record was made only because it was deemed important to preserve in perpetual memory what actually occurred. There was no inducement to make a false record, but, on the contrary, false entries in most of the cases would be misleading and injurious. It must be kept in view that, after all, such evidence is hearsay, and secondary, and is receivable only when better evidence cannot be had, and in the special cases which come within the rule. Being entries made in due course of business does not make them primary evidence. There is much plausibility in the contention that they are admissible, as against an employé, to show what amount of money was received by the corporation, and when it was received; provided, of course, there is nothing which tends to impeach the record as truthful. In this case, one purpose for which the books were offered was to show that defendant did not keep correct books, but that they were falsified for the purpose of enabling the defendant to perpetrate the crime, or for the purpose of concealment. Under such circumstances they cannot be received as regular entries made in the course of business. The presumption of correctness is destroyed, and they are not offered as proof of the facts recited. If there was evidence that the entries were made by the defendant, or under his direction, or with his knowledge, they would most undoubtedly be competent and important evidence against him. They are clearly inadmissible, except as admissions, or as acts done in furtherance of the crime charged against him. His knowledge and complicity in falsifying the books must first be shown. The presumption of innocence with which the law clothes the defendant is sufficient to overcome the presumption which might prevail in a civil case that he knew because it was his duty to know. As before stated, he is not to be punished criminally for negligently performing his duty. As a new trial must be had on other grounds, it is not necessary to discuss this matter further. The books kept by the collectors and the bank books should have been offered in connection with the evidence of those who kept them. As primary evidence could have been had in these cases, there was no excuse for offering secondary evidence. The judgment is reversed, and the cause remanded for a new trial.

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127 Cal. 258

GOODALL et al. v. JACK. (L. A. 592.)

(Supreme Court of California. Dec. 22, 1899.)

BILLS AND NOTES—RENEWAL—CORPORATIONS—STOCKHOLDERS' LIABILITY—LIMITATIONS.

A corporation authorized the issuance of new notes on surrender of notes held by plaintiffs, or on receipt of their value from any other person; directed new notes to be made to him, and the proceeds applied to plaintiffs' claim. Plaintiffs presented K.'s check for the amount and the notes, and new notes were executed to K., who immediately indorsed them to plaintiffs. The corporation indorsed K.'s check to plaintiffs, who deposited it in a bank to their credit. At the time the check was drawn, K. did not have sufficient funds in his bank to meet it, and on the following day gave the bank his note for the amount of the check, which he paid on the next day by a check from plaintiffs. The entire transaction was between plaintiffs and the corporation, which knew nothing of K. except that the check was signed by, and the notes made payable to, him. *Held*, that such facts constituted a renewal of the old notes merely, and not the creation of a new debt, and hence plaintiffs were not entitled to maintain an action to enforce a stockholder's liability on the new notes more than seven years after the giving of the original notes.

Department 2. Appeal from superior court, San Luis Obispo county.

Action by Charles Goodall and others, copartners, against R. E. Jack. From a judgment in favor of defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Geo. W. Towle, Jr., and Wilcoxon & Bouldin, for appellants. W. H. Spencer, for respondent.

PER CURIAM. The defendant, Jack, was, during the times mentioned in the complaint, a stockholder of a corporation called the West Coast Land Company, and this action is brought to recover the proportionate share of defendant as such stockholder of a debt of the corporation alleged to have been incurred to one J. N. Knowles for money borrowed from him by the corporation on the 15th day of May, 1894. In his answer the defendant pleads, among other things, that the alleged cause of action is barred by the provisions of subdivision 1 of section 338 and section 359 of the Code of Civil Procedure. Judgment went in the court below for the defendant, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The court found, among other things, that the alleged cause of action was barred by the provisions of the Code above mentioned, and the only point discussed by counsel is whether or not that finding was correct. It appears from the evidence that in May, 1890, the corporation above mentioned incurred an indebtedness to the plaintiffs herein of a sum of money amounting to nearly $200,000, for which it gave to the plaintiffs four promissory notes for different sums, amounting in the aggregate to said sum of about $200,000. Four years afterwards—on or about the 15th day of May, 1894—the board of directors passed a resolution authorizing the president and secretary to make notes of the corporation, payable to plaintiffs in the amount of the old notes, with interest, upon the surrender of the old notes, or, upon the receipt of the face value of the new notes from "any other person," then to make the new notes to such other person, and "to immediately apply all sums so received from said new notes in payment of said old notes." The old notes, with interest, then amounted to $219,213.62. On said 15th day of May, 1894, one of the plaintiffs brought to the secretary of the corporation a check of J. N. Knowles upon the Anglo-Californian Bank, Limited, for the said sum of $219,213.62, and the plaintiff delivered up to the secretary all the old notes to be canceled. The check of Knowles was immediately indorsed by the secretary to plaintiffs, and notes for the said amount were made payable to Knowles, which notes were on the same day indorsed by Knowles to the plaintiffs, and the check of Knowles was deposited by plaintiffs to their credit with the First National Bank of San Francisco. Knowles seems to have had good financial standing with the Anglo-Californian Bank, although when he drew the check on the 15th there was a balance due him on his account with the bank of only about $1,200. But on the next day—the 16th—he gave to the bank his note for the amount of the check, and the amount of his note was placed to his credit. On the next day he received a check from plaintiffs for $219,286.69, and took up his note by checking against his account. In the whole transaction the negotiations were between the plaintiffs and the corporation, and the latter knew nothing of Knowles in the business except only that the check was signed by him and the new notes were made payable to him. From the foregoing facts it is apparent that the court was warranted in finding that the transactions above mentioned constituted merely a renewal of the old debt by taking up the old notes and giving new ones in lieu thereof. But the running of the statute of limitations in favor of the stockholders could not, in this way, be interrupted. The suit was not brought until seven years after the time when the original liability was created. Code Civ. Proc. § 359; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 37 Pac. 499; Redington v. Cornwell, 90 Cal. 63, 27 Pac. 40; Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077. These views make it unnecessary to discuss other questions,—as, for instance, what the respondent's rights would have been if Knowles had really advanced the money to the corporation upon the credit of its notes to him, and the money thus advanced had been actually used by the corporation to pay off the old notes which were evidences of the original liability created in 1890. The judgment and order appealed from are affirmed.

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6 Cal. Unrep. 367

PEOPLE v. GARCIA. (Cr. 561.)

(Supreme Court of California. Dec. 21, 1899.)

GRAND LARCENY—INFORMATION—EVIDENCE—HARMLESS ERROR—WITNESSES—CROSS-EXAMINATION.

1. A demurrer to an information on the ground that it was indefinite was properly overruled, as that is not one of the grounds for demurrer enumerated by Pen. Code, § 1004.

2. As Pen. Code, § 487, declares that grand larceny is committed when the value of the property taken exceeds $50, an information is within the statute, whether it alleges that the stealing of property of such value was from the person or not.

3. Where the evidence tended to show that an alleged larceny took place in a certain room, evidence that defendant lived therein was admissible, though it appeared that a woman jointly accused with him of the same offense lived in the same room, and the circumstance was possibly unfortunate to defendant, with the jury.

4. The cross-examination of witnesses who testified to defendant's general reputation for truth, honesty, and integrity may take a wide scope.

5. The evidence in a prosecution for larceny of money tended to show that the money was taken from an intoxicated person, to whom defendant afterwards introduced a hack driver as his coachman, and directed the driver where to go and throw him out. *Held* that, if it was error to admit evidence of what was thereafter done by the driver and defendant's victim in his absence, it was entirely harmless.

Department 1. Appeal from superior court, Los Angeles county.

T. N. Garcia was convicted of larceny, and he appeals from the judgment and from an order denying a new trial. Affirmed.

H. H. Appel and Davis & Morrison, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. By the information in this case T. N. Garcia and two females—Susie Douglass and Rosa Durbin—were jointly accused of grand larceny committed in the stealing, etc., from "the ownership and possession of Thomas Tomlinson," certain money of the value of $295, the property of said Tomlinson. Garcia was tried separately. He was convicted of the offense charged, and has appealed.

Appellant demurred to the information on the alleged ground that the same "is indefinite, in that it cannot be ascertained therefrom whether said larceny is from the person or not." The demurrer was rightly overruled. Indefiniteness of the information is not a ground for demurrer thereto. Pen. Code, § 1004; People v. Markham, 64 Cal. 157, 30 Pac. 620. Moreover, although the language of the information varied somewhat from the usual formula, yet, since it was alleged that the property stolen was above the value of $50, the offense charged was within the statutory definition of grand larceny, whether the stealing was from the person or not. Pen. Code, § 487. So that the information can no more be called indefinite for failing to show whether the money was taken from the person of Tomlinson, than for failing to show whether it was taken from his house.

The chief insistence of appellant in this court seems to be that on the trial the court below allowed the district attorney to show ("in devious and improper ways," it is claimed) the existence of immoral relations between appellant and said Rosa Durbin. Many instances of evidence having this bearing and admitted by the court are specified as error in the brief of appellant. It would not be profitable to discuss them singly. There was evidence tending to prove the following facts, among others: Said Susie Douglass occupied room 47, and said Rosa Durbin occupied room 49, of a certain building in the city of Los Angeles. Tomlinson, a stranger in the city, visited them at said rooms on the evening when the alleged larceny occurred, having then in his possession paper currency to the amount stated in the information. Appellant, Garcia, was also present, and the party passed some hours in carousing together at Tomlinson's expense. Late in the evening Tomlinson had become grossly intoxicated, and all his money aforesaid was gone. Appellant then caused him to be taken away in a hack, instructing the driver, among other things, to keep silent, and to "take him somewhere and throw him away." Immediately afterwards appellant handed to said Rosa Durbin $80 in bills of like character and denominations with some of the said money of Tomlinson, and she secreted them. She testified that appellant took the same from Tomlinson, and there was evidence other than hers that by appellant's direction she paid the driver for "hauling" Tomlinson away. Under the circumstances detailed, the close associations existing between Rosa Durbin and defendant, Garcia, are quite apparent. The evidence tended to show that the larceny took place in the Russ House, and probably in room 49. The fact that defendant lived in that room was admissible evidence. And, if it also appeared that Rosa Durbin lived in the same room, such circumstance possibly was an unfortunate one for defendant in the eyes of the jury. At the same time, it is a circumstance of which defendant is not entitled to complain. We see nothing objectionable in the cross-examination of defendant's witnesses who took the stand and testified as to his general reputation for truth, honesty, and integrity. The cross-examination of that class of witnesses may take a wide scope.

Appellant introduced the said driver to Tomlinson as his (appellant's) coachman, and directed the driver where to go and to throw Tomlinson out. The driver testified that he took him to the place indicated by appellant; that he opened the door of the carriage, and Tomlinson "crawled out." It is objected that this evidence, and some other of similar character, was improper, because the things done by Tomlinson and the driver were not in the presence of appellant. Conceding the rule of the court to be error, still it is apparent that the error was entirely harmless.

The other points made by appellant have, we are disposed to think, as little merit as the one last considered. It seems unnecessary to state them in detail, though we have attentively examined them all. The judgment and order denying a new trial are affirmed.

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127 Cal. 243

PEOPLE v. ESLABE. (Cr. 507.)

(Supreme Court of California. Dec. 21, 1899.)

HOMICIDE—EVIDENCE—DEPOSITION OF DECEASED WITNESS—REPORTER'S NOTES.

1. Pen. Code, § 869, subd. 5, provides that the reporter's stenographic notes of depositions taken in cases of homicide must be filed with the county clerk. *Held*. in a prosecution for murder, not error to overrule an objection to the admission in evidence of the deposition of a witness, since deceased, taken at the preliminary examination, where it was not affirmatively shown that the reporter's notes had been filed with the county clerk.

2. Any irregularity in admitting in evidence in a prosecution for murder the deposition of a deceased witness taken at the preliminary examination, where it was not shown that the reporter's stenographic notes had been filed with the county clerk, as required by Pen. Code, § 869, subd. 5, was without injury to the defendant, where the notes were actually so filed before the conclusion of the trial.

In bank. Appeal from superior court, Alameda county.

Joaquin Eslabe was convicted of murder in the first degree, and appeals. Affirmed.

A. L. Frick and W. B. White, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. The defendant, convicted of murder in the first degree, appeals from the judgment, and from the order denying his motion for a new trial.

John Metz was a witness at the preliminary examination of the defendant. At the trial it was shown that he was dead. His deposition taken at the preliminary examination, and contained in the transcript of the notes of the official reporter at that hearing, was offered in evidence. Objection to its introduction was made upon the ground that it had not affirmatively been shown that the stenographic reporter had filed his original notes with the county clerk, as required by section 869, subd. 5, of the Penal Code. The objection was overruled, and the deposition admitted in evidence. There was no error in this ruling, and, if there was any irregularity, it was without injury to the defendant, in view of the fact that the notes were actually filed with the county clerk before the conclusion of the trial. In People v. Grundell, 75 Cal. 301, 17 Pac. 214, another provision of section 869 of the Penal Code, which requires that the transcript of the reporter's notes shall be filed with the clerk within 10 days, was held to be directory merely, and not mandatory. The provision here under consideration merely requires that the reporter shall file his original notes with the county clerk; and this, as has been said, was done before the conclusion of the trial.

The defendant made statements in the nature of confessions to several different persons who were witnesses at the trial. Objections were interposed to the reception as evidence of these statements, upon the ground that it was not shown that they were freely and voluntarily made. The objection, however, finds no support in the record, which discloses that in each instance before the admission in evidence of the defendant's declarations it was proved that they were freely and voluntarily given, and made neither under duress nor inducement nor promise. These being the only matters called to our attention upon this appeal, the judgment and order appealed from are affirmed.

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127 Cal. 232

HANLEY v. CALIFORNIA BRIDGE & CONSTRUCTION CO. (S. F. 1,137.)

(Supreme Court of California. Dec. 20, 1899.)

MOTION FOR NONSUIT—MASTER AND SERVANT—PERSONAL INJURY—TUNNEL WORKMEN—REQUIREMENTS FOR SAFETY—NOTICE—PRESUMPTION—APPLIANCES — EVIDENCE—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

1. A motion for nonsuit admits the truth of plaintiff's evidence, and every legitimate inference of fact which may be drawn therefrom, and on such motion the evidence should be interpreted most strongly against defendant.

2. A superintendent engaged to supervise the construction of a tunnel, and who visited the work once or twice a day, must be presumed to know as much as his workmen as to the general requirements to make the place reasonably safe from the fall of overhanging rock.

3. Where a permanent tunnel is under construction, as fast as completed the finished part becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted.

4. There was evidence that a tunnel had been driven in about 18 feet, and that it was about 8 feet wide and from 9 to 10 feet high; that a rock which fell and injured a workman was about 10 feet from the mouth; that the tunnel had passed the place where the rock was three or four days. *Held*, in an action for the injury, that on a motion for nonsuit this would be assumed to show that the tunnel was completed at the point in question, so that it was his employer's duty to see that it was reasonably safe, though there was some unexplained evidence that the side of the tunnel opposite this point had been blasted, which might possibly imply that it was not entirely completed there.

5. As plaintiff was removing, with a wheelbarrow, rock from a tunnel as it was being constructed, he was injured by an overhanging rock, which fell from a finished portion thereof, unsupported by timbers. He was inexperienced in running tunnels, and had no means of knowing that the tunnel was unsafe. He saw the rock, but it did not appear to be loose, and was beyond reach high above his head. His fellow servants were skilled miners, but gave him no warning. Nei-

ther did the superintendent, who visited the work daily. It appeared, however, that the tunnel, to be safe, required some timbering, but these had not been inserted. *Held*, that plaintiff's negligence in exposing himself to the danger was for the jury.

McFarland, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Action by Philip Hanley against the California Bridge & Construction Company, a corporation. From a judgment of nonsuit and from an order denying a new trial plaintiff appeals. Reversed.

Henley & Costello, for appellant. Davis & Hill, for respondent.

CHIPMAN, C. Action to recover damages for personal injury while working in a tunnel. The pleadings are verified. The cause was tried by a jury, and at the close of plaintiff's evidence the court granted defendant's motion for judgment of nonsuit. The appeal is from the judgment and from an order denying motion for new trial.

Plaintiff introduced evidence tending to show the following facts: Defendant was engaged in the construction of a tunnel at Baker's Beach, in San Francisco, and plaintiff was employed by defendant as a laborer, his duty being to load and haul away rock and débris from this tunnel with a wheelbarrow. He was inexperienced in running tunnels, and was working with experienced miners, who were skilled, and had had long experience in such work. He had been working 6½ days when the accident happened by which he was injured. The tunnel ran into the face of a receding rock bluff which rose up from the ocean beach. As driven in at that time, it measured about 18 feet at the bottom and about 15 feet at the top, and was 8 feet wide and 9 or 10 feet high. Defendant had a superintendent, who was in charge of the work, and employed the men, and who visited the tunnel once or twice a day, but gave no instructions to the men concerning the work, except generally for them to go on with the tunnel; and he never gave any instructions to the plaintiff, except that when he employed plaintiff he directed him to wheel out the stuff which was blasted down or loosened. On the day of the accident the plaintiff, having laid some planks upon which to run his wheelbarrow, was arranging these planks on the bottom of the tunnel, when a rock, weighing about 1,000 pounds, fell from the corner or angle where the roof and wall met, about 10 feet from the mouth and 8 feet from the back end of the tunnel, breaking plaintiff's leg, driving the bones out through the flesh, and seriously injuring him. The rock fell quickly, without giving opportunity to escape, and plaintiff heard no noise before it fell. The tunnel had passed this place three or four days before the rock fell. The rock which fell differed from the others "in that it had a kind of diamond shaped point projecting into the tunnel," and was in size about 2 by 2½ feet. Before it fell, "plaintiff did not notice any definite boundaries around it, nor whether the edge of the rock could be seen; that he had noticed this rock hanging there for three or four days before it fell." Timon, one of the miners helping to drive the tunnel,—a witness for plaintiff,—testified: "That the bluff into which the tunnel was being driven was seamy rock. That he thought the tunnel should have been timbered three or four days before, to prevent the falling of rock, and make it reasonably safe. * * * That for three or four days he (Timon) had thought that rock dangerous [referring to the rock which did the injury], but that there was no visible cleavage or breaking around the rock." He "didn't tell plaintiff it was dangerous, or say anything to him about it, because he didn't think it his business to speak about it." He spoke to the other two men about it, and they paid no attention to it. The rock could not be seen from the surface, but only inside. A small stream of water ran down the face of the bluff over the tunnel, and the wall of the tunnel where this rock was located was damp, and he thought this water seeping through would loosen the rock, "and let it fall sooner than it otherwise would, on account of its not being timbered." The other two miners "were trying to let the rock hang until they had got another center. They left it, thinking perhaps it would stay there. That the way to have made the tunnel reasonably safe for the men working in it would have been to have timbered it." He was asked if there were not timbers there for this tunnel. He answered: "There was none before the rock fell. There were no timbers there before the rock fell. They were on the ground, I guess, but we did not have them in the tunnel." Being again asked, he answered: "No timbers were there until the rock fell; not that I saw; not for the tunnel. There were timbers there for the sewer, but they had no timbers in the tunnel until the rock fell upon the man." He further testified that they had, a half an hour before the accident, fired some blasts, and he was picking down the loose rock from the blasts when the rock fell, and plaintiff stood near him. Their custom was to light the fuse to fire the blasts, and go out to await the explosion, and then return quickly, and "by using the pick, and striking the walls and listening, would discover where rock had been loosened, and was liable to fall, and pick that down, in order to avoid the danger of falling rock." This was done just before the accident. A blast had been put in in the front of the tunnel and one opposite this rock at the top of the tunnel, and one opposite, near the bottom. After the explosion, witness went into the tunnel, and "was picking down the loose rock. The plaintiff went about adjusting the planks on which to run the wheelbarrow." At this time it was "the rock fell, and without noise, and plaintiff received his injuries." Sheridan, a witness for plaintiff, testified: That he had been engaged 30 years in constructing tunnels, and had gone out to look at this ground with a view to bidding on the contract. "Q. And from your observation of it, and your experience as a miner, I will ask you whether it is ground of such character as, to insure reasonable safety in tunneling, would or would not require timbering. A. That would depend altogether upon the size of the excavation. Q. Suppose the excavation was a tunnel of about ten feet wide and ten feet high? A. In that character of rock, I should judge that it would require some timbering." He further testified that many tunnels are run without timbering, depending upon the hardness of the rock and the course of the cleavage and circumstances of the case; that it is not customary in small tunnels to timber, depending upon circumstances; that a practical miner understands all these matters, and, if he wants to work in a dangerous place, it is his own risk; "but he should insist upon having it timbered where the character of the rock is dangerous,—where it is seamy;" that the timbering is generally done by the miners, but not always; that experienced miners are often deceived, "and something falls in where they have thought the tunnel safe," and "often where it looks as if the walls of the tunnel might fall in it does not fall, but remains."

1. Respondent devotes some attention to the evidence of the witness Timon to show that it is susceptible of a different meaning than that given it by appellant, and otherwise comments upon the weight of certain evidence. For example, that the result of Timon's testimony was that timbers were at the tunnel, ready to be used for timbering, and not, as claimed by appellant, that there were no timbers there except for the sewer. The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant. Goldstone v. Cold-Storage Co. (Cal.) 56 Pac. 776. This rule must be applied to all the evidence submitted by plaintiff.

2. The contention of respondent may be summarized as follows: That the three experienced employés and plaintiff were fellow servants, and this fact was for the court to determine; that the injury resulted from the negligence of these men, and, if the duty of removing the dangerous rock rested more directly upon the skilled and experienced workmen, still the rule applies to all fellow servants, though working in different capacities, and the employer is not liable to one who is injured by the negligence of another; that, though it be the duty of the employer to furnish the employé a safe place in which to work, in the present case the rule has no application, because the employer did not furnish the place, but plaintiff and the other three furnished the place by making the tunnel (citing Callan v. Bull, 113 Cal. 593, 45 Pac. 1017); that the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts, and the dangers of the employment known to him, and he assumed the risks (citing Vaughn v. Railway Co., 83 Cal. 18, 23 Pac. 215, and other cases); and, finally, that the facts show contributory negligence. The complaint charges "that said defendant, in violation of its duty to furnish this plaintiff with a safe place to work, negligently and carelessly failed to properly or at all brace or timber said tunnel." This allegation is not denied. The evidence tends to show that the materials through which the tunnel was being driven were of a character requiring it to be timbered to be reasonably safe. The superintendent having charge of the work visited the tunnel once or twice a day, and must be presumed to have known as much as his workmen with regard to the general requirements to make the place reasonably safe from a danger such as befell plaintiff, even though it does not appear that he had actual knowledge of this particular overhanging rock; and it was his duty to ascertain the condition of the tunnel as to its safety. Among the requirements necessary to the safety of the workmen, as the evidence tends to show, were timbers to be placed in the tunnel; and the evidence also tends to show that none were supplied for this purpose, although there were timbers for the sewer. I cannot agree with respondent's counsel that the rule of law which requires the master to furnish a safe place in which his servants may work does not apply to this case as it presents itself. What further evidence might disclose is not now to be considered. In Callan v. Bull, relied upon by respondent, the facts presented a different case from this. There the workmen were engaged in constructing a jetty. To do this, certain temporary structures were necessary, and it was through the defects in one of these that the injury occurred. In speaking of the rule we are now considering the court said: "Manifestly, the place at which the work was to be done was not provided by the defendant, nor can it be said that different portions of the work in which the laborers might be engaged as it progressed was the 'place' furnished by their employer, within the meaning of the above rule, or that the bent or trestle, from which was suspended the mat on which the plaintiff was at work at the time of his injury, was one of the appliances to be furnished by the defendant." The soundness of these views need not be and are not questioned. Elsewhere in the opinion it was said that the rule "has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appli-

ance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation." Among the cases cited in support of the opinion is Mining Co. v. Clay's Adm'r, 51 Ohio St. 542, 38 N. E. 610, where certain laborers in a coal mine were injured by the falling in of the roof by reason of its not being sufficiently propped, and the court held that "the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and, instead of being a place furnished by the master for the employés, within the spirit of the rule referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform." What was said in Callan v. Bull and what we find in the Ohio case must be read in the light of the facts before the court. Where a permanent tunnel is driven into a mountain to open up veins of mineral, or pierces a mountain to furnish a permanent bed for a railroad, we think that, as fast as it is completed, the finished tunnel becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted. Some of the great railroad tunnels of this century—for example, the Hoosac and Mont Cenis tunnels—required years for their completion from end to end. It would be most unreasonable to hold that the laborer employed upon the unfinished portion of one of these tunnels must take a fellow servant's risk in passing through miles of completed work to get to his place of employment. Nor can we see that the case would be different where he himself helped to complete the finished portion. The evidence before us is not entirely clear as to whether the tunnel in question was completed at the point where the accident occurred, so as to bring it within the reason of the rule we are discussing, but there was not sufficient evidence on the point to justify the court in holding that portion of the tunnel not to be completed in the sense we are considering a completed tunnel. The evidence is that the tunnel had been driven in about 18 feet, and that it was about 8 feet wide and from 9 to 10 feet high; that the rock that fell was in the top of the tunnel, and was about 10 feet from the mouth and 8 feet from the back end of the tunnel; that the tunnel had passed the place where the rock fell about three of four days. These expressions seem to imply a completed tunnel to the extent named; at least must be so taken on this motion. There is other evidence showing that for some reason, not fully nor intelligently explained, two blasts were put in the side of the tunnel opposite where the fatal rock was hanging. This might possibly imply that at that point the tunnel was not entirely completed. We do not think, however, that we are sufficiently enlightened by the evidence as now before the court to warrant us in saying that it takes the case out of the rule we are considering. We do not think that the court, on this motion, should assume, on such evidence as this, to say that the tunnel was not completed at the point in question, and that at that particular point the "place" was not such as it was the duty of the employer to furnish and to see that it was reasonably safe.

I think the view we have taken of the rule under consideration is fully supported in Railway Co. v. Jarvi, 3 C. C. A. 433, 53 Fed. 65, and in Kelley v. Mining Co. (Mont.) 41 Pac. 273. In the first of these cases Jarvi was a coal miner. He was injured by a rock falling upon him from the roof of one of the tunnels by which he had access to the place where his particular work called him. The case was heard before Caldwell and Sanborn, circuit judges, and Shiras, district judge. The opinion presents a careful review of the law upon the question here. The court said: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employé may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition, so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. * * * For a failure to exercise this care, resulting in injury to the employé, the employer is liable; and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended." Further, as to the duty of the master and the rights of the servant, it was said: "The latter [the servant] has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man in the performance of his work as a miner would have learned facts from which he would have apprehended danger to himself." Upon the question of contributory negligence it was said: "The degrees of care required of the master and servant also differ, because defects in a piece of machinery or in the roof of a mine that to the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no significance to a laborer or miner who has had no experience in watching and caring for machinery or roofs of slopes in a mine; and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which these defects indicate. The dangers and defects merely must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence." These principles are supported by numerous cases cited in the opinion, and seem to us a clear and sound exposition of the law. Applying these rules of law to the facts of this case, ought the court to have nonsuited the plaintiff? In actions like the present one, questions of negligence are for the jury to determine; and it is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion from them, that the question of negligence is ever considered one of law for the court. Railway Co. v. Jarvi, supra, and cases cited. We do not think the case, as it comes to us here, is one where all reasonable men must draw the inference that the plaintiff was guilty of, or the defendant free from, negligence. In Kelley v. Mining Co., supra, plaintiff was working in a mine, and was an experienced miner. His work was at the face of the tunnel which he was helping to run. He was injured by the falling of rock from the roof of the tunnel a short distance behind where he worked. The facts were not in all particulars as in this case, but they presented the question now before us, and it was decided that: "Where a miner is engaged in running a tunnel, drilling and blasting from its face, the employer is bound to furnish a safe place for work by using proper precautions to prevent the falling of the roof of that part of the tunnel already created, and by keeping the floor so free of débris as not to obstruct his escape in case of accident." (Syllabus.) Plaintiff had no knowledge of or experience in running tunnels. He neither knew, and, because he was inexperienced, had not the means of knowing, that the tunnel was unsafe without timbers. He saw this overhanging rock, but it presented to him no evidences of loosening, and no cleavage from around its edges was visible, and it was high above his head, and beyond his reach. His fellow servants were skilled in mining, and they gave him no warning, although at least one of them thought it liable to fall. The superintendent visited the mine daily, and he gave no warning and took nó steps for the safety of plaintiff. A witness of long experience in running tunnels testified that, in his opinion, the tunnel would require some timbering, and in this opinion he was corroborated by the witness Timon. We cannot say that the facts were such that the court had the right to consider the question of negligence involved as one of law for the court.

We do not deem it necessary to discuss the other points made by defendant, for, conceding that the men on the work were fellow servants, it was still the duty of defendant to furnish them a reasonably safe place in which to work. Whether the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts, and the dangers of the employment were known to plaintiff, were questions of fact as to which there was at least some evidence which should have gone to the jury. The decision of the lower court seems to have turned on the proposition that the case was similar to Callan v. Bull, and was controlled by the rules applied in that case. But we think the circumstances attending the injury in this case clearly distinguishable from those found to exist in Callan v. Bull, and that the cases in 53 Fed. and 41 Pac., supra, more nearly illustrate the principles which should govern here. It is advised that the judgment and order should be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

McFARLAND, J. I dissent, and think that the judgment should be affirmed.

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127 Cal. 212

PEOPLE v. WILLIAMS et al. (Cr. 533.)

(Supreme Court of California. Dec. 19, 1899.)

EXTORTION—THREATS—INDUCEMENTS—EVIDENCE—PRIOR OFFENSE—WITNESSES—EXAMINATION.

1. Under Pen. Code, § 518, declaring it extortion when property is obtained with the consent of the owner induced by an unlawful use of force or fear, the unlawful force or fear must be the controlling cause; and an instruction that, if the threat and fear formed any part of the inducement to the transfer of money, then its receipt constituted extortion, is erroneous.

2. In a prosecution for extortion, it was error to allow evidence of a conversation, held prior to the extortion charged, in which one of the defendants stated that he and the other defendant were making arrangements to blackmail persons other than the prosecuting witness, since such evidence was not connected with the crime charged, and was prejudicial to defendant.

3. Where a question asked a witness in a prosecution for extortion did not appear objectionable, but the answer let in inadmissible matter, after such answer it was not too late to move to strike it out.

Department 1. Appeal from superior court, city and county of San Francisco.

Elsie Williams was convicted of extortion, and from the judgment she appeals. Reversed.

Frederick McGregor and Evans & Meredith, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant Elsie Williams and one Azhderian were jointly charged, tried, and convicted of the crime of extortion. The gist of the charge is that said defendants did extort from W. A. Nevilles $2,000 through fear upon his part induced by threats of defendants that they would publicly accuse him of adultery with defendant Williams.

The defendants asked the court to give the jury the following instruction: "If the money was given to Mrs. Williams by reason of love or affection, or by reason of the past relations existing between the said Mrs. Williams and the said Nevilles, or in settlement or compromise in whole or in part of a suit either begun or threatened, then I charge you that such payment is not extortion, and the defendants must be acquitted." This instruction was given as asked, but the following addition was made thereto by the court: "But, if the threat and fear mentioned in the indictment formed any part of the inducement to any such transfer of money, then the receipt of it would constitute the crime of extortion, and the person who received it, as well as any others who were concerned in the commission of such crime, * * * would be guilty of the crime charged." After the jurors had retired to deliberate upon their verdict they returned to the court for further information, whereupon the court, among other matters, stated to them as follows: "The fear that the threat would be carried out, if there was a threat, must have become a part, at least, of the reason for the payment of the money. It may be that there would be half a dozen reasons for a man to pay out money, which there would be no crime in receiving at all; but if a threat had been made, such as charged in the indictment, and fear that such threat would be carried out forms a part of the reason for the payment of the money, then the crime of extortion would be accomplished." The foregoing instructions do not correctly present the law of extortion. The conditions therein existing may have been disclosed by the evidence, and still the defendant be not guilty. Measured by these instructions, if the fear of the prosecuting witness induced by the threats of defendants entered to any extent whatever into the parting by him with his money, then the crime of extortion was committed. This cannot be a sound declaration of law. If the fear working upon the mind of the prosecuting witness by reason of these threats formed but the slightest part of the operating cause which induced Nevilles to part with his money, then no extortion was committed. If affection or sympathy upon the part of Nevilles for this defendant was the principal reason which induced him to part with his money, then there was no crime. In other words, our statute (section 518, Pen. Code) defining "extortion" says, "The crime is only committed when the property is obtained with the consent of the owner, and this consent must be induced by an unlawful use of force or fear." The statute can only mean that the unlawful use of force or fear must be the operating or controlling cause which produces the consent. If some other cause were the primary and controlling one in inducing the consent, then there would be no extortion. In another form we find this principle stated in People v. Haynes, 11 Wend. 567,—a case of obtaining property under false pretenses. It is there decided: "The position that the falsehood had a material effect upon the person defrauded in procuring the property necessarily implies that without it the object of the felon would have failed; he could not have obtained it. At least, we are disposed to require the false pretense or pretenses to be so material that, without the existence of their influence upon the mind of the person defrauded, he would not have parted with the property." Tested in the measure furnished by this decision, these instructions fail. The fear induced by the threat may have formed a part of the reason for the payment of the money, and yet the defendant be not guilty, for such a fear does not necessarily exclude the idea that the prosecuting witness would have parted with the money in the absence of the fear. This "part of the reason" must be so material that the money would not have been paid without it. And, when so material, it is the moving or operative cause which produces the consent to part with the money. It is plain that the instructions quoted fail to cover this ground. While the court repeatedly charged the jury correctly as to the various elements constituting the crime of extortion, these instructions in no degree neutralize the error committed in the giving of the instructions quoted. It is impossible for this court to say that the verdict of the jury was based upon the sound rather than the unsound. In view of the somewhat peculiar facts of this case, it was all-important that the instructions to the jury bearing upon the reasons which induced the prosecuting witness to part with his $2,000 should be squarely within the law. Some of these facts are to the effect that within a day or two after the alleged commission of this extortion the prosecuting witness parted freely and voluntarily with an additional $500 to this defendant. And, indeed, the social relations existing between these two people for some time after the commission of this alleged offense seem to have been of a very friendly character.

A witness was interrogated as to a certain conversation he had with the co-defendant, Azhderian, prior to the alleged extortion. He testified that in answer to the question, "What are you building the house out there for?" the co-defendant, Azhderian, in substance, stated: "The ladies [meaning the defendant and another woman] are dead fly, and I am building this house so that when we leave the Paragon [Nevilles' farm] we can go there. Then I will bring business men out there, and we will get them full of wine, and afterwards blackmail them." A motion to strike out this statement of the witness was denied. The statement should have been stricken out. It has nothing whatever to do with the merits of this prosecution. It was greatly prejudicial to this defendant, for it was well calculated to make the jury look upon her with unkindly eyes. A contemplated scheme by these two defendants to blackmail or extort money from other persons was no more admissible at this trial than the evidence of previous robberies or arsons would have been admissible if defendants had been upon trial for robbery or arson. It is now urged that the motion to strike out was properly denied as coming too late, no objection having been first made to the question. This position cannot be sustained. No objection perceptible to this court could have been well made. It was not until the answer came that it could be ascertained the evidence should not go to the jury, and then the only remedy was the motion to strike out. Many statements made by the co-defendant would have been clearly admissible. And the admissibility of this evidence could not be determined until it was first ascertained what it was. When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late, unless preceded by an objection to the question, but the rule is otherwise when the evidence may or may not be admissible.

Defendant now asserts that the trial court permitted other errors in the admission of evidence. Many of these claims are without substantial foundation, while the lack of objections or exceptions forbids the consideration of others. Upon a second trial of the defendant many of these matters will not arise. It may be suggested that evidence tending to show these defendants to have been guilty of immoral conduct between themselves prior to the alleged commission of this crime should not be admitted. Such character of evidence in no way tends to indicate the commission of the crime with which they are charged. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

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127 Cal. 230

SULLIVAN v. JOHNSON. (Sac. 566.)

(Supreme Court of California. Dec. 20, 1899.)

SALE OF PERSONALTY—RIGHT TO QUESTION VALIDITY—ESTOPPEL.

Where a creditor recognized a sale of her debtor's personal property, so that the buyer expended money thereon which he would not otherwise have done, she and those claiming under her are estopped to question its validity because unaccompanied by an immediate delivery, followed by an immediate and continued change of possession, as demanded by Civ. Code, § 3440, to rebut a conclusive presumption that it was fraudulent and void as to creditors and their successors in interest.

Department 1. Appeal from superior court, Sacramento county.

Claim and delivery by Minnie Sullivan against Frank T. Johnson. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

A. M. Johnson, for appellant. Hinkson & Elliott, for respondent.

GAROUTTE, J. This is an action of claim and delivery, defendant justifying as sheriff under a writ of attachment. Judgment went against him, and he takes an appeal from the order denying his motion for a new trial. This attachment was issued in an action begun by the administrator of the estate of Harriett M. Figg, deceased, against Sarah Andrews. This action involves the possession of certain furniture and other household goods situated in a lodging house, of which personal property plaintiff claims to be the owner, as the vendee of Sarah Andrews. For present purposes it may be conceded that the sale of the property to plaintiff by the defendant in the attachment suit was void as to the plaintiff in that suit by reason of the fact that it was not accompanied by an immediate delivery, followed by an actual and continued change of possession, as demanded by section 3440 of the Civil Code. But it is now claimed upon the part of the plaintiff that Mrs. Figg, and, therefore, this defendant, is estopped from raising the question as to the validity of the sale of the furniture to her. Upon this question of estoppel the court made a finding of fact to the effect that the sale to plaintiff was made for a valuable consideration, in good faith, and without any intent to defraud any of the creditors of Sarah Andrews, the vendor, "all of which facts were well known to the said Harriett M. Figg, who consented to the same, and recognized the validity of the sale; and, acting upon said knowledge and acts of the said Harriett M. Figg, plaintiff expended a large sum of money, to wit, about one hundred dollars, on and for said personal property, which she would not otherwise have done." We do not deem it necessary to enter into a detailed recital of the evidence to show that this finding has support therein. It is sufficient to say that the evidence does support it, and, in view of this finding of fact, the defendant, standing in the shoes of the attaching creditor, cannot successfully defend the present action. The case of Escolle v. Frank, 67 Cal. 137, 7 Pac. 425, is directly in point. It is there stated: "If a creditor make any statement or agreement in effect confirming the sale, 'upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances as his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he would be held to have confirmed the transfer.' Bump, Fraud. Conv. p. 458, and authorities there cited. In this case Tresconi recognized plaintiff's purchase, released his attachment, caused the sheep to be returned over to the plaintiff, and upon the good faith of those acts the plaintiff took the sheep, and expended about $400 in and about their care, which he would not otherwise have done. After all this, to permit Tresconi to question the sale would be to countenance a palpable fraud on the plaintiff." For the foregoing reasons, the order denying the new trial is affirmed.

We concur: VAN DYKE, J.; HARRISON, J.

127 Cal. 208

BANK OF ORLAND v. DODSON et al. (Sac. 590.)

(Supreme Court of California. Dec. 18, 1899.)

MORTGAGES—FORECLOSURE—DECREE—SALE—VALIDITY—SERVICE OF SUMMONS.

1. A decree in foreclosure taken by default, and a sale thereunder, where actual service was made on defendants, and the record shows on its face that it was by one having authority, were not invalid because the summons was in fact served by one without authority, until reversed or set aside.

2. Where defendants in foreclosure failed to appeal from the decree, and permitted a sale thereunder without objection, and paid a deficiency judgment, they could not attack the decree and sale thereafter for an irregularity in the service of the summons.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county.

Action by the Bank of Orland against T. H. and Ellen M. Dodson. From a decree in favor of plaintiff, defendants appeal. Reversed.

Charles L. Donohoe and Seth Millington, for appellants. Ben F. Geis, for respondent.

CHIPMAN, C. Foreclosure. Plaintiff remarks in its brief, "The case is indeed a peculiar one, and none just like it is found in the books." The statement is probably correct. The undisputed facts are that plaintiff brought the action in due time to foreclose a mortgage given by defendants. Summons duly issued April 17, 1896, and was served and returned on April 18, 1896, the return being signed "H. C. Stanton, Sheriff, by C. H. Merrill, Deputy Sheriff." An indorsement made thereon by the clerk shows the service to have been regularly made upon the defendants, and that, the time for answer having expired, their default was duly entered. On May 13, 1896, the court entered its decree, containing the usual recitals, and showing, among other facts, that summons was served upon defendants, and that "the time to appear and demur or answer the complaint having expired, and no appearance having been made by either of the said defendants, * * * the default of said defendants * * * was duly given and made, and regularly entered." The decree then recites that the cause came on to be heard, and evidence both oral and documentary was introduced, from which it appeared that all the allegations of the complaint are true, etc. Wherefore the court found the amount due on the promissory note mentioned in the complaint, to wit, $2,743.55, and decreed the same to be a lien upon the described premises, ordered the sale thereof, and appointed a commissioner to conduct the sale, and also made the usual directions as to a deficiency judgment. The commissioner was duly appointed. He qualified, and on June 10, 1896, he made the sale in due form and upon due notice, and made return thereof, from which it appears that plaintiff became the purchaser for the sum of $2,700, and received a certificate of sale. In his return the commissioner shows that he deducted certain expenses from said amount, leaving $2,680, and paid the same to plaintiff, and took its receipt therefor, which was credited upon the judgment, leaving a deficiency of $63.55, for which judgment was entered July 9, 1896, and was by defendants fully paid August 10, 1896. The period for redemption having expired, the commissioner on January 14, 1897, made and delivered his deed of the premises in due form to plaintiff, which was duly acknowledged and recorded January 15, 1897. Apparently plaintiff became distrustful of the validity of its judgment, because, as it turned out, Merrill was not at the time he served the summons in fact a deputy sheriff; and, acting on this assumption, plaintiff caused the sheriff to make an affidavit to the effect that Merrill was not a duly and regularly appointed deputy sheriff when he served the summons. Whereupon plaintiff on April 12, 1897, filed this affidavit with the clerk, obtained an alias summons, and caused it to be served upon defendants. Defendants appeared by demurrer, which was overruled; and they thereupon answered, and, among other things, averred the facts as to the former trial of the cause, the judgment therein, and that it has not been set aside or modified; set forth the sale pursuant to the decree, and the purchase by plaintiff, the entry of the deficiency judgment, and its payment in full satisfaction of all claims against defendants; and prayed for a dismissal of the action. In this state of the matter, and against defendants' objections, the court proceeded to hear and determine the case upon the original complaint as it was amended at the first trial, and to try the cause precisely as though it had not been already once tried. The court and counsel for plaintiff acted upon the theory that all the previous proceedings were void, and could be treated as though they had no existence whatever.

We think plaintiff entirely misconceived the powers of the court in the premises. It is conceded, and the fact was, that defendants were served with summons. The court had jurisdiction by virtue of this service, for the record shows on its face that the service was made by one having authority, and the court therefore could hear and determine the cause. Until set aside by some proceeding known to the law, its judgment was valid, and it follows that the sale in pursuance thereof was valid. Herman v. Santee, 103 Cal. 519, 37 Pac. 509; Freem. Judgm. § 126. It is the fact of service, rather than the proof of service, that gives jurisdiction. In re Newman's Estate, 75 Cal. 220, 16 Pac. 887. Defendants, as we have seen, were in fact served with summons. They did not appear, nor in any way call in question the regularity of the service. They took no steps to have the judgment set aside, but permitted their property to be sold, without objection, pursuant to the judgment entered in the action, and they paid the deficiency judgment. They did not appeal from the judgment, and the time for appeal had expired when the alias summons was issued. Under the circumstances disclosed, the defendants could not attack the judgment, and, so far as we know, never threatened to do so; nor did they in any way attempt to prevent the plaintiff from enjoying its fruits. The plaintiff had all the relief under that judgment to which it was entitled under any judgment. The court had no authority to enter upon a second trial of the cause, and its proceedings therein were therefore unavailing for any purpose, and wholly unauthorized. After the court had entered its judgment, it had no jurisdiction to again try the case until that judgment was set aside; and when the alias summons was issued the action was no longer pending, for judgment had been entered, the time for appeal had elapsed, and the judgment had been satisfied. The court was without jurisdiction, and its judgment at the second trial was void. Freem. Judgm. § 127. It is advised that the judgment and order be reversed, and the proceeding dismissed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the proceeding dismissed.

(127 Cal. 202)

FAST v. STEELE et al. (L. A. 801.)

(Supreme Court of California. Dec. 15, 1899.)

ADMINISTRATOR'S MORTGAGE—VALIDITY—ORDER FOR—CONSTRUCTION.

1. In view of the provision of Code Civ. Proc. § 1578, that the court may prescribe the maximum period of a loan ordered to be negotiated by an administrator, an order to execute a mortgage therefor payable on or before two years from date must be regarded as fixing the maximum period only.

2. An order to an administrator to mortgage real estate did not direct him, as provided by Code Civ. Proc. § 1578, to execute a promissory note, which he did in connection therewith, and the note and mortgage were made due in a shorter time than directed. *Held* irregularities which, as provided by such section, did not invalidate the mortgage.

3. Where an order of the court directs an executor to make a certain mortgage, the mortgagee is not bound by subsequent oral directions of the judge to the executor, of which he had no notice.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county.

Action by Salathiel Fast against Walter D. Steele, executor, etc., and others. From a judgment for plaintiff, William L. Steele and others, defendants, appeal. Affirmed.

H. C. Booth, for appellants. W. P. Butler, for appellant W. D. Steele. Grant Jackson, for respondent.

HAYNES, C. This appeal is from a judgment in favor of the plaintiff foreclosing a mortgage executed to him by Walter D. Steele, as executor of Mrs. C. L. Steele. The defendants who have taken this appeal are interested in the estate of said testatrix. The authority to execute said mortgage was not given by the will of the deceased, but it was executed under an order of the court, made for that purpose upon the petition of the executor; and it is contended by appellants "that the executor has not exercised the power to mortgage given him by the court in the manner prescribed by the order from which all his authority was derived." That order, so far as material here, is as follows: "It is therefore ordered that said executor execute in the name of and for the benefit of said estate a mortgage of all the land and improvements described in said petition to any person, or firm, or corporation who will lend said estate the sum of $1,653.72 in gold coin of the United States of America, payable on or before two years after the date of said mortgage, with interest not to exceed ten per cent. per annum, payable semiannually." This order was made June 17, 1896, and two days afterwards the plaintiff loaned to the estate said sum; and the executor made and delivered to the plaintiff a promissory note therefor, payable "on or before one year after date," with interest payable semiannually at the rate of 10 per cent. per annum, and also made and delivered to the plaintiff a mortgage upon the premises described in the order to secure the payment of said note.

It is said "that under said order the executor was authorized to execute a nonnegotiable instrument of mortgage, which the mortgagee should have no right to foreclose for two years from its date, and that instead of this he executed a negotiable promissory note payable on or before one year after its date, and a mortgage to secure it." The proceedings to obtain an order to mortgage real property belonging to the estate of a deceased person are fully specified in section 1578 of the Code of Civil Procedure, which provides that the order, among other things, shall authorize, empower, and direct the executor or administrator "to make such mortgage, and a promissory note or notes to the lender for the amount of the loan to be secured by said mortgage; * * * and may prescribe the maximum rate of interest and period of the loan." Said section further provides that the "jurisdiction of the court to administer the estate shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same, or the note or notes and mortgage given in pursuance thereof. * * *" The order as made by the court omitted the direction to execute a promissory note. This was an irregularity, but no motion was made to correct it, nor was there any appeal from the order. The executor, however, followed the statute in this respect, and executed a promissory note for the money borrowed. But whether the irregularity consisted in the omission of the court to direct the execution of a promissory note, or in the action of the executor in giving it, appellants have not been injured. It is true that "a mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect." Civ. Code, § 2928. As between a mortgagor, acting in his own right, and the mortgagee, by the execution of a promissory note secured by the mortgage a personal liability is created against the mortgagor to pay any deficiency which may remain after exhausting the mortgage security; but the execution of a note and mortgage by an executor or administrator under an order of court does not create any liability for a deficiency, "except in cases where the note or notes and mortgage were given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate." The present case does not come within said exception, and therefore the giving of the note creates no liability beyond that which would have been created by the mortgage alone, and appellants are not prejudiced by its execution.

It is further contended by appellants that there was a fatal departure from the authority given by the order, in that the note and mortgage were made payable "on or before one year" after their date, while the order directed that the mortgage should be made payable "on or before two years" after its date. The Code provides that the court "may prescribe the maximum rate of interest and period of the loan," thus leaving it to the discretion of the executor or administrator to make the loan for any shorter period; and in the light of this provision the order should be construed as fixing the maximum period only. In any event it would be nothing more than an irregularity which would not "impair or invalidate" the note or mortgage.

It appears from the findings that at the time of making said order the executor was orally directed by the judge of the court to pay or individually secure to the mortgagee the whole of the interest which was to become due on the note which was to be secured by said mortgage, and that the executor, in order to secure to the plaintiff one year's interest, assigned to him his commissions as executor to the extent of one year's interest. The plaintiff is not bound by this oral direction of the judge to the executor. He is charged with notice of all that the order contains. Whether he would be affected by such oral directions, if it were shown that he had knowledge of them, we need not inquire, since it is neither alleged nor found that plaintiff had any such knowledge or notice. There is nothing in Thomas v. Parker, 97 Cal. 456, 32 Pac. 562, or in Stow v. Schiefferly, 120 Cal. 609, 52 Pac. 1000, cited by appellants, inconsistent with the views here expressed. Edwards v. Taliafero, 34 Mich. 13, was under a different statute, which required that the order should "specify the amount to be secured by such mortgage, the rate of interest to be paid, and the length of time for which such mortgage shall be given." Neither the petition nor the order contained any of these particulars. Griffin v. Johnson, 37 Mich. 87, is directly against appellants. It was there held that the insertion of an attorney's fee, though unauthorized by the license under which the mortgage was made, did not invalidate the mortgage; that it could only support a claim for the reduction of the amount due. It was further held that an administrator's mortgage is not avoided for mere irregularities, and that a proceeding that cannot affect the substantial rights of the parties cannot be worse than irregular. In Deery v. Hamilton, 41 Iowa, 16, the mortgage was executed by the executrix without an order of court, and without authority given by the will. It was held that "where money has been borrowed by an executor without authority, and the estate has received the benefit of the same, the creditor may recover the amount loaned, with interest thereon at six per cent." None of the numerous cases cited by appellants conflict with our conclusions hereinbefore expressed. We do not doubt that a failure to comply with our statute in essential particulars would invalidate the mortgage, but all that we do decide is that the matters here relied upon by appellants are irregularities only which do not affect the validity of the mortgage. I advise that the judgment appealed from be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(127 Cal. 171)

HOULT v. RAMSBOTTOM et al. (Sac. 693.)[1]

(Supreme Court of California. Dec. 13, 1899.)

MORTGAGES—COLLATERAL SECURITY—FORECLOSURE—TRUSTS—EVIDENCE—HARMLESS ERROR.

1. Plaintiff transferred to defendant's agent, as collateral security for plaintiff's indebtedness to defendant, a mortgage on certain real estate, which the agent foreclosed, and under an agreement with plaintiff purchased the property at the face value of the mortgage, taking a deficiency judgment against the mortgagor for the balance due. Plaintiff joined with the commissioner in receipting for the amount of the purchase price, but no money was paid, nor was the evidence of plaintiff's indebtedness to defendant canceled. *Held*, that plaintiff could not recover the difference in money between the amount of his indebtedness to defendant and the amount of the purchase price of the property at the sale, as the agent held the property in trust as security for the payment of plaintiff's indebtedness; but that plaintiff, on payment of his indebtedness to defendant, would be entitled to a conveyance of the trust property and an assignment of the deficiency judgment.

2. The judgment of the lower court will not be reversed on appeal for harmless error in excluding or admitting evidence.

Department 2. Appeal from superior court, San Joaquin county.

Action by D. J. Hoult against Robert Ramsbottom and others. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Minor & Ashley and A. H. Ashley, for appellant. Elliott & Elliott, for respondents.

CHIPMAN, C. Plaintiff brings this action for an accounting with defendant Ramsbottom; also for judgment against him for the surplus resulting from the proceeds coming into his hands upon the foreclosure of certain mortgages held by him as collateral security for plaintiff's debt; also for an assignment to plaintiff of a certain deficiency judgment arising out of said foreclosure proceedings, and for general relief. The court found as facts: That Ramsbottom loaned plaintiff $2,000, and directed plaintiff to execute and deliver to defendant Summerville his promissory note therefor, which was done; that, as security for said note, Ramsbottom directed plaintiff to assign to Summerville a certain note executed by W. J. and J. F. Hoult to plaintiff for $5,500, together with a certain mortgage on real estate and a certain chattel mortgage, both given by said W. J. and J. F. to plaintiff to secure said last-mentioned note; that Summerville had no interest in the transaction, and was acting merely as Ramsbottom's agent, except that subsequently in certain foreclosure proceedings he acted, through his attorney, defendant Webster, for the benefit of plaintiff. Summerville foreclosed the mortgage on the real estate, and the property was sold by a commissioner, and was bid in by Summerville, the plaintiff in the action, for $5,500. A certificate of purchase of the land was issued to him, and for the deficiency Summerville had a judgment. As to this sale the court found that Summerville made the bid and purchase for said sum, and took the certificate in his own name, while acting "as in the matter of said two thousand dollar note, for the benefit of Ramsbottom," and that he (Summerville) had no interest whatever in the purchase; that the foreclosure proceedings were conducted by Webster as Summerville's attorney of record, and said bid and purchase were made by Summerville through Webster, under an agreement with plaintiff "that said foreclosure proceedings should be conducted in Hoult's [plaintiff's] interest, and that fifty-five hundred dollars of the judgment in said proceedings in favor of D. J. Hoult [plaintiff] should be bid and used in the name of Summerville at the foreclosure sale"; that Webster was employed and paid cash in part by plaintiff to foreclose the mortgage, and was promised a further fee if it could be realized from the judgment; that the bid was made for the accommodation of Webster, Summerville, Ramsbottom, and plaintiff, as above stated, and "in pursuance of the premises described in the undenied allegations of the complaint." What these "premises" or "undenied allegations" are the court does not point out. The admissions, so far as we discover, are that Summerville paid no money on account of the purchase; that the judgment in the foreclosure was for $6,417.15 and that he bid $5,500, and that Summerville was credited by the commissioner this amount, and that the certificate of purchase was issued to Summerville. It is further found that plaintiff joined in the receipt given the commissioner for the $5,500 bid, under the agreements hereinbefore mentioned; that prior to the commencement of this action Summerville "orally offered to assign to plaintiff said certificate for less than the amount of said two thousand dollar note"; that Summerville has never assigned the certificate to Ramsbottom, but now holds it "precisely as between himself and Ramsbottom he held the two thousand dollar note,—i. e. for the benefit of Ramsbottom,—he (Summerville) having no beneficial interest therein." It appears that the personal property held in pledge was also sold to Summerville, upon proper proceedings had, as to which sale the court finds that he acted for Ramsbottom, and had no beneficial interest himself therein. The court finds that prior to the commencement of this action the $2,000 note was not canceled or satisfied, nor was there deducted from the proceeds of the pledged property the amount due upon this note. There was a deficiency judgment docketed against the Hoults in the foreclosure proceeding, as to which the court finds that neither Summerville nor Ramsbottom has ever been ready or willing to assign the same, "save upon the condition that the plaintiff herein pay the full amount due and unpaid upon the two thousand dollar note," on which there appear to have been certain payments made, amounting to $678, including, as we understand the evidence, the proceeds of the sale of the personal property sold under the chattel mortgage. As conclusions of law the court found that Summerville holds the title to the land purchased on foreclosure "in trust as security for, and for the purpose of securing the payment of," the $2,000 note in question; and also holds the deficiency judgment "in manner and for the purposes above stated," and that "plaintiff is entitled to a decree declarative that said Summerville has and holds the said land and said deficiency judgment in the manner and for the purpose above stated"; that plaintiff is entitled to his costs from Summerville and Ramsbottom, and is entitled to no further relief. Judgment was accordingly entered, from which, and from an order denying his motion for a new trial, plaintiff appeals.

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[1] Rehearing denied January 12, 1900.

It was said in Kelly v. Matlock, 85 Cal. 122, 24 Pac. 642, that: "The holder of a mortgage as collateral security, who causes the property to be sold on execution, and himself becomes the purchaser, does not hold the title as a trustee for his debtor, unless it is shown that he obtained the title by some fraudulent means. He cannot sell an evidence of debt of this kind, but may collect the same when due. Civ. Code, § 3006. And to that end he may foreclose the lien, and himself become the purchaser. Civ. Code, § 3011. If so, and no fraud is shown, he takes the absolute title to the property, and must account to the debtor for the proceeds." If Summerville in the present case had foreclosed his collateral mortgage on his own motion, as he had the right to do, and had bid in the property at $5,500, no fraud appearing, he would have taken the absolute title to the property (subject, of course, to redemption of the mortgagors), and would have been compelled to account to plaintiff for the proceeds; i. e. the amount bid, which would perhaps have entitled plaintiff to what he now seeks. But the facts as found by the court, upon, as we think, sufficient evidence, show that Summerville bid $5,500 at the request of plaintiff, who himself, with Summerville, receipted to the commissioner for that amount, no money in fact passing; and the bid was thus made in excess of plaintiff's debt to Summerville for the benefit of plaintiff in the very amount of this excess now claimed by him. The evidence is that, but for the agreement between plaintiff and Summerville, made with the attorney, Webster, on plaintiff's behalf, the bid would have been only enough to cover the debt of plaintiff to Summerville. The trust found by the court does not arise by reason of the fraud of Summerville, for no fraud was alleged or proved, but it arises from the agreement by which Summerville took the title by purchase at foreclosure sale, and by which Summerville, as Ramsbottom's agent, had an interest in the property to the extent of the unpaid balance due on the $2,000 note of plaintiff, and plaintiff had an interest to the extent of the excess by reason of his being the owner of the $5,500 collateral mortgage note and as mortgagee of its makers. We do not see how plaintiff can claim, on the facts found, that he should be paid in money the difference between the two above amounts. Nor can we see any occasion for an accounting at this time. We think the decree accords to plaintiff his full rights. He may pay to Summerville the balance due the latter, and he would then be entitled to a conveyance of the land, and an assignment of the deficiency judgment; or he may, by appropriate proceedings, have the trust property converted into money, and the proceeds ratably apportioned. It would certainly be most inequitable to compel Summerville to account in money for a surplus which nominally exists by reason alone of plaintiff's acts, but which, by reason of depreciation in values since the purchase, may not now in fact exist at all.

Many of the findings of fact are challenged as not justified by the evidence. Upon the principal question—whether Summerville bid $5,500 for the mortgaged property upon the agreement found—the evidence is conflicting. It was clearly testified to by Webster, and was denied by plaintiff when on the witness stand. The receipt given the commissioner, as well as some other circumstances, tend to corroborate Webster's testimony. We are not at liberty to attempt a reconciliation of this conflict. Upon an examination of the record, we cannot say there was not sufficient evidence to justify the findings.

At the trial, plaintiff attempted in many ways to show the relation existing between Ramsbottom and Summerville in respect of the transactions, but the court refused the evidence, and the rulings are now claimed to be error. The fact alleged and sought to be proved by plaintiff came out, and the court found that Summerville was acting as the agent of Ramsbottom, and that Summerville had no beneficial interest in the loan or in the securities. As the case resulted, and as the facts appeared, we cannot see that plaintiff was in any wise injured by the rulings of the court. There was no dispute that plaintiff got the money, and that it was loaned to him by Ramsbottom; that he gave his note therefor to Summerville, and assigned the collaterals to Summerville as security in the capacity of agent. Plaintiff's rights turned chiefly on the question whether the bid made at the foreclosure sale was for plaintiff's benefit, and by his direction, and upon the agreements alleged by defendants. Upon this point plaintiff testified as to his conversation about the sale with Webster, who was managing the foreclosure, and he testified that he had no conversation with Ramsbottom or Summerville relative thereto. We have examined the assignments of error in excluding and admitting evidence, but cannot discover wherein plaintiff was injured by the rulings of the court, conceding that some of the rulings were error. We can discover no fact which plaintiff sought and was refused permission to prove that would have entitled him to greater relief than he finally was awarded. Upon the whole case we are of opinion that the judgment and order should be affirmed, and so advise.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

127 Cal. 197

CAUHAPE v. SECURITY SAV. BANK et al.

(S. F. 1,743.)

(Supreme Court of California. Dec. 14, 1899.)

EVIDENCE—HEARSAY—TRUSTS—RIGHT TO JURY TRIAL.

1. Where a witness, asked to state how a conversation between himself and one F. began, and who spoke first, etc., answered that he could not say who spoke first, but the matter came up while they were discussing circumstances attending a request by F.'s father to pay a certain sum to plaintiff's intestate, at which the witness was not present, and that he then incidentally asked her if she had paid such sum, the granting of a motion to strike out evidence of the event narrated, as hearsay, was proper.

2. Where plaintiff claimed that a daughter, by promising her father to pay plaintiff's intestate $3,000, had prevented the father from changing his will, and that the daughter, by depositing such sum in a bank, and directing it to pay the dividends accruing thereon to plaintiff, had created a fund to which the trust attached, plaintiff was not entitled, in a suit against the daughter's executors for the money so deposited, to a trial by jury, since such suit was not for money claimed as due on contract, or damages for a breach thereof or for injuries, within Code Civ. Proc. § 592, but was a suit in equity to recover a money judgment in satisfaction of a trust, and hence a trial by jury was not guarantied by the constitution.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Jean Pierre Cauhape, administrator, etc., against the Security Savings Bank and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

A. F. Morrison and E. J. Pringle, for appellant. O. P. Evans and S. V. Smith, for respondents.

TEMPLE, J. Plaintiff, in his complaint, besides showing the corporate character of the bank defendant, and the representative character of the other defendants, simply avers that the bank is indebted to the plaintiff in the sum of $3,079.20 for money had and received for the use of the plaintiff, for which due demand has been made, and that the other defendants, as executors of the estate of Cora L. Floyd, deceased, claim and assert some right, title, or interest in or to said money, which claim is without right; and plaintiff asks that such executors be required to set forth the nature of their claims, and that the court adjudge them to be invalid, and that plaintiff is the owner of the money, and that he have judgment against the savings bank for the amount. The bank answered, denying its indebtedness, and averred that Cora L. Floyd in her lifetime deposited in the bank $3,000, which the bank still holds, and which is claimed by the other defendants as the property of the estate. The court is asked to determine between the claimants. The executors answered, denying all the material allegations of the complaint, but averring that their testatrix in her lifetime deposited in the bank $3,000, and at the time instructed the bank as follows: "Please pay to Mary Pond, or order, the dividends on my term deposit account (for the sum of $3,000), No. 1,356, until further notice. Cora L. Floyd." The deposit was made January 27, 1874, and Mary Pond, afterwards Mary Cauhape, brought this action, but upon her death the present plaintiff was substituted. Dividends upon the deposit were paid to plaintiff's intestate until the death of Mrs. Floyd, on the 27th day of February, 1891. The executors claim the deposit as part of the estate of Mrs. Floyd. It was stipulated for the purposes of the trial that Henry A. Lyons, father of Mrs. Floyd, died testate, and by his will gave Mary Pond $2,000, which was paid, and left the bulk of his estate to Mrs. Floyd. There is no further evidence as to the character or amount of property disposed of by the will of Henry A. Lyons. Defendants had judgment, and plaintiff on this appeal makes two points: (1) The court erred in striking out certain evidence, and (2) in refusing a jury trial.

The evidence stricken out was part of an answer made by A. J. Bowie, a witness for plaintiff, whose deposition was taken upon commission, by questions and answers. Having stated that he was an intimate acquaintance of Mrs. Floyd, and had conversed with her in reference to Mary Pond, he was asked this question: "How did such conversation or conversations begin? Who spoke first, and what was said? State fully and particularly all that was said by both parties, giving the words, if you remember them; if not, the substance of the conversation. A. Can't say who spoke first, but the matter came up in this way: Mr. Friedlander was alone with Judge Lyons one day during his last illness, when he sent for his daughter Cora, and told her what his will was, and that he had left Mary Pond certain money in his will (two thousand or twenty-five hundred dollars, I believe) for her faithful services, and he wished Cora to give Mary Pond on his death five thousand dollars; and, turning to Mr. Friedlander, said: 'Now, Friedlander, I want you to be a witness to this.' Mr. Friedlander was one of his executors, and Judge Lyons' intimate friend. So it was, subsequently, in talking over these things with Mrs. Floyd, that incidentally the Mary Pond matter came up. Knowing her character so well, I incidentally asked her if she had paid Mary Pond that money, in accordance with her father's request. She answered," etc. When the deposition was offered in court, defendants' counsel moved to strike out all down to and including the words, "Now, Friedlander, I wish you to be a witness to this," as hearsay. The motion was granted, and plaintiff excepted. Appellant contends that the recital must have been made in that conversation either by witness to Mrs. Floyd, or by Mrs. Floyd to witness, and in either event was relevant. But I cannot so understand the statement. The witness evidently thought the subject needed some explanation to enable the court to understand the conversation, and thereupon proceeded to recite, not what was a part of the conversation, but a circumstance which may have been familiar to him and Mrs. Floyd. He says that subsequently, in talking over these things, incidentally the Mary Pond matter came up, and, knowing her so well, he incidentally asked her if she had paid the money in accordance with her father's request. The question could not properly have been said to be incidental, if either had during that conversation recited the event narrated in answer to the question. The ruling was clearly right.

It is next contended that the court erred in denying to plaintiff a jury trial. So far as the bank is concerned, the complaint is for money had and received. As the complaint did not show that there was in the possession of the bank any special fund or money which could be the subject of controversy, it may be matter of doubt whether it states a cause of action against the executors of Mrs. Floyd. However, the relief asked against the executors is not such as a court of law could give. The bank denied the indebtedness, but admitted that it was possessed of a special deposit made by Mrs. Floyd, which was claimed both by the plaintiff and by the executors of Mrs. Floyd, and asked to have the matter determined, declaring its willingness to pay as the court should determine. This position was acquiesced in by the plaintiff and the other defendants, and there was therefore no issue to try with the bank. Plaintiff admits that the legal title to the money was in the estate, but contends that in equity it belonged to plaintiff. The argument is that Mrs. Floyd, by promising her father to pay plaintiff the $3,000, prevented him from changing his will in favor of Mary Pond, and therefore the estate received by her from her father is charged in equity with a trust in favor of Mary Pond; and they further contend that when Mrs. Floyd made this deposit, instructing the bank to pay the dividends which should accrue upon it to Mary Pond, she created the fund to which the trust specifically attached. There is much trouble with this theory as applied to the evidence, which it is not necessary to notice, but it is evident that plaintiff brings suit simply to enforce an equity, and not "for money claimed as due upon contract, or as damages for breach thereof, or for injuries." Code Civ. Proc. § 592. The plaintiff seeks to recover a general money judgment in satisfaction of a trust. I think, therefore, the relief demanded in the complaint, as against the executors, the issues made by the answer of the executors, the facts disclosed by the evidence, and the issues actually tried, all show that the action is in equity. In such cases it has been held that the constitution does not guaranty the right to a jury trial. Koppikus v. Commissioners, 16 Cal. 249. The language of the constitution, it is said, has reference to the right as it existed at common law, and the right which was familiar to the people who adopted the constitution. They desired to secure and render inviolate the right which they understood and had always enjoyed. There is no reason to suppose they intended to extend the right of a jury trial to other cases. The decision cited above was made at an early day, and since that construction was placed upon it the constitution has been many times amended, and this provision has always remained unaltered, and, in my opinion, wisely so. The ruling is in accord with the Code provision. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(127 Cal. 184)

In re HEDRICK'S ESTATE. (L. A. 786.)

(Supreme Court of California. Dec. 13, 1899.)

EXECUTORS AND ADMINISTRATORS — FINAL SETTLEMENT—EXTRA COMPENSATION—SEMIANNUAL RETURN—EXPENDITURES.

1. Where it was stipulated that the semiannual returns of a public administrator showed that he had duly paid out as expenses in an estate a certain sum, and that all items of credit contained in his amended final account, excepting the amount of $2,090.18, were correct, such stipulation amounted only to an admission that the returns showed certain total expenses for given periods, and did not admit that the expenditures were just.

2. Code Civ. Proc. § 1632, provides that, on settlement of a public administrator's final account, he may be allowed any item of expenditure, not exceeding $20, for which no voucher is produced, if such item be supported by his own uncontradicted oath, but that such allowances in the whole shall not exceed $500 against any one estate. *Held*, that such limitation should not be restricted to such expenditures only as had no support other than the oath of the administrator, but included all items of expenditure, not exceeding $20, for which the administrator had no voucher, though supported by his oath and by satisfactory proofs corroborative thereof.

3. Semiannual returns of a public administrator, showing the condition of estates in his hands, as required by Code Civ. Proc. § 1736, are not accounts stated, and hence are not conclusive on persons interested in such estates, though they made no objection to such returns at the time they were filed.

4. Refusal of a probate judge to allow an administrator extra compensation, as authorized by Code Civ. Proc. § 1618, will not be reversed on appeal, in the absence of abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county.

Judicial accounting by the public administrator, as administrator of the estate of John Hedrick, deceased. From an order settling his final account, and from an order denying him extra compensation, he appeals. Affirmed.

Purington & Adair and Elmer E. Rowell, for appellant. W. J. McIntyre, for respondents.

CHIPMAN, C. Appeal by the administrator from an order settling his final account, and from an order denying him extra compensation.

1. Appellant was public administrator, and became administrator of this estate by virtue of his office in the year 1893. He filed eight semiannual returns, as required by section 1736, Code Civ. Proc.; the first being "for the term commencing December 1, 1893, and ending June 1, 1894," and the last being "for the term commencing June 1, 1897, and ending December 1, 1897." These "returns," as the statute calls them, do not appear in detail, but it is agreed and stipulated that each one "shows that during said term [i. e. the term embraced in each return] the administrator duly paid out as expenses in this estate" a certain sum total, the several amounts of which are given. The administrator filed his final account April 23, 1898, and on July 13, 1898, he filed an amended final account, which latter was the account heard and determined. The following stipulation was entered into at the hearing: "It is stipulated that all the items of credit contained in the amended final account, * * * excepting the item of $2,090.18, are correct; the same having been gone into at the former hearing of the first final account herein filed." Appellant claims, as the result of the foregoing stipulations, that respondents admitted the correctness of the expenditures as shown by these semiannual returns, and, as they form the total of the principal items in the amended final account, their correctness as to that account is also admitted. We cannot so regard these stipulations. The item of $2,090.18 was expressly and specifically contested; and much (indeed, most) of the evidence was addressed to that item, with a view to make legal proof of its correctness, and to show that the administrator should be credited with it. The manifest object of the stipulation as to the semiannual returns was to show that they contained a statement of expenses, and their amount for each period; but it was not intended by the contesting parties that they should be received as conclusively showing the expenditures to be just and proper, and as duly established by vouchers. The stipulation went no further than to admit that the returns showed certain total expenses for given periods.

2. The contestants are the heirs at law of the deceased, and the contested item in the account reads as follows: "By amount paid out for expenses of keeping up and properly caring for the estate as per semiannual exhibits of administrator, filed herein as follows: June 1, 1894; December 6, 1894; June 1, 1895; December 1, 1895; June 1, 1896; December 1, 1896; June 1, 1897; December 1, 1897,—$2,090.18." The administrator testified that this amount was "made up of money paid out for the benefit of the estate, for which there are no vouchers. I get that amount from the regular reports made semiannually to this court." He explained that he arrived at the above sum by subtracting from the totals of each semiannual report the amount for which he had vouchers at the hearing, and adding these different amounts together. He testified that he could only give a general idea of how these different amounts of money were paid out. In one case he said: "It was paid out for car fare and buggy hire, and little things for the ranch,—paid out in cash." In another instance he added to these purposes "for improvements." Again he testified: "In those instances where I testify that these different balances were expended for the benefit of the estate, it would be impossible to remember the items, and the persons to whom I paid them, and the places where I paid them." He further testified that the items entering into the first five of his semiannual reports were taken from a regular account book and cash book; that this cash book has since been lost, and he has been unable to find it; that this book contained the items of expense now charged for; and that he now has no memoranda of any of the items for which he has no vouchers. He testified that the money was expended for the estate, and he personally derived no benefit from any of the expenditures. Some testimony was introduced to corroborate the testimony of the administrator. Section 1632, Code Civ. Proc., provides as follows: "On the settlement of his account he [the administrator] may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate," etc. Appellant contends that by a fair construction the statute must be held to mean that the limitation of $500 applies only to such items in excess of that sum as have no support other than the oath of the administrator. He may support his account by his own "uncontradicted oath" to that extent and no more; but that where he supports his account by his own oath, and by satisfactory proofs other than and corroborative of this oath, the excess over $500, no matter how much it may be, must be allowed in the settlement of his accounts. We cannot accept this construction of the statute. Its language is plain and unambiguous, and means, as we conceive, that the administrator may support his account as to an item not exceeding $20, for which he has no voucher, "by his own uncontradicted oath to the fact of payment, specifying when, where and to whom it was made," to the extent in all of $500. Beyond

that limit he must support the account by vouchers, and no amount of corroboration of his oath to the expenditures by the testimony of other witnesses will avail to dispense with vouchers; and, as to the $500, he must show when, where, and to whom the disbursement was made. This is the plain and obvious reading of the statute, which, so far as we are aware, has never been questioned by this court. Such loose and unsatisfactory statements as those made by the administrator, as to when, where, and to whom he made the disbursement, are wholly insufficient. The administrator was confessedly unable to make the statutory proofs, and must abide the consequences of his failure to do so.

3. Appellant claims that the semiannual returns made under section 1736, Code Civ. Proc., must be treated as accounts stated, and conclusive against the respondents (citing Hendy v. March, 75 Cal. 567, 17 Pac. 702), for the reason that they were aware that these returns had been made and filed, and had made no objection to them. Respondents were nonresidents, and it is claimed that their resident attorney here, Mr. Harvey Potter, examined the returns from time to time, and made no objection to them, and that he sent two or three of them to the attorney of respondents at their place of residence. We do not think that the return to be made by the public administrator, required by section 1736, could, under any circumstances, be treated as an account stated. It is wholly different from the accounts required to be made by administrators, and for a wholly different purpose, and is not intended to, and does not, take the place or serve the purpose of the semiannual accounts required by section 1622, Code Civ. Proc., and sections following. Before even these latter accounts can be conclusive, they must be heard by the court, and its order made, determining their correctness. The "return" spoken of in section 1736 is not an account in the sense that these other accounts are such. It is not made to the court. There is no hearing upon it, and no order of the court required as to it. No heir is bound by it, nor does it conclusively establish any fact stated in it, as against an heir. The account mentioned in Hendy v. March, supra, was an account stated between two persons having pecuniary relations with each other, and was an entirely different account from the official return of the public administrator in the case before us.

4. The evidence as to appellant's right to extra compensation discloses no abuse of discretion by the court in refusing this allowance. The order must therefore stand. Code Civ. Proc. § 1618. It is advised that the orders appealed from be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

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127 Cal. 323

PEOPLE v. GLEASON. (Cr. 550.)

(Supreme Court of California. Dec. 26, 1899.)

CRIMINAL LAW—MURDER—EVIDENCE—MISCONDUCT OF PROSECUTING ATTORNEY—INSTRUCTIONS—IMPEACHMENT OF WITNESS.

1. Evidence, in a prosecution for murder, that immediately after the shooting a purse with some money in it was found in a pocket of deceased's clothing, and that the pocket was partly turned inside out, is not inadmissible, as tending to prove another crime.

2. That the district attorney, in his opening statement, mentioned facts which he expected to prove, but did not prove, is not misconduct justifying reversal.

3. Where the general charge was not objected to, the refusal to give a requested instruction on the subject of impeaching a defendant who testifies in his own behalf is not ground for reversal, where the instruction failed to state all the means by which the witness might be impeached.

In bank. Appeal from superior court, Kern county.

T. M. Gleason was convicted of murder, and appeals. Affirmed.

For opinion on former appeal, see 55 Pac. 123.

A. J. Bledsoe, for appellant. Atty. Gen. Ford, for the People.

McFARLAND, J. The defendant was convicted of the crime of murder in the first degree, and the jury fixed the punishment at imprisonment for life. He appeals from the judgment, and from an order denying his motion for a new trial.

The appellant contends that the evidence was not sufficient to justify the jury in finding that the homicide was committed with that degree of premeditation and deliberation which is necessary to constitute murder in the first degree. Upon this point it is sufficient to say that this contention cannot be maintained, and that the evidence was amply sufficient to warrant the verdict.

Dr. Cook, a witness for the prosecution, testified that immediately after the shooting he made an examination of the body of the deceased; and he was allowed to testify, over the objection of the appellant, that he found in a pocket of the clothing of the deceased a purse with some change in it, and that the pocket was partly turned inside out. Appellant contends that this ruling was an error for which the judgment should be reversed, but we do not think so. It is usual, and not improper, to show the condition of the body of a deceased party immediately after the commission of the homicide; and, even if it cannot be considered strictly a part of the res gestæ, still we do not see how it could have been prejudicial to appellant. Even if it tended in some degree to show that robbery was the motive of the assault,—and that seems to be the particular objection which appellant makes to it,—that consideration would not make the evidence inadmissible. We see no ground for the contention by appellant that the evidence was inadmissible because it tended to prove another and distinct crime.

Appellant, having testified on the witness stand that he feared that deceased was about to attack him with a knife, was asked this question: "Now, I ask you how he could reach you after he stepped two or three feet up, from the distance that you first saw him, —ten or twelve feet,—how he could reach you with a lunge." Appellant objected to this question, and contends that it was improperly asking for the opinion of the witness. We do not think that this contention can be maintained. Considering the testimony of the appellant in chief, the question was entirely proper. It was not asking for an opinion, but really as to the fact of distance between the two parties at the time the fatal shot was fired.

The prosecuting attorney in his opening statement to the jury mentioned one or two facts which he said he expected to prove, but which he did not prove; and appellant contends that this was such misconduct as calls for a reversal. No objection was made to this during the trial; but, waiving the question whether the point is properly presented here, the contention cannot be maintained. It would be going a great distance to hold that, every time a district attorney happens to state in his opening more than he is able to prove, the judgment should be reversed for misconduct; and there is nothing in the present case to show such an extreme disregard for the truth, and such a clear intent to influence the jury by false statements, as would warrant a reversal of the case upon that ground. Usually such an overstatement is prejudicial to the party making it.

The general charge of the court to the jury is not objected to, and it was certainly as favorable to the appellant as he could have reasonably desired; but he claims a reversal upon the ground that the court refused an instruction asked by appellant which is as follows: "You are instructed, gentlemen, that where a defendant presents himself as a witness in his own behalf he subjects himself to the same rules of testing or impeaching his credibility before the jury as any other witness; and he may be impeached by the testimony of other witnesses that his general reputation in the community for truth, honor, and integrity is bad. And in the absence of such impeaching testimony the law presumes that the reputation of a witness for truth, honor, and integrity is good." If this instruction had been in all respects a complete statement of the law on the subject to which it refers, still it is doubtful whether the judgment should be reversed on account of the mere failure of the court to give it, for it might perhaps be truly said that it contains nothing but mere commonplaces within the general knowledge of jurors. However, when it is sought to reverse a judgment for a refusal to give an instruction asked, the instruction itself must contain a full and correct statement of the law on the subject; and the instruction here in question was not of that character. It is said in the instruction that the appellant might be impeached "by the testimony of other witnesses" that his general reputation is bad; and it is further said that "in the absence of such impeaching testimony the law presumes," etc. But "such impeaching testimony" (that is, the testimony of other witnesses as to a man's general reputation) is not the only means by which a witness may be impeached.

The foregoing are the only reasons urged for a reversal, and they are not sufficient to warrant that result. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.

127 Cal. 278

PEOPLE v. CAMPBELL. (Cr. 568.)

(Supreme Court of California. Dec. 23, 1899.)

LARCENY—FACTS CONSTITUTING—INCLUDED OFFENSES—NECESSITY OF CHARGING.

1. Where one by false pretenses acquired money as a mere bailee, charged with the duty of depositing the funds and taking therefor a certificate of deposit in the name of the bailor, but intending at the time he acquired possession to convert the money to his own use, which he afterwards did, it constitutes larceny.

2. That, under the peculiar circumstances of the commission of a larceny, it might have been punished under Pen. Code, §§ 530, 532, relating to receiving property in a false character and obtaining money by false pretenses, did not make it obligatory on the prosecution to charge the offense under either of these sections.

Department 2. Appeal from superior court, Los Angeles county.

A. H. Campbell was convicted of larceny, and he appeals. Affirmed.

W. H. Shinn and S. V. Landt, for appellant. Atty. Gen. Ford, for the People.

HENSHAW, J. Defendant was jointly charged with one Spencer with the crime of grand larceny; the information alleging merely that they "did willfully, unlawfully, and feloniously take, steal, and carry away" five hundred dollars, lawful money of the United States, the personal property of Fred Seagrave. The defendants obtained separate trials, and from the judgment which followed his conviction Campbell appeals. The facts disclosed upon the trial appear by the testimony of the complaining witness, Seagrave, and are the following: Seagrave answered an advertisement in a Los Angeles paper which read as follows: "Wanted—A young man of good habits to collect for a large firm. Must be able to drive, and give reference. State age, and where last employed. Five hundred dollars security required; cash or unincumbered real estate. Address M, Box 35, Times Office." He was called upon by Spencer, who represented himself to be an employé of the Patton-Davies Lumber & Fuel Company, a prominent business firm in Los Angeles, and was told that it was this firm which wished to employ a collector. He was taken by Spencer ostensibly to visit the office of the Patton-Davies Company. As they were about to enter the office, Seagrave's companion said, "There is Mr. Davies now," and introduced him to the defendant Campbell, who personated Mr. Davies, of the Patton-Davies Company. The result of the conversation was that the false Davies agreed to employ Seagrave as his collector. The next day they met, and Seagrave accompanied Campbell in a ride about town while the latter was attending, as he stated, to certain business matters. During the progress of the ride, Campbell said: "Now, it will save time if you go round to the bank and draw the money;" the money being the $500 called for in the advertisement, money which was to be held by the firm as security against possible embezzlements upon the part of their collector. Seagrave got the money. Campbell then said: "I have got a few bills I would like to settle, and it would save me so much time. * * * Now, loan me the money to pay these debts in the Stimson Block, and the balance I will put in, and draw the balance out of the firm's money, and give you a certified check around at the First National Bank for five hundred dollars in your name." Elsewhere the witness Seagrave testifies as follows: "Q. Is it not true that you agreed with him that he was to use this money in his business, and he was to make a certificate of deposit for the full money which you delivered to him from his own funds? A. Yes, sir; I made an agreement; that is, it was agreed that he was to use the money just as you say, providing he returned the full amount on that same day. The agreement was that he could use the money and return it; yes, sir. Q. And there was no limit to the amount he was to use? A. No; there was no limit at all. Q. And you delivered to him the five hundred dollars under that agreement? A. Yes, sir; I gave him the money. Q. For their own use and their own business, as you have stated? A. Under that provision; yes, sir." Still further the witness testified: "'Well,' he says, 'now, if you can get that in cash, it will save me the trouble of going around there, and I can pay a couple of bills, and when we come round there [to the bank] we can stick in the balance, and draw out enough to make up the deficiency, and put it in the bank in your name on the certificate of deposit.' Q. Did he say anything about what amount of bills he had to pay, or what they were? A. It was something like between twenty-five and fifty dollars, he said. Q. Why did you let him have five hundred dollars, if it was only twenty-five or fifty dollars that he had to pay? A. Now you ask me a question that I don't know myself, but I handed it to him. It was all rolled up together, and I simply handed it to him. Q. Did he not request you to deliver that money to him, or let him have it to use to pay bills with, and then you were to go down to the First National Bank and get a certified check from the funds of the Davies Lumber Company? A. Yes, sir. Q. Yes, sir? A. Hold on, now. Let me answer your question there. I come to think of it, he demanded the five hundred dollars, and said about paying the bills, and putting the balance what he had left in a certificate of deposit, and he would draw out enough of the company's funds to make up the balance of the deficiency. Q. Did he say how much you would have left, or anything about that? A. No. sir; he said that he had about twenty-five or fifty dollars to pay."

It is of the essence of the crime of larceny that the title to the property alleged to have been stolen shall not have been parted with. If one is induced by fraud or deceit to part with the title to personal property, the law recognizes such a crime as the obtaining of goods by false pretenses, and punishes it accordingly. But it is distinctly not larceny. Upon the other hand, where possession merely has been parted with, or where some special property in the goods, as by way of pledge or security, is transferred, if such special property and transfer be fraudulently secured with the present felonious intent to convert the property so acquired, the offense is recognized as larceny. People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Johnson, 91 Cal. 265, 27 Pac. 663. As is said in People v. Raschke: "The most difficult phases of the question arise where a defendant charged with larceny has by false and fraudulent pretenses obtained possession of the property under the guise of a purchase and sale. It is clear that in such a case, where there has been a change both of the legal possession and the entire property of the owner in the thing delivered, there can be no larceny; otherwise, where there has been a change of possession, but no change of property." From the quotations which we have given from the testimony of Seagrave, it is apparent that the jury could have found that, of the $500 transferred to defendant, not more than $50 was a loan. As to the rest, the title remained in Seagrave, and the defendant was a mere bailee charged with the duty of depositing the funds, and taking therefor a certificate of deposit in the name of Seagrave. It is this view of the evidence which the jury must have adopted, and, as no one will question but that there was sufficient shown to warrant a finding that it was the defendant's present intent at the time he acquired possession to convert the money to his own use, the crime of larceny was established. In this view the case is very similar to that of People v. Tomlinson, 102 Cal. 19, 36 Pac. 506.

But appellant objects that the offense proved by the evidence is exactly covered by sections 530 and 532 of the Penal Code, and that he should have been charged under one or another of these sections. There are offenses under these sections which are not larceny, and the mere fact that under the peculiar circumstances of this case the crime, while shown to be larceny, might have been punished under another provision of the Penal Code, did not make it obligatory upon the prosecution to charge under the one provision rather than the other. As is said in People v. Frigerio, 107 Cal. 152, 40 Pac. 107: "The fact that the circumstances disclosed are such that the defendant might have been charged with and convicted of larceny does not make the offense any less one of the special classes provided for in section 332 of the Penal Code, the circumstances being sufficient to bring the case within that section. Nor does it render defendant less amenable to a prosecution under the latter section." The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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127 Cal. 283

JOHNSON v. CALIFORNIA LUSTRAL CO.

(S. F. 1,094.)

(Supreme Court of California. Dec. 23, 1899.)

MINES AND MINERALS—MINERAL LANDS—MORTGAGE.

When a mining corporation, in good faith, works, by ordinary mining processes, deposits of stone and other mineral on its land, with a view to utilizing the product for commercial purposes, the land so worked is "mining ground," within the act of April 23, 1880, p. 131, § 1, making it unlawful for such corporations to sell, lease, or mortgage any part of their "mining ground, * * * unless * * * ratified by the holders of at least two-thirds of the capital stock," whether the undertaking is profitable or not, and whether sound discretion would approve that use of the land or not.

Commissioners' decision. In bank. Appeal from superior court, Napa county.

Action by J. J. Johnson against the California Lustral Company. From a judgment for plaintiff, defendant appeals. Reversed.

Fitzgerald & Abbott, Sam Bell McKee, and R. B. Myers, for appellant. E. M. Gibson and Welles Whitmore, for respondent.

BRITT, C. Suit to foreclose a mortgage made by defendant to secure payment of its two promissory notes, each for the sum of $5,236, besides interest. The property mortgaged is a tract of land owned by defendant containing about 104 acres. The defense is founded on the act of the legislature entitled "An act for the further protection of stockholders in mining companies," approved April 23, 1880 (St. 1880, p. 131); the first section whereof provides, among other things, that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, * * * unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation." The court below found that defendant is a mining corporation, and that said mortgage has never been ratified by the holders of its stock in accordance with the provisions of said statute. But the court further found that the land covered by the mortgage "was and is not mining ground, as specified by said statute, but was and is agricultural land." There was judgment of foreclosure as prayed by plaintiff.

The question most in dispute at the trial was upon the character of the mortgaged premises,—whether "mining ground," within the meaning of said statute, or not. There was evidence without conflict that defendant bought the land for mining purposes, and engaged in the business of taking from a portion thereof, through a tunnel and sundry other excavations, certain rock which defendant called "lustral" or "paint stone," pulverizing the same by means of machinery on the ground, and selling and attempting to sell the product thus obtained, which was to some extent used in the manufacture of paint, and was of some utility for that purpose. Defendant had a mill building on the premises 60 by 140 feet in size, which was "pretty well filled" (such was the testimony) with machinery for drying and crushing the rock. Such business was carried on at and prior to the time of the execution of said notes and mortgage. Some time afterwards defendant ceased operations, and failed in its said business; the total sales of the product having been less than one thousand dollars. A witness produced as an expert testified for plaintiff that he considered said rock to be a common country formation; that it was not mineral bearing, though it had a very small percentage of mineral in it; that it was not valuable for mining ground. It appeared from his evidence, however, that the rock lies in strata, and is different from other formations on the land; also that he considered mining ground to be such as produces mineral in paying quantities. He was asked: "If you mine rock from the earth, and you draw from that rock such mineral as produces paint or polish, don't you mine for that?" and replied, "That would be mining, if the mineral was there in paying quantities." There was other evidence tending to show that the land was chiefly valuable for agricultural purposes.

The defense relied on is hardly conscionable, under the circumstances appearing, and it is with reluctance that we conclude that the decision of the court respecting the character of the land, within the contemplation of the act of 1880, is contrary to the evidence. But the statute declares unlawful a mortgage or other disposition by the directors of the whole or any part of the mining ground of a mining corporation, except upon the ratification of the holders of two-thirds of the stock, and it must be enforced according to its intent. Several instances of its application have occurred. McShane v. Carter, 80 Cal. 310, 22 Pac. 178. Milling Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679. The question is upon the meaning of the terms "mining ground," employed in the statute. It has been suggested that these words should be understood as the equivalent of "lands valuable for minerals" and "valuable mineral deposits," in the statutes of the United States relating to the sale of those parts of the public domain so designated (U. S. Rev. St. §§ 2318, 2319); and hence that land cannot be considered mining ground, under the aforesaid act of 1880, unless it is of such character that, had it been public land, it might have been located as a mining claim and purchased as such from the government. We think, however, that this is not a correct understanding of the statute, and if adopted would lead us into bogs and fens of uncertainty respecting its interpretation. In the first place, the decisions of the officers of the federal land department show that some lands have been held subject to location as mineral under the federal laws which can scarcely be regarded as the subject of mining, in the ordinary sense. Thus, in McGlenn v. Wienbroeer, 15 Land Dec. Dep. Int. 370, the department ruled that public land, chiefly valuable for a peculiar building stone thereon, was subject to entry under the mining laws, and not as agricultural land, although it was worked as a quarry only. And so of lands valuable only for deposits of marble (Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 233); or of petroleum (In re Union Oil Co., Id. 351). Other rulings of similar import might be cited. Unless we are prepared to admit that an ordinary open stone quarry, or a flowing oil well, constitutes "mining ground," as meant in our statute, then we could not accept these rulings as a guide. On the other hand, it is said to have been held by the department in Green v. Grumbley, decided May 20, 1896, that the presence of a thick vein of coal in public land does not render its character mineral, when shown to be not susceptible of mining at a profit. Clark, H. & C. Min. Law Dig. p. 346. Also that bog iron is not a mineral. Id. p. 28. And in Etling v. Potter, 17 Land Dec. Dep. Int. 424, it was held that the presence of gold in land does not characterize it as mineral unless it is in paying quantities. It seems to us that if a California mining corporation should own and mine a thick vein of coal it would be impossible not to hold the ground so used to be its "mining ground," within the act of 1880, whether the operations should prove profitable or not; and so of land which it might own and mine for gold, although the mining might result in loss. In one instance the commissioner ruled that only land containing metalliferous ores should be regarded as mineral, but this decision was reversed by the secretary of the interior, and it seems to be now established as the rule of the department that "lands chiefly valuable for mineral deposits, of whatever kind or nature, may be properly disposed of under the mining laws." Alldritt v. Railroad Co. (Nov. 6, 1897) 25 Land Dec. Dep. Int. 349; Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 241.

Again, as we see the question whether "mining ground" means the same thing as land subject to mineral entry, it is set at rest by the decisions of this court. Thus, it is held that a lien given by statute upon "mining claims" cannot be extended to mines operated on land held under Mexican grant or agricultural patent. Morse v. De Ardo, 107 Cal. 622, 40 Pac. 1018; Williams v. Association, 66 Cal. 193, 5 Pac. 85. Surely, however, lands of the latter class might constitute "mining ground." And in Estate of Byrne, 112 Cal. 176, 179, 44 Pac. 467, the foundation of the decision is that a mine or mining ground has no necessary identity whatever with mineral land patented as such by the United States. The case of Ball v. Tolman, 119 Cal. 358, 51 Pac. 546, arose under the statute imposing penalties on the directors of a mining corporation for omitting certain acts required of them in the course of the business. St. 1880, p. 134. One of the defenses set up was that the operations of the company, which ended in complete failure, were carried on in the bed of the Sacramento river, and were not "mining." The court said: "It is immaterial, if true, that the river bed where navigable was not subject to location as a mining claim. The company did mining there, or endeavored to do so, and expended money of the corporation in the effort, and the requirements of the law * * * cannot be evaded by showing that the company was wrongfully searching for gold in a navigable stream."

We suppose there can be no doubt that an actual mine—land subjected to the processes of mining—is "mining ground," in the sense of the statute. What, then, is a "mine," or what is "mining"? In Rex v. Inhabitants of Sedgley, 2 Barn. & Adol. 65, the question was whether certain property from which limestone was obtained, by means of tunneling and other excavations, to be used in smelting iron and in the manufacture of lime, constituted a mine. The court (per Lord Tenterden, C. J.), having adverted to an attempt by counsel to restrict the term "mine" to works for the extraction of metals, proceeded: "If the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way this stone was obtained, will not be mines, nor, indeed, will coal works be mines. * * * And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the English language." In Rex v. Brettell, 3 Barn. & Adol. 424, the court held that similar works for obtaining fire-brick clay were a mine, saying: "In order to determine whether an excavation in the earth constitutes a mine or not, we are to look to the mode in which the article is obtained, and not to its chemical or geological character." In Westmoreland Coal Co.'s Appeal, 85 Pa. St. 344, it was held that, as to coal, a worked vein is a mine, and the court said: "By working the vein, it becomes a mine." In Hartwell v. Camman, 10 N. J. Eq. 128, it was held that paint stone found in strata below the surface of the soil, distinct from the ordinary earth, and worked by ordinary means of mining, will pass by the designation of "mines and minerals" in a deed. In Ball v. Tolman, 119 Cal. 358, 51 Pac. 546, dredging the bed of a navigable river for gold—which operations yielded no returns whatever—was yet held to be mining, and among the reasons assigned for the decision was that the method adopted was among the modes of placer mining. In Hines v. Miller, 122 Cal. 517, 55 Pac. 401, it was held that one engaged in the construction of shafts, tunnels, and the like, for prospecting and developing a mine, is engaged in mining as much as he who extracts gravel or ore from the mine. Suppose the shafts and tunnels should fail to strike profitable ore or gravel (which was probably the fact in Hines v. Miller, as the action was to enforce liens for unpaid labor done on the ground); would the operations be any the less "mining"? Or suppose some expert should testify that the ground explored was worthless for any purpose of profit; we think his opinion would hardly justify the conclusion that the ground was not in fact mined, assuming, of course, that the operations were prosecuted in good faith.

We do not hold that the inferences to be deduced from the authorities cited would control the decision of all questions which may arise concerning the proper definition of a "mine" or "mining ground," for the phases in which such questions may occur are perhaps very varied; but in view of the authorities, and considering the object of the statute as expressed in its title ("the further protection of stockholders in mining companies"), we think it clear that when a mining corporation, in good faith, works by ordinary mining processes deposits of stone or other mineral on land owned by it, with a view to utilizing the product for commercial purposes, the land thus worked and exploited is "mining ground," within the meaning of the act of 1880, whether the undertaking results in loss or profit, and whether sound judgment and discretion would approve that use of the land or not.

The expert testimony that the land mined is of no value as mining ground is of no consequence, for the reason, if none other, that in a case such as this it sets up a false standard, viz. that mining ground must be land bearing mineral in quantities which make it profitable for working,—a test which would make the question dependent upon market demand for the product and the thousand varying contingencies of the cost of production.

There is no doubt, on the evidence, that some portions of the mortgaged land were actually mined by defendant with a view to profit, and as to those parts, together with the mill and other appurtenances (McShane v. Carter, 80 Cal. 310, 22 Pac. 178), the prohibition of the statute clearly applied. Whether the tract outside the six or eight acres upon which the mining operations seem to have been directly prosecuted ought to be considered as also within the statute, if proved to be worthless for mining purposes and not necessary to the working of the other, is a question not raised by the record and which we do not decide. The act does not relate to the real property of such a corporation generally, but only to its mining ground. Mining Co. v. Maginness, 118 Cal. 139, 50 Pac. 269. The judgment and order denying a new trial should be reversed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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127 Cal. 254

BYRNE v. HUDSON. (L. A. 591.)

(Supreme Court of California. Dec. 22, 1899.)

MORTGAGES—REDEMPTION—EQUITY—NOTICE—JUDGMENT—APPEAL.

1. Where an absolute deed was held to be a mortgage, in a suit brought for that purpose, a judgment cutting off the mortgagor's equity, unless he paid the sum found due by a time certain, was erroneous, since title remains in the mortgagor until devested by foreclosure and sale.

2. Where a judgment required that plaintiff should pay a certain sum within 20 days after written notice of the entry of the judgment, in default of which her interest in certain land should be devested, a recital in defendant's motion for new trial of the rendition of such judgment was not a written notice, within the meaning of the judgment, and hence did not start the running of the time within which payment, under the judgment, must be made.

3. Plaintiff having failed to pay a sum as required by a judgment, a subsequent entry was made in the judgment book adjudging that "plaintiff's action be, and the same is hereby, dismissed, and that plaintiff be, and she is hereby, barred from all equity of redemption or other right to the property set forth and described in said judgment." *Held*, that such entry was a final judgment, and hence appealable.

Department 2. Appeal from superior court, Riverside county.

Suit by Olive A. Byrne against Josephus Hudson. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal denied, and judgment reversed.

J. W. Stephenson and Chas. R. Gray, for appellant. G. A. Skinner, for respondent.

McFARLAND, J. The transcript in this case is disjointed and confused; but, as supplemented by a certificate of the clerk of the lower court filed here at the date of the oral argument, it is discoverable therefrom that this is an appeal by plaintiff from an order or judgment rendered August 26, 1897, and entered in the judgment book October 6, 1897, ordering and adjudging that plaintiff is barred from all equity of redemption, "or other right," to certain mortgaged premises described in the complaint, and dismissing the action. The parties to the action have produced complications by omissions to assert rights at the proper time and in the proper way, and by acts of such uncertain character as to create embarrassments which ordinary carefulness would have entirely avoided.

It is averred in the complaint, substantially, that plaintiff is the owner of certain described real property, and that defendant has a deed from plaintiff's predecessor in interest which on its face purports to absolutely convey said real property to the defendant, but that said deed was intended as a mortgage to secure a loan of $300, with interest; that she tendered said amount to the defendant, and demanded a deed from him, and that defendant refused to accept this money, and claims that he owns absolute title to the premises. The prayer is that the conveyance to defendant "be adjudged to be a mortgage," and that defendant be decreed to execute a conveyance to plaintiff of the property, and that upon his failure to do so the court appoint a commissioner to make such conveyance. The court found the facts to be as alleged by plaintiff. By the judgment it was decreed that, upon the payment by plaintiff to defendant of the sum of $306,—the amount found to be due on the mortgage,—the defendant execute a deed conveying the premises to the plaintiff, and upon his failure to do so that the clerk be appointed a commissioner for that purpose. The judgment then proceeded as follows: "And if the plaintiff fails to pay to the said defendant the said sum of three hundred and six dollars, without interest, within twenty days after written notice of the entry of the judgment, that then she be barred from all equity of redemption or other right to said property." The part of the judgment last quoted was unwarranted. It is definitely settled in this state that a deed absolute in form, but intended as a mortgage, is a mortgage, and conveys no title to the grantee named in the instrument. It has been declared that sections 2924 and 2925 of the Civil Code were intended to abrogate the rule stated in Hughes v. Davis, 40 Cal. 117, and to restore the rule declared in Cunningham v. Hawkins, 27 Cal. 603, and Jackson v. Lodge, 36 Cal. 28. See Brandt v. Thompson, 91 Cal. 461, 27 Pac. 763; Taylor v. McLain, 64 Cal. 513, 2 Pac. 399; Healy v. O'Brien, 66 Cal. 519, 6 Pac. 386; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866. The rule is stated in Cunningham v. Hawkins as follows: "A mortgage, under our system, as between the parties, does not pass the legal title to the grantee. The title remains in the mortgagor until it is devested by foreclosure and sale, whatever the terms of the mortgage may be." In the case at bar, the court, having found that the instrument in question was a mortgage, and that the parties occupied the relation towards each other of mortgagor and mortgagee, had no power to bar and destroy the plaintiff's title to the property at the end of 20 days, as we have, under our system, no such thing as a strict foreclosure. The court, having declared the instrument to be a mortgage, then seemed to proceed upon the theory that the relation of the parties was that of vendor and vendee under a contract of purchase, and that plaintiff's rights should be ended unless she paid the purchase money within a certain reasonable time. And the case is not one where the plaintiff was seeking to recover possession of the mortgaged premises, which, of course, could not be done without payment or tender of the amount due by the mortgagor. It seems unavoidable to notice this erroneous feature of the judgment, although, as plaintiff has not appealed from that part of the judgment, she is, perhaps, not in the position now to take advantage of the error.

Treating the judgment, as the parties treat it, as a proper and valid judgment, the only two points presented are—First, is respondent's contention that appellant did not pay the money within 20 days after written notice maintainable? and, second, was appellant's appeal from the order or judgment appealed from taken in time?

The judgment provided that the plaintiff should pay the money within 20 days "after written notice" of the entry of the judgment. It is not contended by respondent that he gave plaintiff any formal written notice of the judgment, but on June 28, 1897, he served on appellant's attorney a notice of a motion for new trial, in which the rendering of the judgment was noticed by way of recital. And the money was not paid within 20 days after that time. There is no question here of the sufficiency of a statutory notice, nor was the mere actual knowledge of appellant of the rendition of the judgment material. The question arose out of the express terms of the judgment, which required "written notice of the entry of this judgment." We think, therefore, that as appellant's right in the premises depended upon the commencement of the running of a certain period of time mentioned in the judgment, and as her title was to be forfeited unless a certain act was done within that period of time, she was entitled to a notice expressly intended for the purpose of starting the period of time mentioned in the judgment, and that a mere incidental recital in a notice of a motion for a new trial, given for an entirely different purpose, was not a sufficient compliance with the terms of the judgment.

We also think that the order of October 6th, entered on that day in the judgment book, by which it was "ordered and adjudged that the plaintiff's action be, and the same is hereby, dismissed, and that plaintiff be, and she hereby is, barred from all equity of redemption or other right to the property set forth and described in said judgment," was and is, as against appellant, a final judgment, and that she had six months from its date in which to appeal therefrom. The motion to dismiss the appeal is denied. The said judgment entered on the 6th day of October, 1897, is reversed, and the cause remanded.

We concur: TEMPLE, J.; HENSHAW, J.

127 Cal. 400

PEOPLE v. UNION BUILDING & LOAN ASS'N OF SACRAMENTO et al. (two cases. Sac. 610, 611).

(Supreme Court of California. Dec. 29, 1899.)

APPEAL—JUDGMENT ROLL—APPOINTMENT OF RECEIVER—BILL OF EXCEPTIONS.

1. Though a receiver is not entitled to file a petition for rehearing of an appeal from the order appointing him, not being aggrieved by the judgment, the court may, on consent of the parties, consider such petition.

2. Where a complaint in intervention was filed on the day of trial, and counsel acknowledged service thereof, but reserved objections to the filing, and afterwards demurred to the complaint, and moved to strike out portions thereof, which demurrer and motion were never heard nor the complaint considered by the trial court, it is no part of the judgment roll, and cannot be considered on appeal.

3. Unless the facts found and alleged justify the appointment of a receiver, the order appointing him is properly reversed on an appeal on the judgment roll, though the evidence before the trial court was not brought up by bill of exceptions.

In bank.

Action by the people, by W. F. Fitzgerald, attorney general, against the Union Building & Loan Association of Sacramento and others. On rehearing. Judgment in department affirmed.

For former opinion, see 58 Pac. 822.

PER CURIAM. This case was heard in department 2, and decided October 20, 1899, by which the judgment of the court below was modified by eliminating therefrom the order appointing a receiver, and as thus modified the judgment was affirmed. Afterwards a petition for a rehearing in bank was filed by Thomas W. O'Neil, the receiver appointed by the court below, who, by stipulation of counsel and permission of the court, had filed a brief in said cause. In the petition for rehearing it was suggested that said brief must have been overlooked by the commissioner who wrote the opinion, or that it failed to reach him. Upon investigation, it was found that said brief on behalf of the receiver, and a reply thereto by appellant L. Tozer, had not reached either the commissioner or the department, and upon that ground alone a rehearing in bank was granted. O'Neil, having no other relation to the case than that of receiver, an officer of the court created by its judgment from which these appeals were taken, has no standing or relation to the case which would authorize him to petition the court for a rehearing, or even to file a brief therein, except as an amicus curiæ. In re Pina's Estate, 112 Cal. 14, 44 Pac. 332. He had no right of appeal. He was not a party aggrieved by the judgment from which the appeal was taken, and could not have taken an appeal, nor did the service upon him of the notice of appeal give him any standing in this court. He was not a party to the litigation, and had no interest in behalf of or against either party thereto. The only interest he has is that of retaining an office to which he was appointed by the court by its final judgment in a cause litigated by other parties.

The present attorney general has, however, indorsed upon said petition the following: "I hereby consent to the foregoing petition for rehearing, and in this connection desire to add that, from an examination of the transcript on appeal, it appears, through some inadvertence, a stipulation was entered into by this office on the —— day of September, 1898, to the effect that the transcript on appeal contained the judgment roll, whereas in fact the complaint in intervention filed in said cause by Grove L. Johnson, intervener, is omitted from the judgment roll as printed in the transcript." It is due to the learned attorney general to remark, in this connection, that said cause was tried under the administration of his predecessor in that office, and said consent was based upon a reference in the transcript to "Grove L. Johnson, intervener." Upon this representation, leave was given to respondent to file in this court a copy of the said complaint in intervention, and leave was also given to appellants to file a copy of the proceedings of the court below thereon; and from said complaint and proceedings, now before this court upon said application to correct the record, it appears that this cause was tried on February 17, 1898, and that said complaint in intervention was not filed until that day; that service thereof was acknowledged by the attorneys for the defendant association, and defendants Steinman, Heilbron, Jones, and Lock, "reserving all objections made as to granting permission to file the same"; that on February 26th demurrers to said complaint in intervention were filed by the defendants, and on the same day notice was given that on March 4th a motion to strike out parts of said complaint would be made. On March 4th said motion was continued one week, and on March 11, 1898, said motion was "continued without day, to be restored to the calendar upon ten days' notice."

It thus appears that the complaint in intervention was not filed by consent of the defendants, that it was filed on the day of the trial, and was not heard or considered by the court, and is still pending therein upon said demurrers and motion to strike out. It therefore formed no part of the judgment roll of the cause that was tried, and cannot be considered upon this appeal. We must assume, in the absence of a bill of exceptions showing otherwise, that no application was made by the intervener to the court below to postpone the hearing of the case until an issue could be formed upon his complaint in intervention, and that all action thereon was waived, so far, at least, as that trial was concerned.

The rehearing having been granted because of the accident by which the briefs above mentioned were not considered by the court or the commissioners, it now becomes our duty to examine them. In the brief on behalf of the receiver it is contended that the action of the court in appointing a receiver cannot be reviewed because the evidence heard by the court below has not been brought up by a bill of exceptions; that the only ground upon which the action of the court can be assailed is a want of jurisdiction to make the order complained of; that, in the absence of a bill of exceptions, it cannot be determined whether or not the court below erred in making the order appointing a receiver, since it cannot be known what facts were before the court, and must therefore presume that the evidence justified the appointment. There is no merit in this contention. To sustain it, we must presume that the court received evidence outside of the issues, which, if properly received, would justify the order appointing the receiver. It is not contended in this brief that the court failed to find upon any fact alleged in the complaint, but we are asked to affirm the order appointing a receiver, because we do not know but that the court may have received evidence of facts not in issue which justified it. For aught we know, facts may exist which would authorize the appointment of a receiver; but, unless the facts as alleged and found justify it, the order making the appointment is properly reversed on appeal from the judgment upon the judgment roll.

Again, it is contended that the building and loan commissioners' act is a special statute, and is independent of the general provisions of law regulating the appointment of receivers, and that in cases under this statute "the court is authorized to make such appointment, regardless of general principles." This contention, as well as the further contention that "the findings are sufficient to show the existence of good cause for the appointment of a receiver, even when tested by the rules of equity and by the general provisions of the law," are sufficiently answered in the opinion heretofore filed, and which is hereby approved. See (Cal.) 58 Pac. 822. It is therefore ordered that the judgment entered in department stand as the judgment of the court.

127 Cal. 412

PEOPLE v. FUHRIG. (Cr. 578.)

(Supreme Court of California. Dec. 30, 1899.)

CRIMINAL LAW—EVIDENCE—DYING DECLARATIONS.

Where one taking decedent's statement previous to her death testified that the part reciting that she made the same knowing that she was about to die was not her language, but that before she signed the statement he read it over to her without interruption, and she declared it to be correct, and her attending physician, present at the time the statement was taken, testified that he could not positively state that decedent appreciated that she was in a dying condition, and she made no preparation for death, and said and did nothing showing that she believed she was about to die, though conscious and able to communicate with those about her, such statement was inadmissible as a dying declaration.

In bank. Appeal from superior court, city and county of San Francisco.

Dora Fuhrig was convicted of abortion, and she appeals. Reversed.

Robert Ferral, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant, having been convicted of the crime of abortion, appeals from the judgment, and the order denying her motion for a new trial. The most important testimony in the case bearing upon defendant's guilt consists of a so-called dying declaration of the deceased. The conclusion the court has arrived at as to the admissibility of this declaration demands a new trial of the defendant. This declaration was in writing, and signed by the deceased. It began as follows: "Knowing I am about to die, I hereby make this my last statement, and declare same to be the truth, and the whole truth, so help me God." This statement was made in the following manner, as disclosed by the testimony of O. H. Heynemann. He testifies as follows: "My name is Otto H. Heynemann. Am stenographer to the chief of police of this city. Held that position all of December last. Still hold that position. Have seen Dr. Perry. Accompanied Detective Cody to the house of Mrs. Walmsley, at 418 Laguna street, in this city. Got there between ten and eleven o'clock in the morning. Saw Mrs. Walmsley, the deceased, there. Recognize that document. Outside of the signatures, the handwriting in it is mine. The statement therein, except the formal part—the first line—was made by the deceased, Mrs. Walmsley. Detective Cody, Dr. Perry, a lady, and myself were present. Mrs. Walmsley was in bed, sick. Prior to making her statement, Dr. Perry told her that she would probably die, and to make a statement, and tell the truth. Noticed her appearance." He further testified that at this time "she looked to be very emaciated. She seemed to be in a very weak state. She made this statement immediately after the doctor told her she would probably die." The witness continued: "I wrote down the statement she made immediately after the doctor told her she would probably die. The language she used commences on page 2. She used none of the language on page 1. The balance of the statement contains her language. Her language begins with, 'My name is.' I read the whole of the statement to her, including the first page,—the entire statement to its close, —and before she signed it she said that it was all right; and she signed it. She said it was all right. Afterwards Dr. Perry, Mr. Cody, and myself signed it. From the second page to the close of the statement contain the exact words she used. She appeared to be mentally all right." The language which the witness says the deceased did not use, but which he inserted in the statement, is the language which we have heretofore quoted from the statement. The cause of the woman's death was peritonitis, and she died the day succeeding the time of the making of the statement. The foregoing evidence in substance contains everything tending to show the condition of the woman's mind at the time she made the statement.

We find the following definition of "dying declarations" in 6 Am. & Eng. Enc. Law, p. 105: "Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanctity of an oath." In the case of People v. Hodgdon, 55 Cal. 72, this court said, "Dying declarations are not admissible in evidence if the declarant had the slightest hope of recovery, although he dies within an hour afterwards." Indeed, there is no controversy here as to the law. The difficulty arises when a given state of facts is tested in the measure furnished by the law. Yet in this case there is no serious difficulty in making the test. We have found no case in the text-books or decisions of courts where hearsay statements have been admitted before the jury under the guise of dying declarations upon evidence so meager as that disclosed in this record. Let us pause a moment to look at the facts, at the same time bearing in mind that the all-important question is, did this woman at the time she made this statement firmly believe that her death was then impending? In other words, did she believe at the time that she was about to die? We lay aside as unimportant the facts that she was emaciated and in a weak state. Hardly to the slightest degree do these circumstances tend to prove the issue. They might be quite material in some cases, but we do not appreciate their importance here. Neither do we attach any weight to the statement of the doctor to her that she "would probably die." The usual and ordinary effect of such a statement by a doctor to a patient would be to infuse in his mind a hope, a possibility at least, of recovery. Such a statement would naturally indicate that the doctor himself still had some hopes of the patient's recovery. Laying this statement aside, we then have nothing left save the declaration found in the written statement as follows: "Knowing I am about to die, I hereby make this last statement, and declare." This excerpt from the writing must form the foundation upon which to rest the admissibility of the dying declaration, or a foundation is lacking. Yet the difficulty at once presents itself that this statement was a declaration made by the stenographer, and not by the woman. The condition of the mind when a purported dying declaration is made may be determined by the acts or the language of the party. These acts and this language may unite in tending to show one condition of mind, or they may each point to a different condition of mind, and when they are inconsistent the conduct of the patient may indubitably overthrow any conclusion based upon his language, and the reverse may be equally true. So it is not in every case of a statement by the patient that he believes himself about to die that a sufficient foundation for the admission of his declarations is created. But, as suggested, we have not even that here. A statement consisting of 184 words is read to this dying woman without break or interruption. At the conclusion of the reading she stated it was all right, and signed it. It therefore results from the foregoing that the entire basis for the admission of these declarations rests upon a ratification by the unfortunate woman of the stenographer's statement to the effect that she knew that she was about to die. And this ratification of the statement is found in a general assent to the correctness of the entire contents of quite a long written document. To sustain the people in their contention upon this point would be going beyond sound legal principles. If the particular statement of the stenographer had been separately and directly called to the attention of the woman, and she had understandingly and unconditionally declared such statement to be the truth, the question here presented would be different. Certainly a much stronger showing would then be made. But we have no such case, and the showing made is entirely too weak.

We are more fully impressed with the soundness of this conclusion when we find the physician, who had paid her several professional visits, and who was present when the purported dying statement was made, in answer to the question put by the district attorney, "Could you tell, doctor, from her statement [referring to the statement here under consideration] and manner, whether or not Mrs. Walmsley appeared to appreciate the fact that she was in a dying condition?"—saying, "Not positively, I could not." If the attending physician, who knew all about the woman's condition, who had told her that she would probably die, who was in possession of all the evidence that was before the reporter when he made the statement, and which was before the court upon this trial, and who was present when the statement was made, was unable to make a positive declaration that the woman thought she was about to die, then surely her belief of impending death was not plainly manifest. In addition to all this, she made no preparation whatever for death; gave no direction as to her effects; offered no suggestion as to a final parting with her friends and relatives; said nothing and did nothing to indicate that the hand of death was laid upon her. Yet all this time she was fully conscious, her mind was clear, she could talk and use her hands. The trial court justified its ruling in admitting this statement as a dying declaration upon the authority of People v. Bemmerly, 87 Cal. 117, 25 Pac. 266, but upon a careful consideration of that case the court finds nothing there furnishing authority for the ruling here made. In that case it is said, "Aliunde the written declaration there is sufficient evidence that it was made under a sense of impending death." Again it is said, "Whether the statement alone would be sufficient to satisfy the rule that the declaration must be made under a sense of impending death need not be decided in this case, as there was other evidence that it was so made." We also find a broad chasm dividing the two cases in their facts, in this: In the Bemmerly Case the party writing the dying declaration of the wounded man placed nothing therein except what had been in substance stated to him. In the case at bar the writer of the declaration bodily placed declarations of matters therein which had never even been suggested by the unfortunate woman. Again, in the Bemmerly Case the statement after being written was read to the wounded man a single sentence at a time, and then indorsed by him as true, sentence by sentence. Thus, every separate sentence was brought directly home to his mind. In the case at bar the statement was read to the woman in bulk, and only indorsed by her in the same way. From what has been said the great difference in the facts of the two cases is readily perceptible. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; HARRISON, J.; VAN DYKE, J.; HENSHAW, J.

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127 Cal. 351

COSTA v. SILVA. (Sac. 597.)

(Supreme Court of California. Dec. 29, 1899.)

ORAL AGREEMENT TO BUY LAND—RESULTING TRUST—TRIAL—EVIDENCE—OPINION.

1. Plaintiff purchased from defendant an undivided one-fourth interest in a mining claim, but took no deed, and the parties went into possession, and worked the claim jointly for a number of years. Defendant recognized plaintiff's interest, and requested and received payment for one-fourth of the expense of securing a patent, but refused plaintiff a deed of his interest. *Held*, that defendant held one-fourth of the land in trust, and that plaintiff was entitled to a deed therefor.

2. A judgment supported by the findings will not be reversed on appeal because of a finding, on an immaterial matter, contrary to the evidence.

3. Evidence that defendant requested and received money from plaintiff to pay a portion of the expense in securing a patent to a mining claim is admissible to show that defendant held a portion of the claim in trust for plaintiff.

4. Where plaintiff testified to facts showing himself entitled to a one-fourth interest in a mining claim, of which defendant held the legal title, the fact that a portion of such testimony objected to and received was matter of opinion was not reversible error.

Department 2. Appeal from superior court, Siskiyou county.

Action by Enos Costa against Joseph Silva. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Warren & Taylor, for appellant. Gillis & Tapscott, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial. The case is here on the judgment roll and a bill of exceptions. It appears from the unchallenged findings as follows: That about 24 years ago the plaintiff bought a one-fourth interest in a certain mining claim described in the complaint, containing 63.51 acres, and paid therefor the sum of $400, but took no deed for the same. That both plaintiff and defendant went into possession of said claim, and each had a residence thereon, and for a number of years they worked said claim jointly. That during their residence thereon they each cultivated a portion thereof, and that defendant has continued to reside thereon from the time plaintiff first went into possession up to the present time. That a short time prior to the middle of October, 1896, the defendant recognized the one-fourth interest of plaintiff in and to said claim, and then proposed to plaintiff that they take steps to get a patent to said claim jointly, and that plaintiff should pay one-fourth of the expenses of getting the patent, and that the defendant should pay three-fourths, to all of which plaintiff agreed. That they then jointly had the said claim surveyed, and plaintiff, at the request of defendant, contributed his services in making the survey and paid a portion of the expenses thereof. That plaintiff understood that the patent to said claim would be procured in the names of plaintiff and defendant jointly, and they went to the office of their attorneys, in Yreka, who had been employed to procure the patent for them, and each paid a portion of the expenses necessary to obtaining said patent. That plaintiff paid towards the expense of surveying the claim and getting a patent the sum of $45. That prior to October, 1896, the defendant made application, under the Revised Statutes of the United States, to purchase the said claim, and thereafter, about the middle of October, 1896, made final proof in the United States land office at

Redding, in Shasta county, and received a certificate of purchase therefor in his own name. That, after the said certificate of purchase was so issued to the defendant, plaintiff demanded of defendant a deed to a one-fourth interest in and to said claim, and defendant then refused, and still refuses, to execute or deliver such deed or any deed to plaintiff. As conclusions of law, the court found that the defendant holds the undivided one-fourth of said claim in trust for plaintiff, and that plaintiff is entitled to a deed from defendant for said one-fourth interest. A decree was accordingly entered.

We think the above findings support the judgment. The plaintiff having paid for a one-fourth interest in the property, the defendant for many years having recognized this interest, and the plaintiff finally, in pursuance of the understanding of the parties, having contributed towards the expense of surveying the claim and procuring the title thereto, the title, when procured, was for the benefit of plaintiff as well as defendant, in proportion to his interest therein. To now allow the defendant, in violation of his agreement, to keep the property for which plaintiff has paid his money and labor, would be the most flagrant injustice. If a court, under such circumstances, could not afford relief, it would be a sad commentary upon the law.

The defendant challenges the sufficiency of the evidence to sustain findings 8 and 9 and portions of finding 4. Without passing upon the question as to whether the evidence is sufficient in the respects specified, it clearly appears that the judgment is supported by the findings other than those attacked. While findings 8 and 9 and the portions of finding 4 to which our attention is called are not necessary to support the judgment, yet they are not inconsistent or in conflict with the ultimate findings upon which the judgment rests. In such case, they may be disregarded. A finding contrary to the evidence, upon an immaterial matter, is not prejudicial error, if the ultimate facts found support the judgment.

Certain questions were asked of the witness Solus and of plaintiff, while a witness upon the stand, for the purpose of showing that in 1896, before the defendant filed his application for the claim, he asked plaintiff to contribute towards his one-fourth interest, and help pay for the surveying, and that plaintiff did at that time pay $40 towards the survey. The evidence was objected to by defendant upon the ground that it was incompetent, irrelevant, and an attempt to prove a contract concerning real estate by parol. The court overruled the objections, and the rulings are assigned as error. We think the evidence was material, and it was not offered for the purpose of proving a parol agreement to convey land. It was competent for the purpose of showing that plaintiff paid money to defendant at his request, and for the purpose of procuring the title for the common benefit of plaintiff and defendant. Where a transfer of real property is made to one person, and the consideration thereof is paid by another, a trust is presumed to result in favor of the person by whom the payment is made. It has always been held competent to prove by parol the payment of the consideration. The plaintiff testified that 24 or 25 years ago he first went to live on the claim; that he worked there, mining, for three years with defendant; that he had then bought and paid for a one-fourth interest, and claimed such interest; that defendant bought his interest one year before plaintiff. The plaintiff was then permitted to testify, under defendant's objection, that they divided the money taken from the mine; that plaintiff received one-fourth of it; and that defendant recognized his one-fourth interest in the mine. Part of the testimony was a mere opinion of the witness, but he stated the facts fully in other parts of his testimony, and we do not think the objectionable part of sufficient importance to make it ground for reversal. The findings concerning which no complaint is made support the judgment. The testimony in the record is without conflict. The defendant did not deny the facts as stated by plaintiff. The judgment and order are affirmed.

6 Cal. Unrep. 354

HILLMAN v. GRIFFIN. (Sac. 342.)

(Supreme Court of California. Dec. 28, 1899.)

In bank. On rehearing. Reversed.

For former opinion in department, see 59 Pac. 194.

PER CURIAM. On petition for a rehearing of this cause, it is ordered that a rehearing be denied, but the judgment of the department is hereby set aside, and the following judgment given in place thereof: The judgment and order of the superior court denying a new trial are reversed, and cause remanded.

127 Cal. 326

CHILSTROM v. EPPINGER et al. (L. A. 585.)

(Supreme Court of California. Dec. 28, 1899.)

JUSTICES OF THE PEACE—ACTION ON APPEAL BOND—ASSIGNEE OF JUDGMENT.

Where an appeal was taken from a judgment rendered in a justice's court, and the judgment was assigned pending the appeal, but the undertaking on appeal was not assigned, the assignee could not maintain an action on such undertaking.

Department 2. Appeal from superior court, San Luis Obispo county.

Action by P. O. Chilstrom against H. Eppinger, Jr., and others. From a judgment for plaintiff, defendants appeal. Reversed.

Louis Lamy and G. & A. Webster, for appellants. S. M. Swinnerton, for respondent.

HENSHAW, J. The action is by the assignee of the judgment to recover on the undertakings given on appeal, and to stay proceedings. A judgment was rendered in the justice's court in favor of Morgenson, plaintiff, against Grabow, defendant. An appeal was taken, and the undertakings here sued upon were given to support it. Before determination of the appeal, Morgenson assigned his judgment to P. O. Chilstrom, plaintiff in this action. He made no assignment of his rights upon the undertakings. After the assignment of the judgment, the appeal was dismissed, and Chilstrom instituted this action, in which he recovered judgment, from which defendants appeal.

In Moses v. Thorn, 6 Cal. 87, it was held that, in the absence of an assignment of the undertaking, the assignee of the judgment could not maintain an action against the sureties upon the appeal bond, the reasoning being that the contract of the sureties was entirely distinct from, and independent of, the judgment, was not a necessary incident to it, and the rights under it did not pass by assignment of the judgment. See, also, Dray v. Mayer, 5 Or. 185. The point is determinative of this appeal, for we can perceive no distinction between a case where the judgment has been assigned after it has become a finality and the case at bar, where the judgment was assigned pending the determination of the appeal. The judgment is therefore reversed, and the cause remanded.

We concur: McFARLAND, J; TEMPLE, J.

127 Cal. 372

PEOPLE v. HAWKINS. (Cr. 551.)

(Supreme Court of California. Dec. 29, 1899.)

CRIMINAL LAW—DISMISSAL OF PROSECUTION—WAIVER—ASSAULT WITH DEADLY WEAPON—EVIDENCE—CONDUCT AT ARREST—INSTRUCTIONS.

1. Under Pen. Code, § 1382, providing that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, if a defendant, whose trial has not been postponed upon his application, is not brought to trial within 60 days after the finding of the indictment or filing of the information, a defendant waives such right by allowing a jury to be impaneled and sworn without first raising objection.

2. Defendant called the person assaulted to him, and told her "to say her last blessing," at the same time drawing a dirk knife, and making a motion with it towards her. She seized his hand, and at the same time he was caught and held by parties entering the room, and, when arrested, resisted. *Held*, the evidence was sufficient to justify a verdict of assault with a deadly weapon.

3. Evidence of the conduct of defendant, charged with a crime, at the time of his arrest, is admissible, when he knew of the officer's design to arrest him, though the officer did not in words so inform him.

4. Where defendant was found guilty of assault with a deadly weapon, thereby acquitting him of assault with intent to murder, there was no error in refusing an instruction that it must appear that defendant had the intent to murder, and attempted to carry it into effect, "and was only prevented from so doing by some interposition not of his own will."

Commissioners' decision. Department 2. Appeal from superior court, Tulare county.

Jesse E. Hawkins, convicted of assault with a deadly weapon, appeals. Affirmed.

Forrest L. Alford and E. W. Holland, for appellant. Atty. Gen. Ford, for the People.

BRITT, C. 1. On December 2, 1898, an information was filed by the district attorney in the court below accusing defendant of the crime of assault with intent to murder, specifying also that the assault was committed with a deadly weapon. Section 1382, Pen. Code, contains the following provision: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." January 13, 1899, the court made an order setting defendant's case for trial on February 3d following. On said February 3d defendant was present in court, with his counsel, and announced that he was ready for trial. A jury was then impaneled and sworn to try the case, whereupon defendant moved the court to dismiss the action, and discharge him, on the ground that he had not been brought to trial within 60 days after the information was filed. The court denied the motion. The trial proceeded, and resulted in a verdict of guilty of an assault with a deadly weapon, upon which sentence of imprisonment was pronounced. There is no duty incumbent on the court to order dismissal under said section 1382 unless the defendant demands it (Ex parte Fennessy, 54 Cal. 101); so that the right, like other statutory privileges of the accused which do not affect the jurisdiction of the court, may be waived. It is well settled that the impaneling of the jury is part of a trial. Silcox v. Lang, 78 Cal. 118, 20 Pac. 297. The legal jeopardy of the defendant has attached when a jury has been "charged with his deliverance," and the jury stands thus charged when its members have been impaneled and sworn. Cooley, Const. Lim. (6th Ed.) p. 399. When, therefore, the defendant here moved for dismissal, he had been "brought to trial," and was upon trial, without previous objection that the limit of 60 days had expired. If he could then raise the objection for the first time, he could raise it as well on the announcement of the verdict, or at any other stage of the trial. We are satisfied that the statute never was designed for such uses, and must hold that defendant waived its benefit (if he was entitled thereto) by failure to claim it in proper season. The following cases tend to sustain this conclusion: People v. Bennett, 114 Cal. 56, 58, 45 Pac. 1013; Polack v. Gurnee, 66 Cal. 266, 5 Pac. 229, 610; People v. Romero, 18 Cal. 89; People v. Johnson, 104 Cal. 418, 38 Pac. 91.

2. It is claimed that the evidence did not

justify the verdict; chiefly, it seems, on the assumed ground that an attempt at actual violence was not proved. There was testimony for the prosecution tending to show the following circumstances: The person assaulted was a girl about 16 years of age, who was employed as a domestic at the house of defendant's mother, where, also, defendant resided. Defendant was enamored of the girl, and she had accepted some attentions from another man. Defendant, inflamed with jealousy, and probably with liquor, caused the girl, on a frivolous pretext, to arise from bed and dress herself about the hour of 12 midnight, and come to him in an adjacent room. He told her "to say her last blessing," at the same time drawing a dirk knife, and making a motion with it towards her. She seized his hand holding the dirk, and begged him not to touch her. At this instant defendant's mother rushed screaming into the room, and laid hold of him. Other persons in the house were aroused, and came in, and tried to pacify the defendant. He said he would "die the death of a murderer; would die before the sun rises; would meet the girl in heaven before morning." A constable was summoned, and defendant, with force and arms, resisted arrest. It is plain that this evidence, which was given at the trial with much elaboration of detail, made a question for the jury whether defendant had attempted violence with the weapon upon the prosecuting witness, and that it sustains the verdict.

3. It is argued that the court erred in allowing evidence of the conduct of defendant at the time of his arrest, which followed a few minutes—possibly half an hour—after the assault. The only plausible ground advanced for this objection is that the officer did not state to defendant that his purpose was to arrest him. It seems unnecessary to set out the evidence on this point. Although the officer did not, in words, inform defendant that he intended to arrest him, yet it is perfectly clear that defendant knew such to be his design. The evidence objected to was rightly admitted. People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

4. Defendant requested the court to instruct the jury, in substance, that, before he could be convicted of an assault with intent to murder, it must appear that he had such intent, and attempted to carry it into effect, "and was only prevented from so doing by some interposition not of his own will." The court gave the instruction, and much more of similar import, omitting, however, the words which we have quoted. Defendant claims that the court erred in striking those words from the charge. It is sufficient to say in this behalf that, since the jury found him guilty of an assault with a deadly weapon only, thus acquitting him of any intent to kill, it is impossible that he could have been injured by failure to instruct on the means by which he was prevented from effectuating an intent which he never had. There is no material error in the record, and the judgment and order denying a new trial should be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

127 Cal. 312

DAVIS v. PACIFIC TELEPHONE & TELEGRAPH CO. (S. F. 1,097.)

(Supreme Court of California. Dec. 26, 1899.)

TELEGRAPHS AND TELEPHONES—CRIMINAL PROSECUTION—MALICIOUS DESTRUCTION OF TELEPHONE WIRE.

Under Pen. Code, § 591, prohibiting malicious injury or removal of a telegraph wire, and section 4, providing that the rule of common law that penal statutes are to be strictly construed shall not apply to the Penal Code, a criminal prosecution will lie for the illegal destruction of a telephone wire, as "telephone" is included within the meaning of the term "telegraph."

In bank. On rehearing. Affirmed.

For opinion in department, see 57 Pac. 764.

HENSHAW, J. A rehearing was granted in this case for consideration of a question not discussed in the department opinion, namely, whether "telephone" is included within the meaning of "telegraph," as used in section 591 of the Penal Code. It appeared that in the criminal action the defendant was charged with cutting telegraph wires, while the facts without dispute disclosed that the wires which he cut were used as telephone wires. The importance of the consideration in the case at bar arises from the fact that, if telephone wires are not within the purview of section 591, it would tend to show lack of probable cause to procure the arrest and prosecution of a person charging him with cutting telegraph wires, when the known fact was that he had cut telephone wires. The cases are numerous where the question has come under consideration, and the holding of the courts has been uniform that "telephone" is included within the meaning of "telegraph." Many of these cases are noted in 25 Am. & Eng. Enc. Law, at page 746. In Attorney General v. Edison Telephone Co. of London, 6 Q. B. Div. 244, it was held that a telephone was a telegraph, within the meaning of the telegraph acts, although the telephone was not invented or contemplated at the time of the passage of those acts. It was further declared that a conversation through the telephone was a message, or at all events "a communication transmitted by a telegraph, and therefore a telegram, within the meaning of the acts." In City of Richmond v. Southern Bell Tel. & Tel. Co., 28 C. C. A. 659, 85 Fed. 19, the circuit court of appeals, construing an act of congress of 1866 relative to "telegraph companies," and answering the question whether those words included telephone companies, declared that each was but a form of use, the product and result of the same principle, and that the names were only used to distinguish the method of communication. In Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399, 7 Atl. 809, the court, in construing an early act relative to telegraph companies, declared that the term "telegraph," which means and includes any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, embraces the telephone. In Iowa Union Tel. Co. v. Board of Equalization, 67 Iowa, 250, 25 N. W. 155, it was held that, by reason of the substantial identity of telephonic and telegraphic modes of communication, the telephone company was to be regarded, for purposes of taxation, as coming under the denomination of a telegraph company. These cases are sufficient by way of illustration, though many more could be instanced. They are civil cases, it is true, but they at least serve to show the unanimity and uniformity of the courts' holdings upon the question. If the consideration could be limited to a strict etymological point of view, it would have to be conceded at once that there is a difference in the meaning of the two words,—the one conveying the idea of transmission of writing to a distance; the other, the transmission of sound to a distance. In the very early history of the telegraph it is a matter of common knowledge that there was an actual recordation of letters under the Morse code. That soon passed away, and the telegraph operator of to-day receives by sound upon a principle no different from that which obtains in the telephone. Again, in the case of submarine cables neither sound nor writing is always employed, but the varying deflections of an indicator within sight of the receiver serve the like purpose. The words therefore cannot be limited to their etymological meaning, and consideration must be had to their present sense and acceptation. Anderson (Dictionary of the Law), defining "telegraph," says that it "includes any apparatus for transmitting messages or other communications by means of electric signals." Defining "telephone," he declares it to be "a conversation held through a telephone; a message or a communication transmitted by a telegraph; a telegram. A telephone is a telegraph. The idea conveyed by each term is the sending of intelligence to a distance." Accepting these definitions,—and they are well supported,—the term "telegraph" means any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word "telephone."

But is this construction justifiable in the case of the penal statute? Section 4 of our Penal Code provides that "the rule of the common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice." In contemplation of this section, in recognition of the fact that a substantial identity exists between the two words, we think no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire. The opinion heretofore rendered in department is therefore adopted, and the judgment is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; McFARLAND, J.; VAN DYKE, J.; TEMPLE, J.; HARRISON, J.

127 Cal. 245

SOUTH SAN BERNARDINO LAND & IMPROVEMENT CO. v. SAN BERNARDINO NAT. BANK. (L. A. 500.)

(Supreme Court of California. Dec. 22, 1899.)

TRUSTS—APPEAL AND ERROR—ESTOPPEL.

1. A complaint stated that R. and seven others purchased land under an agreement that each should share in proportion to the amount of the price paid; that, though R. paid but one-tenth of the price, he received one-eighth of the land under the deed, which conveyed the land to the eight grantees in equal portions; that all the grantees had conveyed their interest to plaintiff except R., who conveyed an undivided one-tenth to plaintiff's grantor; that thereafter defendant purchased all R.'s interest in the land under execution against him, with notice of plaintiff's rights therein, and that plaintiff had demanded a conveyance from defendant, and prayed that he be declared constructive trustee of the title held by him for, and be decreed to convey it to, plaintiff. *Held*, that since the complaint showed that R. received the title to one-fortieth of the property, the price of which had been paid by plaintiff's grantors, and that defendant took such title with notice, the complaint stated facts sufficient to constitute a cause of action against defendant.

2. Under Code Civ. Proc. § 1908, declaring that a judgment is a bar to a subsequent action only "when the same thing under the same title" is litigated, a judgment in favor of defendant in an action to quiet title is not res judicata of plaintiff's rights in a subsequent action to declare defendant a constructive trustee for plaintiff in the same land.

3. Where a judgment was rendered for defendant, he is not entitled to make objections to the complaint on plaintiff's appeal, unless the complaint is so defective that it would not support any judgment in plaintiff's favor.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the South San Bernardino Land & Improvement Company, a corporation, against the San Bernardino National Bank, a corporation. From a judgment in favor of defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Caldwell & Duncan, for appellant. J. G. North and Curtis & Curtis, for respondent.

GRAY, C. This is an action to enforce a trust and compel a conveyance. The plaintiff appeals from the judgment and from an order denying a new trial.

1. The substance of the complaint is that

one Rosenthal and seven others bought certain lots of the Rancho of San Bernardino, said Rosenthal and five others paying each one-tenth, and the other two each paying two-tenths of the purchase price of said lots; that the eight persons were to have proportionate interests in the land purchased equal to the amount paid by each of them; that they subsequently received a deed to the lots, which deed failed to designate the interest conveyed to each of the grantees; that thereafter all the grantees named in said deed formed the corporation plaintiff, and all except Rosenthal conveyed all their interest in the property to the plaintiff; that Rosenthal conveyed an undivided one-tenth of said property to one Boggs, who subsequently conveyed the same to plaintiff; that thereafter defendant herein, in a suit against said Rosenthal and another, seized, sold, and bought in under execution all the right, title, and interest of said Rosenthal in and to said property, and obtained a sheriff's deed therefor; that defendant purchased said property with notice of plaintiff's rights therein; that plaintiff had demanded a conveyance of defendant, which defendant had refused. Plaintiff prays that defendant be declared a trustee of the legal title for the benefit of plaintiff, and that defendant be compelled to convey to plaintiff.

2. The first question to be determined is that raised by a general demurrer to the complaint: Does the complaint state a cause of action? It appears from the facts set forth in the complaint, and recited above, that, while Rosenthal paid but one-tenth of the purchase price of the property, there was conveyed to him by the deed an undivided one-eighth of said property. Having thereafter conveyed to the plaintiff corporation a one-tenth interest in the property, there was still left some sort of title in him to an undivided one-fortieth of said property, and to this one-fortieth the defendant has succeeded. The question is, do the facts stated in the complaint show that defendant holds this one-fortieth interest in trust for plaintiff? If this question is answered in the affirmative, then the complaint states a cause of action. It is settled law that where one pays the purchase price of land, and the land is thereupon conveyed to another, the title to the land is held, under such conveyance, in trust for the person who has paid the purchase price. Civ. Code, § 853. This principle is also applied so as to make the payment of a part of the purchase money carry with it a proportionate equitable estate in the land purchased equal to the amount paid (2 Pom. Eq. Jur. § 1038); and the cestui que trust may, in a court of equity, compel a conveyance to himself of the legal title, as well from any one succeeding to the title of the trustee with notice as from the trustee himself (Id. § 1043; Case v. Codding, 38 Cal. 191; Murphy v. Clayton, 113 Cal. 153, 45 Pac. 866). The facts stated in the complaint show a sale, and the proportion of the price paid by each grantee, and bring the case clearly within the principle of the authorities cited above; and the complaint is certainly good as against the general demurrer interposed. If there is any uncertainty in the complaint as to the time of the payment of any part of the purchase price of the land by any of the vendees, such uncertainty could only be reached by special demurrer based upon that ground. In the absence of any special demurrer to the complaint, it is unnecessary to specially notice the other points urged in respondent's brief as to the sufficiency of the complaint. It may be proper also here to say that the defendant, not having appealed, cannot be heard on any objection to the complaint unless the complaint is so defective in averment that it would not support any judgment in plaintiff's favor. Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745.

3. Defendant pleaded in bar a judgment in his favor and against plaintiff, rendered in a former action to quiet title, which action was brought by plaintiff herein against defendant herein; and the judgment of the court below in defendant's favor is based entirely on a finding favorable to defendant on this plea in bar. In an action to quiet title, the relief sought in the case at bar could not be obtained. This action, being to enforce a trust and compel a conveyance, proceeds on the theory that the legal title is in the defendant, whereas a suit to quiet title ordinarily proceeds upon a contrary theory, and cannot be maintained against the holder of the legal title. The former judgment is conclusive between the parties only "when the same thing under the same title" is litigated. Code Civ. Proc. § 1908. We think, therefore, that the findings of the court and conclusions of law should have been for plaintiff on the plea in bar. Plaintiff should not be estopped from maintaining an action for relief that he is entitled to on the facts as they exist because he previously mistook his remedy, and tried to maintain an action that he never was entitled to. The foregoing views find support in the following cases: Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236; Harrigan v. Mowry, 84 Cal. 457, 22 Pac. 658, and 24 Pac. 48; Shanahan v. Crampton, 92 Cal. 9, 28 Pac. 50. We advise that the judgment and order denying a new trial be reversed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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127 Cal. 341

CRUSOE v. CLARK. (L. A. 595.)

(Supreme Court of California. Dec. 29, 1899.)

CONTRACTS—EVIDENCE—WITNESSES—COMPETENCY—MASTER AND SERVANT—INSTRUCTIONS—APPEAL—CONFLICTING EVIDENCE.

1. Where a contract is pleaded and relied on as a defense to an action, evidence as to another

contract, not pleaded, is inadmissible, as not being within the issue.

2. A witness cannot be impeached by contradictory statements as to matters irrelevant to the issues; hence, where plaintiff was permitted to testify to irrelevant matter, it was not error for the court to refuse to allow defendant to introduce testimony tending to contradict it.

3. The fact that plaintiff's witnesses, called to testify as to the value of services rendered by him, resided in another city of the same county, and admitted that they did not know the value of like services in the city where they were performed, does not render their testimony incompetent, where they were present in court, and heard plaintiff describe the nature and extent of his services, were business men of experience, and had employed persons for services similar to those performed by plaintiff, and testified that they knew the value of such services in such county.

4. Account books are admissible in evidence to explain the nature and show the extent of services performed in keeping them.

5. Evidence of another bookkeeper is admissible to show that certain books were not complicated, but a simple set of books, and that any one of ordinary skill in bookkeeping could keep them.

6. Refusal of an instruction limiting the value of services of a bookkeeper, and manager of his employer's business, in his absence, to the "ruling rate of wages" generally paid for similar services, was proper, since there can hardly be a "ruling rate of wages" for such services, because their value depends as much on the capacity and fidelity of the servant, as on the customary wages paid for such work.

7. Refusal of an instruction that the services of one who was employed as bookkeeper, clerk, and salesman, and manager of his employer's business, in his absence, could not in any degree be based on the wages for like services in the county, unless it was shown that the rate of wages elsewhere in the county was the same, was proper, since a comparison might be made even if the wages elsewhere were not the same, which would in some degree tend to show their value at the place performed.

8. A judgment will not be reversed on the ground of insufficiency of the evidence to sustain it, where the evidence is conflicting.

Commissioners' decision. Department 2. Appeal from superior court, Kern county.

Action by Charles W. Crusoe against J. A. Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

A. J. Bledsoe, for appellant. S. N. Reed (C. E. Arnold, of counsel), for respondent.

CHIPMAN, C. Action for work and labor as bookkeeper, salesman, and clerk. Defendant denied any indebtedness, pleaded certain counterclaims, and set up an agreement whereby plaintiff, defendant, and one Shurley entered into a joint enterprise to prospect for mines, in the accomplishment of which plaintiff was to take charge of defendant's mercantile business as clerk, bookkeeper, and salesman without pay, and defendant and Shurley were to do the prospecting, and share equally with plaintiff in any mineral discoveries. The cause was tried by a jury, and plaintiff had a verdict for $564.23. Defendant appeals from the judgment and from an order denying new trial.

Certain errors in rejecting the testimony of the witness Shurley are claimed. Some testimony had been given by defendant in support of the agreement pleaded in defense. The alleged agreement was oral, and it was alleged that it was entered into about October 1, 1896. There was no evidence that the three parties to the agreement had met and come to any mutual understanding as to its terms, but it was claimed by defendant that they met in June, 1897, and confirmed the contract. Plaintiff's services were alleged to have been performed between October 21, 1896, and December 15, 1897. Defendant testified that Shurley went with plaintiff and defendant from Bakersfield to Mohave, but that he (defendant) did not introduce Shurley to plaintiff; that Shurley stayed at Mohave about two weeks; was in ill health, and returned to Bakersfield, and returned to the desert about June 20, 1897. Shurley was called as a witness for defendant, and was asked a number of questions as to what was said at a meeting between the three in June, 1897, "referring to certain prospecting that was to be in contemplation by you and Mr. Clark out on the desert." He was asked if he had any conversations with plaintiff and defendant "with regard to prospecting for minerals in that country," and to state the conversations. Several questions were asked him by defendant's counsel, all of which related to the understanding after he returned to the desert. The court properly, we think, sustained the objection made by plaintiff. The agreement pleaded was alleged to have been entered into October 1, 1896. There was no agreement pleaded such as Shurley was asked to testify about, and the testimony was therefore not within the issues presented. It did not tend to corroborate defendant's testimony that the agreement took effect October 1, 1896. For like reason, it was not error to refuse a question asked Shurley for the purpose of contradicting plaintiff, who had denied a conversation with defendant and Shurley "referring to certain prospecting that was to be." A witness cannot be impeached by contradictory statements as to matters irrelevant to the issues.

It was not error to refuse the question put to defendant, Clark, as a witness, "Did Mr. Shurley and Mr. Crusoe understand that Crusoe, Shurley, and yourself were interested in the matter?" and the question, "State whether or not Mr. Crusoe expected any wages from you when he went out there." Clearly, these were questions calling, not for facts, but for the conclusion of the witness, and were inadmissible. It was immaterial how much defendant paid out for expenses in the prospecting venture; there was no issue involving such disbursements.

It is objected that the testimony of witnesses Parks and Munzer as to the value of plaintiff's services was improperly admitted, because they resided at Bakersfield, and admitted that they did not know what the wages for like services were at Garlock or Mohave, where they were rendered, which were places situated in Kern county, remote from Bakersfield. These witnesses were present in court, and heard plaintiff describe the nature and extent of his services. They were business men of experience, and had employed persons for services similar to those performed by plaintiff. They testified that they knew the value of such work in Kern county. We think they fully qualified themselves to testify upon the point at issue.

Defendant offered in evidence the books kept by plaintiff to show the character and amount of bookkeeping done by plaintiff, and the extent of defendant's business. I think this evidence was admissible upon the issue as to the value of the plaintiff's services. It tended to explain the nature and extent of his work. The court had refused to allow defendant to prove the amount of the monthly sales, on the ground that the books were there, and were the best evidence, but when they were offered refused to admit them. This was error. The court also refused to allow the witness Broadwell, who was himself a bookkeeper, to testify, from an examination of the books, that they were not complicated, but a simple set of books to keep, and that any one of ordinary skill in bookkeeping could keep them. We think this evidence was also admissible, as bearing upon the question of the value of plaintiff's services. It does not, however, appear from any statement of counsel or otherwise what the books would have shown, or that their introduction would have furnished evidence material to appellant. It appeared from the offer of Broadwell's testimony that he had examined the books. He testified to the value of plaintiff's services, we must presume, at least in part from this examination. The jury got the benefit to some extent in that way of the rejected evidence. While we think the books ought to have been admitted, and that this witness ought, as an expert bookkeeper, to have been permitted to testify as it was claimed he would, still nothing is shown to enable us to say whether or not the error was prejudicial.

Defendant asked and was refused the following instructions: "That the rule for determining the value of services, in the absence of an express contract therefor, is to ascertain from the evidence the character and kind of work performed, and the rate of wages generally paid in the same neighborhood for the same kind of work;" and that the value of the services must be ascertained "from the testimony as to the ruling rate of wages for similar services paid at" the place of the service (Garlock and Mohave); and that the estimate of value cannot be based upon the "estimate of the value of such services in any degree upon testimony of the rate of wages paid at Bakersfield or elsewhere, unless it is first shown to your satisfaction that the rate of wages at both places was the same." The value of the services of one who is a bookkeeper, clerk, and salesman, and has the care and management of the business, in the absence of his employer, as was the case here, can hardly be determined alone by the rate of wages generally paid for salesmen or clerks. The value of the services would depend much upon the man himself, as to his capacity and fidelity, as well as upon the customary wages paid for this class of work. While the customary wages might be a criterion, it would not be the only one, as the instruction implies. The services in their nature involve trust and confidence, peculiar fitness as a salesman, skill as an accountant, knowledge of the business, and capacity to manage it. There can hardly be a "ruling rate of wages" for employment of this character applicable alike to all persons who might be employed. Nor do we think it was error to refuse to instruct the jury that the value of the services could not, "in any degree" be based upon the wages for like services elsewhere in the county, "unless it was shown that the rate of wages elsewhere in the county was the same." A comparison might be made, even if the wages elsewhere were not the same, which would in some degree tend to show the value of the services at the place where performed. In the present case plaintiff first showed the character and extent of his services, and then proved their value by witnesses who showed by their answers that they were qualified to speak as to the value of the services at the place where performed, and testified that they knew the value and what it was. There was evidence, also, as to what wages were generally paid for such services, and it is to this latter defendant sought to confine the evidence. We do not think it was prejudicial error to refuse the instructions.

Defendant contends that the evidence was insufficient to sustain the verdict. Upon this point it is enough to say that the evidence was conflicting, that there was sufficient to support the verdict, and that it was for the jury alone to pass upon the credibility of the witnesses. The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(127 Cal. 388)

PATTON v. BOARD OF HEALTH OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 1,853.)[1]

(Supreme Court of California. Dec. 29, 1899.)

HEALTH OFFICERS—INSPECTORS—REMOVAL.

A health inspector appointed by the board of health of the city of San Francisco, whose duties are to inspect and report concerning premises on which nuisances are situated, and to serve notices for their abatement, is a public officer, within Const. art. 20, § 16, providing that an officer whose term is not fixed by the constitution or declared by law shall hold his position during the pleasure of the authority making the appointment, for a period not exceeding four years; and hence such inspector might properly be removed by the board without notice of charges preferred against him, or opportunity to be heard, though Pol. Code, § 3009, declares that such officers shall not be removed without cause.

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[1] Rehearing denied January 26, 1900.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Action for a writ of mandate by A. T. Patton against the board of health of the city and county of San Francisco. From a judgment in favor of plaintiff, and from an order denying a new trial, the board appeals. Reversed.

Garret W. McEnerney, for appellants. J. P. Langhorne, for respondent.

CHIPMAN, C. Plaintiff brings this action against the board of health of the city and county of San Francisco for a writ of mandate requiring it to admit plaintiff to the position of health inspector and to approve certain of his demands on the treasury for salary accruing since his removal. The court found as facts: That the board of health appointed plaintiff on August 6, 1895, as one of the six health inspectors provided to be appointed by section 3009, Pol. Code; that the board of health, in its order appointing plaintiff, did not specify or in any manner limit the term for which plaintiff should hold or exercise the position; that plaintiff entered upon the discharge of his duties pursuant to such appointment, and discharged the duties required of him by the board until about November 6, 1896, at which time, and while plaintiff was proceeding to perform his duties, the board passed a resolution purporting by its terms to remove plaintiff from his said position, "but the said resolution was so passed without plaintiff's knowledge or consent, and without any notice to him that any charge whatever had been made against him, or that any charge against him would be heard by said board, * * * and plaintiff had no opportunity to be heard in his own behalf before said board of health or its members before the passage of said resolution." It is further found that solely upon the authority of said resolution plaintiff has been denied his right to be and act as such health inspector, and has been deprived of the emoluments pertaining to said position; that the duties of plaintiff as such inspector, prescribed by the board, were "to inspect premises concerning which complaints have been made to said board, and to report thereon to said board, and to serve notices issued by said board to persons to abate nuisances on their premises." As conclusions of law, the court found that plaintiff has never been legally removed from the position of health inspector, and that he is still one of the six health inspectors appointed by the board of health August 6, 1895, and that "it is not material whether plaintiff was guilty of insolence, insubordination, or neglect, as he had no trial on such charge or charges"; that plaintiff is not an officer or commissioner, within the meaning of section 16, art. 20, of the constitution of this state; and that plaintiff is entitled to the writ, etc. At the trial plaintiff testified: "When I became a health inspector no written commission was issued to me. I took no oath of office, nor filed any bond." Plaintiff had judgment, from which, and from the order denying new trial, defendant appeals.

Appellant relies principally upon the following proposition: The plaintiff's term of office as health inspector not having been fixed by the constitution or by law, he held at the pleasure of the appointing power; and that portion of section 3009 of the Political Code prohibiting his removal without just cause is unconstitutional and void, because in violation of section 16, art. 20, Const. This provision of the constitution reads as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." It is conceded that the term of the position of health inspector is not prescribed either in the constitution or by any law. Section 3009, Pol. Code, contains the following among other provisions: "The board of health must appoint * * * six health inspectors * * * whose duties must be fixed by the board of health. * * * The appointing power aforesaid is vested solely in said board of health, and said board shall have power to prescribe the duties of said appointees [referring to health inspectors and many other appointees], and shall not remove the same without just cause." It cannot be doubted that the legislature may authorize the employment of persons to perform certain duties in their nature public, to be prescribed by the authority making the appointment of such persons, and may provide in the law that such persons shall not be removed without just cause, if the employment is not an office, within the meaning of the constitution; and it is well settled that, under such a clause in the statute, the appointee is entitled to notice and opportunity to be heard before he can be legally removed. Kennedy v. Board, 82 Cal. 483, 22 Pac. 1042; Marion v. Board, 97 Cal. 608, 32 Pac. 643, 20 L. R. A. 197; Fairchild v. Board, 107 Cal. 92, 40 Pac. 26.

With the policy of such a law we have nothing to do; its wisdom or unwisdom is for the legislature alone to determine. We are only concerned, in the present case, with the question, is the health inspector an "officer," within the meaning of the provision of the constitution above quoted? Many of the cases and authors giving definitions of the word "office" and "officer," as used in statutes and constitutions, will be found cited in chapter 1, Mechem, Pub. Off. Counsel in their briefs have called attention to some others. I do not think it possible from this mass of learning to deduce a definition universally applicable, although nearly every conceivable case has arisen and has been passed upon. It seems to be agreed by all writers that certain things are requisite to make a given employment a public office and its incumbent a public officer. Then there are numerous criteria which, while not in themselves conclusive, are yet held to indicate more or less strongly the legislative intent to create or not to create an office. One of the requisites is that the office itself must be created by the constitution of the state or it must be authorized by some statute. The section of the constitution in question embraces all classes of officers, statutory as well as constitutional. People v. Perry, 79 Cal. 105, 21 Pac. 423. But not all employments authorized by law are public offices, in the sense of the constitution. The presidency of a private corporation may be spoken of as an office. An executor, guardian, a referee for the decision and trial of an action, are all officers who derive their existence from statutes, but they are not public officers in the constitutional sense. "Their authority is restricted to specific matters, and no general powers are conferred upon them authorizing to act in respect of all cases, or in any case or matter, other than specified and named in their appointment. They owe no duty to the public, and could perform no service for the public. * * * 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law." In re Hathaway, 71 N. Y. 238. Danforth, J., in Rowland v. Mayor, etc., 83 N. Y. 376, said: "Whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or to be in office." Platt, J., in Re Oaths, 20 Johns. 492, speaks of "office" as "an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." Pearson, C. J., in State v. Stanley, 66 N. C. 59, said: "A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. * * * The essence of it is, the duty of performing an agency; that is, of doing some act or acts, or series of acts, for the state." It has hence been held by most courts, as was said in the opinion of the judges given to the governor, reported in appendix to 3 Me. p. 481: "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office." The opinion proceeds to further point out the distinction between an office and an employment under the government. "The power thus delegated and possessed may be a portion belonging to some one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And, if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights." In U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747, Chief Justice Marshall, in determining that the "agent of fortifications" is an officer of the United States, said: "An 'office' is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. * * * Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to the station without any contract defining them; if those duties continue, though the person be changed, —it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer. If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured." Judge Cooley distinguished the "officer" from the "employé" in the "greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of the position." People v. Langdon, 40 Mich. 673. But it has been held that an oath of office is not a necessary criterion, nor is salary. These are but incidents, and form no part of the office, though they may aid in determining the nature of the position. Duration or continuance have been said to be embraced in the term "office," and Chief Justice Marshall, in the case cited, spoke of the duty being a continuing one as an important element. But Chief Justice Pearson, in the North Carolina case cited, said "that it made no difference whether there be but one act or a series of acts to be done,—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior,"—the service being performed for the state. Our court at an early day, in Vaughn v. English, 8 Cal. 40, held that the clerks in the offices of secretary of state and comptroller and treasurer of state were "officers," within the meaning of the act of April 21, 1856 (St. 1856, p. 224). It was there said: "The term 'officer,' in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government." The definition given in 4 Jacob, Law Dict. 433, was quoted as follows: "It is said every man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority." The opinion continues: "The respondent was appointed by government; the duties which he is to perform concern the public, and he is paid out of the public treasury; he is therefore a public officer." It was held that because there was no definite term of the office could not be urged as an objection, for the clerks are appointed for the term of the officer making the appointment, subject to the power of removal. It was held in U. S. v. Germaine, 99 U. S. 508, 25 L. Ed. 482, that civil surgeons appointed by the commissioner of pensions are not officers of the United States, because they are not appointed by a head of a department, nor are the appointments approved by such head, and this distinguished the case from U. S. v. Hartwell, 6 Wall. 385, 18 L. Ed. 830, where it was held that a clerk in the office of the assistant treasurer of the United States is an "officer," within the meaning of the act of congress of June 14, 1866 (14 Stat. 65), punishing embezzlement. It was there said: "An 'office' is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary." In the case of Bunn v. People (1867) 45 Ill. 397, the cases were very fully examined, and the conclusion reached that the commissioners appointed under an act of the legislature to superintend the construction of the state house were not officers, within the meaning of the constitution, but were agents or employés for a single and special purpose, whose functions ceased upon the completion of the work. The question was subsequently regarded in that state of sufficient importance to call for a constitutional definition, and hence in 1870 the constitution ordained the following: "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." Const. Ill. 1870, art. 5, § 24. Somewhat in line with the Illinois case last above cited is the case of McDaniel v. Yuba Co., 14 Cal. 444, where it was held that the examining physician of the county hospital was not an officer, but an employé, to be paid under the terms of his contract, though his services were rendered in a capacity in the nature of a public office or appointment. And so it was held recently in White v. City of Alameda, 124 Cal. 95, 56 Pac. 795, that the position of driver of a street wagon, with a salary fixed by the board of trustees, was not an office, but a mere employment, held at the pleasure of the board. In the case of Quigg v. Evans, 121 Cal. 546, 53 Pac. 1093, the question was whether the harbor master of the port of Eureka was an officer, within the meaning of section 8, art. 5, of the constitution, which reads: "When an office from any cause becomes vacant, and no mode is provided by law for filling such vacancy," the governor may appoint, etc. The act creating the position reads: "The town marshal of Eureka is the harbor master of the port of Eureka," etc. St. 1869–70, p. 745, § 4. By the act he was to enforce the rules and regulations of the harbor commissioners, and his compensation was to be fixed by them. It was held that the office of harbor master was created, and that when, by the adoption of a new charter, the city of Eureka no longer had a town marshal, there existed a vacancy in the office which the governor could fill. Illustrations might be multiplied, but it would only emphasize what must already be apparent, that the definitions of the term "office," while not inaccurate, taken in a general sense, are quite inadequate when applied to particular cases. An examination of adjudicated cases will show that the disagreement among judges has not been so much as to definitions, as in their application to the circumstances of each particular case.

Turning to the statute, we find that it is made the duty of the board of health to appoint a large number of persons to various positions therein named, of greater or less importance (Pol. Code, § 3009), among which are six health inspectors. In every case "the duties must be fixed by the board of health," except in the single instance of the two police surgeons, who, in addition to the duties to be prescribed by the board, "shall make all autopsies required of them by the coroner." Certain "medical attendants" and "employés" are to be paid such compensation as the board shall fix, but most of the appointees named are to be paid salaries fixed by section 3010 of the Political Code, while others are to be paid such sums as may be authorized by law: "Health inspectors, twelve hundred dollars each." It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an office, and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office.

It is only where the legislature has delegated its power to create the office, and to prescribe the duties and compensation, that differences of opinion have arisen in the courts. Without attempting a reconciliation of these differences, it appears that the legislature in the present case has created the office and has fixed the salary attaching to it; the employment is a continuing one, and not transient, occasional, or incidental; and its incumbent would remain in office should the officers of the board of health cease to act as such, and the office of health inspectors would continue if the incumbents were removed or for any cause ceased to act. The health inspector is invested with some portion of the sovereign functions of government to be exercised for the benefit of the public. His duties are not prescribed by contract, but are defined by the government through the board of health, and we find in the employment all the elements mentioned in the Hartwell Case, supra, viz. tenure, duration, emoluments, duties, and a compensation fixed by law. The element of duties to be performed involved in the creation of an office, under all definitions and under most of the decisions, was not directly determined by the legislature; to the board was delegated the power to prescribe the duties. But many cases hold, we think properly, that an employment may be none the less an office, although the duties are to be prescribed by a superior officer. "The board of health have general supervision of all matters appertaining to the sanitary condition of the city and county," etc. Pol. Code, § 3012. Their powers and duties are large and important, and the statute authorizes the board to devolve upon the health inspectors such portion of these powers and duties as the board may deem best for the good of the public service. So far as the evidence shows, the duties thus delegated to the inspectors are not extensive, but they cannot be said to be unimportant or purely ministerial, or lacking in the requirements of judgment and discretion, and the board may at any time enlarge them. It is difficult to take this case out of the rules which governed the case of Quigg v. Evans, supra; or the case of U. S. v. Hartwell, supra; or U. S. v. Maurice, supra; or the principles laid down in the opinion of the judges reported in 3 Me. supra; or to distinguish it from Vaughn v. English, supra. In the case of Kennedy v. Board, supra, it was conceded by both parties, and assumed by the court in the majority opinion, that the position of teacher in the public schools of the city and county of San Francisco is not an office, and hence that case cannot aid us in reaching a decision here. Our conclusion is that the intention of the legislature was to make the health inspectors "officers," within the meaning of the constitution, and, having failed to declare the term of the office, they hold during the pleasure of the board of health. People v. Perry, supra; Same v. Hill, 7 Cal. 97; Smith v. Brown, 59 Cal. 672. It is advised that the judgment be reversed, with directions to dismiss the writ.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to dismiss the writ.

127 Cal. 442

ASHTON et al. v. HEYDENFELDT.

(S. F. 1,580.)

(Supreme Court of California. Jan. 11, 1900.)

EXECUTORS—DISTRIBUTION—RESTITUTION—REVERSAL OF DECREE.

Executors can maintain an action against a devisee for the restitution of property constituting assets of the estate delivered over by them under a decree of distribution subsequently reversed, though such property was not "actually delivered," but was used by them, with the consent and under the direction of the legatee, to discharge her debts.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles Ashton and another, as executors of Solomon Heydenfeldt, against Elizabeth A. Heydenfeldt. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Knight & Heggerty and Geo. D. Collins, for appellant. Evans & Meredith and Lester H. Jacobs, for respondents.

PER CURIAM. Appellant is the residuary legatee under the will of her late husband, Solomon Heydenfeldt, deceased. On October 23, 1893, the final account of the respondents having been settled, a decree of distribution was entered, which, after directing the executors to pay to certain persons named in the decree certain specified sums, directed them to pay the remainder of the money in their hands, amounting to the sum of $18,665.89, to appellant. This sum, excepting a few hundred dollars, was then on deposit in a savings bank to the credit of the estate. The court found "that pursuant to said decree said executors paid to said Elizabeth A. Heydenfeldt, the defendant herein, the said sum of $18,665.89; that thereafter it was determined by the supreme court, and this court finds the fact to be, that the sum of ten thousand three hundred and seventy dollars of said amount so paid to said Elizabeth A. Heydenfeldt was not a part of the assets of said estate, but was the proceeds of an insurance upon the life of said Solomon Heydenfeldt, deceased, payable by its terms to Catharine, wife of said Solomon Heydenfeldt, or to any wife that may survive him, and minor children living at the time of his death; that the remainder of the money so paid to the defendant, to wit, the sum of $8,295.89, consisted entirely of assets of said estate." The court further found that on March 15, 1895, said decree of distribution was reversed by this court (106 Cal. 434, 39 Pac. 788), and the matter of the distribution of said estate was remanded to the superior court for a further hearing; that no further hearing has been had, and no other order or decree of distribution made; and that repayment was demanded by the plaintiffs. The cause was tried, and judgment rendered in favor of the plaintiffs for the sum of $8,295.89. This appeal is from an order denying defendant's motion for a new trial, based upon the ground that certain of the findings are not justified by the evidence.

The evidence on the part of the plaintiffs was, in substance, that, after the payment of specific sums directed by the decree to be paid to other parties, there remained said sum of $18,665.89, to which appellant was entitled under the decree; that at that time she was indebted to her counsel, Messrs. Knight & Heggerty, in the sum of $5,000, and to Pierson & Mitchell, also her counsel, in the sum of $2,000; that she was also indebted to Julius Jacobs, one of the plaintiffs, in the sum of $3,781.51, and to Ashton & Gardiner, real-estate agents, in the sum of $7,052,—the indebtedness to Jacobs being for money lent and advanced to her, and to Ashton & Gardiner for advancements and services connected with her real estate; the last two items being secured by a mortgage executed by appellant to Mr. Ashton. On October 26th Mrs. Heydenfeldt and her attorneys and the executors and their attorneys met, and Mrs. Heydenfeldt directed the executors to pay to her said attorneys the said sums due to them, and to discharge her said debts due to Jacobs and to Ashton & Gardiner, respectively. As the bank was not at that time paying deposits, except upon the notice required by its rules, it was agreed between the parties and the bank that a bank book should be issued to each of these creditors for the amount respectively due to each, and this was done, a book being issued to appellant for the remainder; and she thereupon executed and delivered to the executors her receipt acknowledging that she received from them "$18,665.89, the residue of the cash on hand in the hands of the executors as shown by their final account, and distributed to me [her] under the decree of distribution entered in the above-entitled action," and Ashton released the mortgage he held as security for her indebtedness to Ashton & Gardiner and to Jacobs. The transaction as above stated was not controverted by defendant, except that testimony was given tending to show that there was no settlement of the amounts due to Jacobs and to Ashton & Gardiner on their personal accounts, but that the receipt was given to facilitate the closing of the estate. We think, however, that the evidence fully sustains the conclusion that there was a full settlement of these accounts, and that they were paid with the consent and by the direction of appellant in the manner above stated. If the bank had failed, the loss would undoubtedly have fallen upon those who had accepted bank books, and thus became depositors. Nor could one be well led to believe that the mortgage securing these demands would have been canceled, if the transaction was not regarded by both parties as a full and unqualified settlement and payment. The argument on behalf of appellant is, however, mainly upon a question of law. Appellant concedes the right of an executor to maintain an action for property delivered over to a devisee or legatee pursuant to a decree of distribution subsequently reversed, but it is contended that this right is strictly confined to property constituting assets of the estate "actually delivered" under the decree. If, as we have seen, the money was used, with her consent and under her direction, to discharge her personal debt, and relieve her land from the incumbrance of a mortgage given to secure it, the law will not permit her to say that, as she did not actually receive the money in her hand, she did not receive it at all.

It is further contended on behalf of the appellant that "even if she had actually received the money, and then paid it over to respondents in settlement of her indebtedness to them, * * * knowing, as they must be deemed to know, that the decree was subject to appeal and reversal, they, and not she, would be liable for restitution to the estate, as for so much money had and received, and would be chargeable accordingly in the probate proceedings, in the event of a reversal of the decree." If this proposition is sound, it is difficult to perceive why the $5,000 paid at the same time and in the same manner to her counsel who procured the decree of distribution, and now represent her on this appeal, should not be refunded to the executors. It is well settled that the judgment plaintiff who enforces the judgment is charged with the duty of making restitution to the defendant of whatever was received on the judgment, if the judgment be afterwards reversed. This the appellant concedes; but her contention above stated is, in effect, that the executors against whom a decree of distribution is rendered, and who comply with the command of the court before the time limited for taking an appeal has expired, do so at their peril, for the reason that they must be deemed to have known that an appeal might be taken. The case of Langley v. Warner, 3 N. Y. 327, is directly in point. In that case Walsh recovered a judgment against Langley in a prior action in which Warner, the defendant, was Walsh's attorney. Walsh agreed with his attorney, Warner, that he might retain the amount collected from Langley on execution, and credit it on an indebtedness due from Walsh to Warner. The money was collected, and the credit given. The judgment was afterwards reversed, and Langley, the defendant in the first action, from whom the money had been collected, brought the action against Warner to recover the money received by him under the circumstances above stated. The court, by Bronson, C. J., said: "It was the same thing, in effect, as though the defendant had first paid over the money to Walsh, and the latter had then repaid it to the defendant in satisfaction of his debt. About two months afterwards the judgment was reversed, and restitution was awarded to the plaintiffs against Walsh. It was very proper that he should make restitution, for he had in effect received the money and applied it to the payment of his debt. The plaintiffs proceeded to execution against Walsh in pursuance of the judgment for restitution, but, failing in that, they now seek to recover the amount from the defendant. I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money. He has got nothing but his own. Walsh had a perfect title to the money when it was collected, just as perfect as it would have been if no certiorari had been issued. He had a right to do what he pleased with the money, and he made a very proper use of it by paying his debt. The plaintiffs have taken up the strange notion that, because they were trying to get the judgment reversed, Walsh could not give a good title to the money, especially if he paid it to one who knew what they were doing. I am not aware of any foundation for such a doctrine. As Walsh had a good title to the money, he could, of course, give a good title to the defendant or any one else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous, and would be reversed. The legal presumption was the other way,—that the judgment was right, and would be affirmed. But, if the judgment had been known to be erroneous, the pendency of the proceedings in error could not affect in the least degree the title of Walsh to the money. Nothing short of a reversal of the judgment could destroy or impair his right." In Bank of U. S. v. Bank of Washington, 6 Pet. 8, 8 L. Ed. 299, it was said: "It is a settled rule of law that upon an erroneous judgment, if there be a regular execution, the party may justify under it until the judgment is reversed; for an erroneous judgment is the act of the court. * * * A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error might be brought." Appellant cites, upon the point now under consideration, Reynolds v. Harris, 14 Cal. 681, 682; Ex parte Morris, 9 Wall. 605, 19 L. Ed. 799; Marks v. Cowles, 61 Ala. 299, 303; and 2 Perry, Trusts, § 827. None of these authorities are inconsistent with Langley v. Warner or Bank of U. S. v. Bank of Washington, supra, though Ex parte Morris appears, upon a casual reading, to be so. The court said: "If Smith, the district attorney, received from McCrosky any part of the fund ordered to be paid to the latter, the rights of the petitioners followed the money into his hands, and he is liable for it." The proceeding was against certain bales of cotton, the property of the petitioners, under which they were forfeited to the United States and sold, and the proceeds distributed, 5 per cent. to the district attorney, and other parts to other officers, and one-half the remainder to McCrosky, the informer. It was offered to be shown that Smith "had received a large part of the money paid to the informer," who was out of the state. Under the circumstances the word "received" implies a gift or voluntary deposit without consideration, and not the payment of a prior obligation. It would be very strange, if the court meant what appellant seems to think was meant by the language quoted, that no reference was made by the court to Bank of U. S. v. Bank of Washington, supra, which is wholly inconsistent with appellant's interpretation of Ex parte Morris. Finding no error in the record, the order appealed from is affirmed.

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127 Cal. 339

PEOPLE v. MOONEY. (Cr. 576.)

(Supreme Court of California. Dec. 29, 1899.)

ARSON—INFORMATION—SUFFICIENCY—INTENT.

Under Pen. Code, § 447, defining arson as "the willful and malicious burning of a building with intent to destroy it," an information alleging that the accused "willfully, unlawfully, feloniously, and maliciously" set fire to, and caused to be burned, a certain building described, without averring any "intent to destroy it," charges no offense.

Commissioners' decision. Department 2. Appeal from superior court, Merced county.

K. J. Mooney, convicted of arson, appeals. Reversed.

James F. Peck and Frank H. Farrar, for appellant. Atty. Gen. Ford, for the People.

GRAY, C. The defendant appeals from a judgment convicting him of the crime of arson in the second degree, from an order denying him a new trial, and from an order denying his motion in arrest of judgment.

Section 447 of the Penal Code defines arson as "the willful and malicious burning of a building, with intent to destroy it." The defendant was charged in the information with "the crime of arson, committed as follows: The said K. J. Mooney on or about the 4th day of March, 1899, at and in the said county of Merced, and state of California, and prior to the filing of this information, did willfully, unlawfully, feloniously, and maliciously set fire to and cause to be burned a certain building occupied and used by said Mooney as a notion store, and situated on Main street, in the city of Merced," etc. It will be seen that one important element of the crime of arson, as defined in the Code, is the "intent to destroy." The words quoted are a part of the description of the crime of arson, and there can be no such crime in the absence of this intent to destroy. It is therefore necessary that this essential element should be averred in the information, either in the language of the statute or in some other way, so as to make it clearly appear that the defendant had this specific intent and purpose, and that the building was burned by him to carry such intent and purpose into execution. The words "willfully, unlawfully, feloniously, and maliciously" were properly used in the information, but they are not sufficient. Such words import only that criminal intent which is a necessary part of every felony or other crime, but they do not necessarily include the specific purpose to destroy the building which is an element of the crime of arson. "Whether the indictment is on a statute or at the common law, it is a rule, universal and without exception, that every intent, like everything else which the law has made an element of the offense, must be alleged; for otherwise no prima facie case appears." 1 Bish. Cr. Proc. § 523. It has been held by this court in a burglary case that the information charging that the intent of the defendant in entering the building was to commit the crime of felony, without stating what particular felony, does not state the offense of burglary. People v. Nelson, 58 Cal. 104. In another case the indictment was for perjury, and it was held to be just as necessary to allege therein "that the affidavit was delivered with the intent that it be uttered and published as true, as to charge that the affidavit was made by the accused, or that it was false," and that for want of such allegation the information charged no crime. People v. Robles, 117 Cal. 681, 49 Pac. 1042. There is nothing in People v. Wooley, 44 Cal. 494, in conflict with the principle laid down in the other cases cited above. The question involved here was not raised or discussed in People v. Wooley. The recent case of People v. Fong Hong, 120 Cal. 685, 53 Pac. 265, cites with approval an instruction of the trial court which accurately sets forth the elements of the crime of arson. It is clear to us that the information in this case does not allege sufficient facts to constitute the crime of arson, and this makes it unnecessary to discuss the other points urged on appeal. The judgment and orders appealed from should be reversed, and the cause remanded.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are reversed, and the cause remanded.

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127 Cal. 365

WILLIAMS v. RIEHL et al. (Sac. 711.)

(Supreme Court of California. Dec. 29, 1899.)

PRINCIPAL AND SURETY—JUDGMENT AGAINST SURETIES — ASSIGNMENT — EXECUTION AGAINST CO-SURETIES — CONTRIBUTION — TRANSFER OF PROPERTY BY PRINCIPAL—EFFECT—SUBROGATION—SURETY'S LIABILITY—EXTENT.

1. Where a judgment creditor assigned the judgment against the principal and sureties on a bond to certain of the sureties, authorizing them to enforce it in his name, the assignees, on filing the assignment with the clerk, were entitled to execution against a co-surety to enforce contribution, though they had filed no notice of payment of the judgment nor claim for contribution, and no entry of such notice had been made by the clerk in his docket, as required by Code Civ. Proc. § 709, authorizing the enforcement of contribution between sureties on filing and entry of such notice, since such section does not apply to the assignment of judgments.

2. Where certain sureties procured an assignment of a judgment recovered against them and their principal on an indemnity bond on payment of the judgment, such payment did not amount to a satisfaction of the judgment, so as to prevent them from obtaining contribution from co-sureties, or to recover thereon against the principal.

3. Where, after a judgment against sureties on an indemnity bond had been recovered, the fact that the principal assigned property to certain of the sureties who paid the judgment did not prevent them from obtaining contribution from other sureties, since they were only entitled to an accounting of the proceeds of the property transferred after it had been sold.

4. Where certain sureties procured an assignment of the judgment against them for less than the amount thereof, they became subrogated to the rights of their assignor only for the purpose of compelling payment from the principal, or contribution from the sureties for an aliquot part of the amount paid for the assignment in proportion to the amount for which all the sureties were liable, in the absence of proof that any of them were insolvent.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county.

Action by A. L. Williams, administrator, etc., against P. G. Riehl, Patrick Kelly, and others, to recover on an indemnity bond. The judgment recovered against defendants was assigned by plaintiff to defendants Johnston, Smith, and Lufkin, on which execution was issued against defendant Kelly, whereupon he moved to recall and quash the writ, and for an order directing satisfaction of the judgment, and from an order denying such motion he appeals. Modified.

James B. Devine, for appellant. A. J. Hull, Thos. Watt, Grove L. Johnson, W. M. Sims, and Albert M. Johnson, for respondents.

COOPER, C. The defendant Riehl was the guardian of the estate of one Carver, a minor, and as such guardian executed a bond, as required by the order of the court in which the proceedings were pending, in the penal sum of $25.000, with the following named sureties for amounts named, respectively, to wit, F. S. Smith, for $25,000; George Peters, $5,000; William Johnston, $5,000; Stanton Myers, $5.000; Jacob Gebert, $5,000; D. T. Lufkin, $5.000; and Patrick Kelly, $5,000. Carver died, and plaintiff was appointed and qualified as administrator of his estate. The final account of defendant Riehl as such guardian was regularly settled, and it was ascertained by the court that he had in his hands belonging to his ward the sum of $10,000, with interest, which amount he was directed to pay. The amount not having been paid, the plaintiff brought this action against the defendant Riehl and the other defendants who are sureties on his bond, and on the 11th day of March, 1898, the plaintiff recovered judgment against defendant Riehl, the guardian, in the sum of $10,267, and against defendant Smith in the same amount, and against the other defendants in the sum of $5,000 each. The plaintiff, as administrator of the estate of said Carver, and by permission of the court in which the estate was pending, agreed to accept $9,500 in full payment of his judgment, and the amount was paid to plaintiff on the 27th day of April, 1898, by defendants Johnston, Smith, and Lufkin, and at their request the plaintiff executed and delivered to them a written assignment of the judgment authorizing them to enforce the same in the name of the plaintiff as such administrator. This assignment was filed with the clerk of the court, and with the papers in this action. After the said assignment was filed, the defendants, who paid the judgment, and to whom the said assignment was made, applied to the clerk, and the clerk issued a writ of execution directed to the sheriff of Sacramento county commanding him to levy upon the property of the defendant Kelly, and cause to be made out of the same the sum of $5,000, besides interest and costs. The sheriff to whom the writ was directed proceeded to levy upon the property of defendant Kelly, and noticed the same for sale. Kelly, after giving notice, moved the court below to recall and quash the writ of execution, and for an order directing satisfaction of the judgment to be entered. The court denied the motion, and refused to make the order. The court further ordered that the writ of execution be amended so as to run against Kelly for $1,875 only. The defendant Kelly has appealed from the order so made and from the order refusing to recall the execution.

1. It is claimed by appellant that the defendants Smith, Johnston, and Lufkin, who will hereafter be called the "respondents," having failed to comply with the provisions of section 709, Code Civ. Proc., cannot proceed under the judgment by obtaining an execution thereon to enforce contribution from him. The section is as follows: "When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon a filing of such notice the clerk must make an entry thereof in the margin of the docket." Respondents do not claim to have complied with said section as to filing with the clerk of the court the notice as therein provided, or as to having an entry made in the margin of the docket; but they claim that, independent of said section, by virtue of the written assignment to them of the judgment, they have the right to an execution to enforce contribution from the appellant. We think the contention of respondents as to this point correct. The section is somewhat obscure, and the first part of it, down to the word "principal," only lays down fundamental rules as to the rights of sureties and joint judgment debtors to compel contribution. The latter part of the section, "in such case the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days," etc., is the portion that contemplates giving to sureties or joint judgment debtors the right to an execution in the original proceedings. The section was no doubt enacted for the benefit of sureties and joint judgment debtors, in order to enable them,

without bringing an action, to use the judgment and the writs of the court for the purpose of compelling, in the case of sureties, the repayment from their principal, or contribution from co-sureties, and, in case of joint judgment debtors, contribution from their codebtors. The legislature evidently did not have in mind a case where the parties paying the judgment procured a written assignment of it. The plaintiff, being the owner of the judgment, had the right to assign it to any one upon payment of the amount authorized by the order of the court in which the estate was pending. The fact that the parties paying it were some of the judgment debtors would not prevent them from taking an assignment of it. The section is substantially the same and in almost the exact words of section 480 of the Civil Code of Kansas. The supreme court of that state, in Harris v. Frank, 29 Kan. 203, has placed a similar construction upon section 480 of its Code. In the opinion it is said: "Besides, said section 480 of the Civil Code was not enacted for the purpose of giving assignees of judgments a remedy as assignees. They have a remedy independent of such section, and could enforce their judgment if such section had never been enacted. Said section was really enacted for the benefit of sureties, and for the benefit of joint judgment debtors, without reference to whether any assignment had been made or not." The cases of Davis v. Heimbach, 75 Cal. 261, 17 Pac. 199, and Clark v. Austin, 96 Cal. 283, 31 Pac. 293, are not in conflict with what has here been said. In neither case was there any assignment of the judgment to the parties seeking to enforce contribution.

2. The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their cosureties or the principal. The rule is that the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect. 1 Brandt. Sur. § 275; Brown v. White (N. J.) 80 Am. Dec. 226; Coffee v. Tevis, 17 Cal. 239; Freem. Ex'ns, § 444.

3. The affidavit of appellant used on the motion states on information and belief that prior to the issuance of the execution the defendant Riehl transferred to respondents real and personal property of the value of $5,000, which they had and held in their possession at the time of the hearing of the motion. It is further stated in the affidavit on information and belief that the said real and personal property was so transferred in part payment of the $9,500, but it is not stated as to whether any price was agreed upon, or as to the amount of the $9,500 the transfer would pay. We must, therefore, from the record, presume that the transfer was of real and personal property, to be held as indemnity to the extent of its value. There is a sharp conflict in the authorities as to whether a surety holding in his hands indemnity can maintain an action against his co-surety, regardless of the indemnity. Many authorities hold that the surety may maintain an action against his cosurety for the sum he is then entitled to, regardless of the indemnity; that in such case, whatever may be afterwards received by a sale of the indemnity shall be accounted for, and proportionately paid to the sureties. On the other hand, it has been held in several cases that the surety so indemnified must save himself harmless, or fully account for the value of the indemnity, before he can recover against his co-surety in an action for contribution. The question does not appear to have been decided by this court, and we are at liberty to lay down the rule in this case. We think the first the better rule. Equality is equity. The moment one co-surety or joint judgment debtor pays the debt of his principal, he has a right to recover from his cosurety or joint judgment debtor his proportionate share. The law gives him this right, and also imposes upon his co-surety the duty of paying his proportionate share. The obligation is as binding upon the co-surety as if created by promissory note or contract. It would be no defense for a defendant, when sued upon a promissory note or other written contract, to set up that the plaintiff held collateral securities or property for the purpose of indemnifying himself. Why should it be a defense in this kind of an action? Why should the plaintiff, in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity, which may require years, while his co-surety, who was as much bound in law and morals as himself by the bond, has paid nothing? This would not make the burdens of the co-sureties equal. The indemnity is for the benefit of one cosurety as much as for the other, no matter which holds it. Civ. Code, § 2849. Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it. The burden of finding a market for it, and applying its value towards the debt of the principal, should be borne by one as well as the other. There is no reason why the co-surety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his co-surety his proportion. The views we have here given are supported by the following authorities: 1 Brandt. Sur. § 274; Paulin v. Kaighn, 29 N. J. 483; Anthony v. Percifull, 8 Ark. 495; Bachelder v. Fiske, 17 Mass. 464; Johnson's Adm'rs v. Vaughn, 65 Ill. 425.

4. Appellant contends that the execution as modified was for too great a sum, and in this we think he is correct. The respondents, by paying the plaintiff, and taking an assignment of the judgment, only became entitled to use it for the purpose of enforcing contribution from their co-sureties or payment from

their principal. They were only subrogated to the rights of the plaintiff for the purpose of using the judgment in order to protect themselves and their co-sureties, and for the purpose of compelling contribution. This is not a proceeding in equity, and no claim is made that any co-surety is insolvent. The law presumes that they are solvent. Respondents, therefore, were entitled to execution against appellant for an aliquot part of the debt, based on the whole number of co-sureties. They are liable to contribute in the proportion of the respective amounts or penalties for which they became surety. 1 Brandt, Sur. § 288; Armitage v. Pulver, 37 N. Y. 499; notes to Dering v. Earl of Winchelsea, 1 White & T. Lead. Cas. Eq. pt. 1, p. 124 et seq.; Cowell v. Edwards, 2 Bos. & P. 268. Applying this rule, the appellant was responsible for one-eleventh of the $9,500, which is $863.63. If the other sureties are insolvent, or if any one of them is insolvent, the respondents can bring their action for contribution, and all matters can be determined so that justice will be done, and the burden equally placed upon the solvent sureties. We advise that the court below be directed to amend and modify its order so that it direct the writ of execution to run against appellant for $863.63, and interest at the legal rate since the 27th day of April, 1898, and for costs, and that, as so amended and modified, it be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the court below is directed to amend and modify its order so that it direct the writ of execution to run against appellant for $863.63, and interest at the legal rate since the 27th day of April, 1898, and for costs, and that, as so amended and modified, it is affirmed.

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127 Cal. 382

CADENASSO et al. v. ANTONELLE et al.
(S. F. 1,997.)

(Supreme Court of California. Dec. 29, 1899.)

BONDS—CONDITION—EVIDENCE—SUFFICIENCY —PARTNERSHIP—AGREEMENT TO SHARE PROFITS.

1. Evidence that plaintiff "advanced money" to a contractor will not support a finding that he furnished "labor and material," within the condition of the contractor's bond, obligating his sureties to pay in full "all persons who perform labor or furnish material" to the contractor.

2. That a contractor assigned his contract to parties who advanced money to him, under an agreement to divide profits for the use of the money advanced, does not constitute a partnership between the contractor and the lenders.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by E. Cadenasso and another against J. S. Antonelle and others. From a judgment for plaintiffs, and from an order denying a motion for a new trial, part of defendants appeal. Reversed.

A. Everett Ball, for appellants. J. K. Ross, for respondents.

COOPER, C. This is an appeal from a judgment in favor of plaintiffs, and from an order denying the defendants' motion for a new trial. The complaint states, in substance: That on the 1st day of November, 1895, the defendant Antonelle entered into a contract with one Perry and others, under the terms of which Antonelle was to build a tunnel in the Butte Basin Gravel mine, situated in Amador county, within the time and for the consideration named in a written contract made by said parties. Antonelle gave to said Perry and others an undertaking, with defendants Turner and Vermeil as sureties, conditioned that said Antonelle would faithfully perform the said contract, and construct the said tunnel as he had agreed to do. The said undertaking contained the following conditions: "We further agree that all persons who perform labor or furnish materials to the parties of the second part in said contract, or any person acting for them or by their authority, upon or in connection with the said contract, shall be paid in full for such labor and material; and we do hereby jointly and severally guaranty to all such persons the payment in full of all their claims, and hold ourselves responsible to them in the sum of three thousand dollars, or as much as may be necessary of the said sum, to pay them in full for all labor and materials furnished for said parties of the second part under said contract, or for any person acting for them or by their authority. This bond is intended to inure to the benefit of the parties of the first part in the above contract, and also to the benefit of all persons who perform labor or furnish materials for the parties of the second part in said contract, or for any person acting for them or by their authority. Witness our hands and seals this 1st day of November, 1895. A. D. Turner. J. L. Vermeil." That after the said contract was made, and said undertaking given, the said Antonelle in due time entered upon the construction of the said tunnel in accordance with the said contract. "That the plaintiffs herein, relying upon said bond, furnished to the said J. S. Antonelle, at his special instance and request, between the dates of 10th and 31st of December, 1895, and with the full knowledge and consent of the said bondsmen, A. D. Turner and J. L. Vermeil, labor and material to the value of four thousand nine hundred and sixty-eight and $^{75}/_{100}$ ($4,968.75) dollars, which labor and material was used in the construction of said tunnel with the full knowledge, consent, and at the instance and request, of said defendants." That the defendants, although requested, refused to pay plaintiffs the said sum of $4,968.75, or any part thereof. Judgment was prayed for said sum and costs. Defendant Antonelle made no appearance, and his default was duly entered. The case was tried in the court below without a jury, findings filed, and judgment entered thereupon in favor of the plaintiffs.

The court found that the plaintiffs did "furnish to the said J. S. Antonelle labor and material to the value of $4,968.75," which said labor and material were used by said Antonelle in the construction of the said tunnel. The finding above quoted is in accordance with the allegations of the complaint, and is the vital finding upon which the court evidently based its conclusions of law in favor of plaintiffs, and against appellants, Turner and Vermeil. The appellants specifically attack the finding as being without support in the evidence, and we are of opinion that there is no evidence in the record to support it. The only evidence in any way bearing upon the finding is that of the plaintiff Cadenasso. He testified: "We advanced this $4,900 under these agreements. * * * The amount of money advanced by us, and for which this action is brought, is as follows, viz.: Cash advanced to J. S. Antonelle & Co., $4,968.75." While the same witness was upon the stand, the court, addressing him, said: "As I understand it, you furnished certain moneys to Mr. Antonelle, and as security for that you received an assignment of this contract, and, in addition to getting your money back, you were to get half of the profits. A. Half of the profits." In the discussion of the evidence and issues, and in answer to questions of the court, the attorney for plaintiffs, addressing the court, said: "Our position is just this: That Cadenasso advanced this money under the bond, and took personal security—the assignment—to secure him for the money advanced, and, to pay him for the use of the money, one-half of the profits of the transaction." It is therefore apparent from the record, from the only evidence in the record and from the statement of counsel to the court, that the testimony as to the "money advanced" was what plaintiffs relied upon in support of the allegation of "labor and material furnished" by plaintiffs to Antonelle. The court in the finding evidently treated the evidence as to money being advanced as the equivalent of "labor and material." In this we think the learned judge was in error. Money is not labor, and it is not "material furnished," in the sense of the undertaking and the complaint. The appellants, Turner and Vermeil, were sureties for Antonelle, and it is elementary law that sureties are never bound beyond the strict letter of their contract. They have a right to stand on the precise terms of their contract, and there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves. In this case they bound themselves "to all persons who perform labor or furnish materials to the parties of the second part." The plaintiffs did neither. Under the mechanic's lien law of this state in favor of laborers who perform labor upon, and material men who furnish material to be used in, the construction of a building, it was held that one who advanced money as a loan with which to buy material was not entitled to the benefit of the statute. Godeffroy v. Caldwell, 2 Cal. 492. In the opinion it is said: "One who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the law." In Dart v. Mayhew, 60 Ga. 104, it was held that creditors furnishing money to sawmills have no lien under the acts of 1868 and 1873 and the Code. The language of the act is: "All persons furnishing saw-mills with timber, logs, provisions, or any other thing necessary to carry on the work of saw-mills, shall have liens on said mills and their products." Code, § 1985. In the opinion it is said: "While, therefore, money is necessary, in one sense, to carry on the work of a sawmill, by buying the things necessary for that work, still it is not primarily the thing necessary. It buys what is used to carry it on from others. The people who actually furnish the timber or provisions, or other things necessary, have the lien. The money lender does not. If it had been the intention of the legislature to give such a lien, money would have been included under its own name, and not under the general words 'or any other thing necessary.'" The statute of Texas (Pasch. Dig. art. 7112) provides: "Any person or firm, artisan or mechanic, who may labor, furnish material * * * to erect any house or improvement * * * shall have a lien on the lot or lots, or land necessarily connected therewith, to secure payment for labor done, material and fixtures furnished for construction or repairs." In the construction of this statute the supreme court said: "The statute under consideration seems sufficiently broad to embrace any person who might furnish material; yet the evident intention of the legislature in the use of this term was to include some character of material which entered into the structure of the building, and formed a component part of it, and not a loan of money with which to purchase the same." Gaylord v. Loughridge, 50 Tex. 577. To the same effect, see Boisot, Mech. Liens, § 114; Phil. Mech. Liens (3d Ed.) § 159; Weathersby v. Sleeper, 42 Miss. 741; Brown v. Rodocker, 65 Iowa, 55, 21 N. W. 160. While the present case does not involve any question as to a claim of lien, the authorities quoted are in point, as illustrating the meaning to be given in the clause of the undertaking. It follows the language of section 1203, Code Civ. Proc., in regard to the undertaking to be given by the contractor under the law of this state as to mechanics' liens. The language of the portion of the section in point is, "Said bond shall by its terms be made to inure to the benefit of any and all persons who perform labor for or furnish materials to the contractor." The question here is as to whether evidence that plaintiffs furnished money will support the finding that they furnished material, and we think it will not, either upon reason or authority. It is claimed that plaintiff Cadenasso testified that $1,600 was for material. He did in one part of his evidence say that he believed something like $1,600 was for material. He did not state what the material was, nor where nor to whom it was delivered. If this, in view of the other evidence of Cadenasso, were sufficient to support any finding as to material furnished, it would not change the result here. The witness said that he received under the contract $1,140, which was credited on account of materials. This would leave only $430 due for materials. This would not support the finding that $4,968.75 was due plaintiff for labor and materials furnished to defendant Antonelle.

The sixth finding, to the effect that the plaintiffs were not at any time partners of Antonelle, is supported by the evidence. The assignment by Antonelle of his contract, and all sums due or to become due under it, with an agreement to divide the profits with plaintiffs, for the use of the money advanced, did not make the plaintiffs partners of Antonelle. Hanna v. Flint, 14 Cal. 74; Nofsinger v. Goldman, 122 Cal. 610, 55 Pac. 425; Coward v. Clanton, 122 Cal. 454, 55 Pac. 147; Eastman v. Clark, 53 N. H. 276.

Under the views herein expressed, it becomes unnecessary to discuss other points. As defendant Antonelle has not appealed, the judgment is in full force against him. We advise that the judgment and order, as to appellants, Turner and Vermeil, be reversed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order, as to appellants, Turner and Vermeil, are reversed.

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127 Cal. 336

McGEE v. HAYES. (Sac. 565.)

(Supreme Court of California. Dec. 29, 1899.)

INSANE PERSONS—GUARDIANSHIP—APPOINTMENT —COLLATERAL ATTACK.

1. Under Code Civ. Proc. § 1763, providing that, on the filing of a petition for the appointment of a guardian for an incompetent person, notice must be given to such person of the "time and place" of the hearing at least five days before the time fixed, and "such person if able to attend, must be produced," the personal presence of such person on the hearing, and his request that the petition be granted, do not cure fatal defects in the notice of the hearing served on him.

2. Under Code Civ. Proc. § 1763, requiring notice to be given to an incompetent person of the "time and place" of the hearing of a petition for the appointment of his guardian, etc., where an order made on the filing of the petition fixed a certain day "as the time for the hearing," without specifying the hour or place, and directed a notice to be given of the "time and place" of the hearing, a copy of such order was not a sufficient notice of the hearing.

3. Where the hearing on a petition for the appointment of a guardian for an incompetent person was adjourned to March 3d, the court has no jurisdiction to hear it on March 2d, though the intention was to adjourn the hearing to that day.

4. An order by a probate court, appointing a guardian for an incompetent person, which is void because the proceedings show that the court was without jurisdiction to make it, is subject to collateral attack.

Department 2. Appeal from superior court, Tulare county.

Action by William L. McGee, by his guardian, Warren W. Hastings, against James C. Hayes. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Shaw & Murray, Hannah & Miller, and Power & Alford, for appellant. R. F. Roth and Chas. G. Lamberson, for respondent.

PER CURIAM. Forcible entry and detainer. Trial by a jury, and verdict for plaintiff, and judgment thereon that plaintiff be restored to the possession of the premises. Defendant appeals from the judgment, and from an order denying his motion for a new trial. The verdict was general,—"that defendant had been guilty of forcible entry and forcible detainer of the lands described in the complaint, and that plaintiff is entitled to a restitution of the premises."

Appellant claims that the proceedings under which Hastings was appointed guardian were void because (1) no citation was ever issued or served; (2) if the order be treated as a citation, it is void for the reason that it did not state the time when, or the place where, the defendant was required to appear; (3) the order was made and entered March 2, 1897, while the hearing was set for March 3d. It appears that, upon the petition of Hastings, it was adjudged that McGee "has become an incompetent person, and that it is necessary that a guardian of his estate and person should be appointed," and Hastings was accordingly so appointed. The order recites that he "was duly notified of the time and place of the hearing of the petition heretofore filed herein, and it appearing that the said William L. McGee appeared in person at the hearing of said petition on this day, and requested that said petition be granted, it is therefore ordered," etc. The only citation issued was the order of the judge made on reading and filing the petition, in which it was "ordered that Tuesday, the 23d day of February, 1897, be, and the same is hereby, appointed as the time [no place or hour mentioned] for hearing said petition, and it is hereby ordered that notice be given to said Wm. L. McGee of the time and place of hearing said petition," etc. The only notice given or citation served was a copy of this order. On February 23d the court made an order "that the hearing of the aforesaid petition be, and the same is hereby, continued until Tuesday, March 3, 1897." The order appointing the guardian is dated March 2, 1897, and is marked, "Filed March 2, 1897." The guardian took the oath of office and filed his bond on March 2, 1897, and letters of guardianship were issued to him that day. When these various proceedings were offered in evidence, defendant objected to their admission on several specific grounds, challenging their competency, relevancy, and materiality. Respondent contends that the personal presence of the incompetent at the hearing cured any defects in the notice or service of the notice, and that by his presence he consented to the order, and waived notice, and that the order so shows on its face. The presence of the incompetent could not supply the requirement of the statute that he should be served with notice of the hearing. He was incapable, by reason of his incompetency, to consent to the jurisdiction of the court, or waive any of the steps necessary to confer jurisdiction upon the court, or to make any request that the petition be granted. Upon the filing of the petition the court or judge "must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing." Code Civ. Proc. § 1763. The statute requires the personal presence of the incompetent, if it can be had, as well as that notice of the hearing of the petition be given him. If the order may be treated as a notice, and a copy of it may be served as a notice, it is requisite that it should state the time and place of the hearing. In the present case the order fixed February 23d "as the time for the hearing," but it directed "notice to be given of the time and place of hearing said petition." This direction was not complied with by simply serving a copy of the order in the form given. But if the notice to appear February 23d could be treated as sufficient, and the adjournment of the hearing to March 3d could also be held sufficient, the court had no authority to hear the petition March 2d, and make the appointment, as the record shows was done. Counsel for respondent states in his brief, but it does not elsewhere appear, that "the 3d of March, 1897, did not fall upon a Tuesday, but upon a Wednesday; and the hearing of the matter was intended by the court to be continued to Tuesday, March 2, 1897, on which last-named day the hearing was had." If we were permitted to reject the day of the month named (March 3d), and take the day of the week named (Tuesday), the order would fail to show what Tuesday. There are many Tuesdays in the year, but there is but one March 3d. We do not think we are authorized to reject a definite time, and accept one so indefinite. The order was prematurely made, and was without authority.

The attack is collateral, it is true, but the proceedings disclose all the steps taken to confer jurisdiction, from which it clearly appears on the face of the record that the court was without jurisdiction to make the order. In such case the order could be attacked collaterally. Land Co. v. Maddux, 109 Cal. 633, 42 Pac 295. See cases cited at page 640, 109 Cal., and page 297, 42 Pac.; 1 Freem. Judgm. § 130. As plaintiff's right to maintain the action depends upon the authority of the guardian, it follows that the judgment and the order denying a new trial should be reversed, and it is so ordered.

(127 Cal. 363)

PEOPLE v. CHILDS. (Cr. 577.)[1]

(Supreme Court of California. Dec. 29, 1899.)

CRIMINAL LAW—LARCENY—EVIDENCE—INSTRUCTIONS.

1. Where the evidence tended to show that defendant committed larceny by aiding and abetting a co-defendant in taking the property stolen, evidence that defendant and his co-defendant had frequently been seen together on occasions other than when the larceny was committed was admissible, as tending to prove a conspiracy in the commission of the crime.

2. An instruction in a prosecution for larceny that mere possession of stolen property is of itself not sufficient to convict, "but, if there is other evidence tending to show guilt, taken in connection with the possession of the property stolen, the rule is different," is not erroneous, for ambiguity of the expression "the rule is different."

Department 2. Appeal from superior court, city and county of San Francisco.

Cal. Childs was convicted of larceny, and he appeals. Affirmed.

Geo. D. Collins, for appellant. Atty. Gen. Ford, for the People.

McFARLAND, J. The defendant was indicted jointly with one Piggott for the crime of grand larceny. The defendants demanded and had separate trials, and each was convicted as charged. This present appeal is taken by the defendant Childs from the judgment, and from an order denying a motion for a new trial. Piggott also appealed, and in his case the judgment and order appealed from have been heretofore affirmed. 59 Pac. 31. Most of the questions raised on this appeal were decided against the contentions of appellants in the said appeal of Piggott, and need not be here further considered. The evidence in this case is slightly different from that in the Piggott Case; but the points that the evidence was insufficient to sustain the verdict, and that the court erred in refusing to instruct the jury that there was no evidence against the appellant, are as clearly not maintainable as the same contentions were in the Piggott Case. We observe only two points made here which did not arise in the Piggott Case, which are necessary to be noticed:

The court did not err in permitting the prosecution to show that Childs and Piggott had been frequently seen together on occasions other than the one at which the larceny is alleged to have been committed. The evidence tended to show that Childs committed the larceny by aiding and abetting Piggott in taking the stolen property from the person of the complaining witness. It was necessary, therefore, for the prosecution to show that the defendants were co-conspirators in the commission of the crime; and it cannot be said that the fact of their being seen frequently together was entirely irrelevant, and did not tend in any degree whatever to establish the conspiracy.

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[1] Rehearing denied January 26, 1900.

The other point to be noticed arises upon the contention of appellant that the judgment should be reversed on account of a certain part of the charge of the court to the jury. The court, having instructed the jury that the mere possession of the stolen goods by appellant would not of itself be sufficient to convict him, proceeded as follows: "In other words, no person can be convicted of crime merely by proof of being found in possession of stolen property. The possession of stolen property, in and of itself, if there be no other evidence, either circumstantial or direct, would not be sufficient to convict anybody; but if there is any other evidence tending to show guilt, taken in connection with the possession of the stolen property, the rule is different." The last part of this language, to wit, "the rule is different," is an inapt and somewhat ambiguous termination of the sentence; but we do not think that the jury could have been influenced prejudicially to the appellant by the language used. The charge of the court to the jury was, on the whole, correct, and very favorable to appellant, and we do not think that the language above quoted could have led them astray. A critical examination of the part of the charge in question made afterwards by counsel at their leisure, and with full time to closely compare each part of it with the context, may enable them to point out incongruities, and even absurdities, in the language used; but the jury, when hearing it, would evidently take it to mean merely that, while the possession of stolen goods would not be of itself sufficient to warrant a conviction of a defendant charged with larceny, yet there might be in a case other evidence which, taken in connection with the circumstance of the possession of the stolen property, would be sufficient to convict. Counsel for appellant contends that the court intended to instruct, and did instruct, the jury that the possession of the stolen property would be sufficient to convict a defendant if there was any other evidence at all tending in the slightest degree to show his guilt; but we do not think that this is a correct statement of the meaning of the expression, or that the jury would take it with the meaning ascribed to it by appellant. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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127 Cal. 70

HIBERNIA SAVINGS & LOAN SOC. v. FREESE et al. (S. F. 2,073.)

(Supreme Court of California. Nov. 29, 1899.)

APPEAL—UNDERTAKING.

Where an appeal has been abandoned, and a new appeal taken, an undertaking prepared with reference to the first appeal will not support the second, though not filed until after the second was taken.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Hibernia Savings & Loan Society against A. C. Freese, administrator, etc., and others. From a judgment for plaintiff, defendant Margaret A. Bullard appeals. Appeal dismissed.

Geo. D. Collins, for appellant. Tobin & Tobin, for respondent. Geo. B. Collins, for defendants.

HENSHAW, J. This is a motion to dismiss appellant's appeal, which grows out of the following facts: Appellant's notice of appeal from an order of court made and given on the 13th day of March, 1899, was served and filed on the 15th day of March, 1899. On the fifth day thereafter—that is, on the 20th day of March, 1899—the appellant procured to be executed an undertaking upon appeal reciting that, whereas Margaret J. Bullard "has appealed" to the supreme court, etc., that in consideration of the premises and of "such appeal," etc. This undertaking bore date the 20th day of March, 1899, and the jurat of the notary thereon is of the same date. On the 21st day of March, 1899, appellant's attorney served and filed a second notice of appeal, and on the following day, March 22, 1899, this undertaking was filed. The first appeal had lapsed for failure to file the undertaking within the statutory period, and this motion to dismiss is directed against the second appeal, upon the ground that no undertaking thereon had been filed. To this appellant makes answer that until the filing of the undertaking it has no force, effect, or validity, and that when filed it is an undertaking in reference to the condition of things at that time existing; therefore, that this particular undertaking filed upon March 22d must be construed to have reference to, and to be an undertaking upon, the appeal, notice of which was given upon March 21st. But we think this position untenable. It is required of a valid undertaking upon appeal that it shall refer with definiteness to the particular appeal to which it relates, and, if it fails so to do, it is ambiguous and insufficient. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, and 8 Pac. 709; Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; Pignaz v. Burnett, 121 Cal. 292, 53 Pac. 633. At the time when the sureties upon this undertaking entered into it, but one appeal had been attempted, but one notice of appeal had been given, and the undertaking clearly and distinctly refers to that. It is the right of the surety to stand upon the strict letter of his undertaking. He can be held to no different contract from that into which he has entered. In this case the undertaking of the sureties was to stand responsible for damages and costs which might follow the prosecution of a particular appeal clearly referred to in their undertaking. By the construction which appellant seeks, the undertaking would be wrested from its natural language, and held to apply, not to that appeal which was subsisting at the time the contract was entered into, but to another appeal, no step in which had been taken at the time the sureties executed their bond. It is true, as appellant says, that the attorney became the agent of the sureties for the purpose of filing the undertaking, and that it takes validity and effect from the date of the filing. But the agency of the attorney was to file the undertaking in the particular appeal to which it made reference, and the validity which the undertaking has as of the date of its filing is a validity in reference only to the particular appeal in question. We conclude, therefore, that there has been no undertaking as required by law filed after the notice of appeal of March 21st, and that this motion to dismiss should be granted. It is ordered accordingly.

We concur: BEATTY, C. J.; McFARLAND, J.

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127 Cal. 427

In re ATWOOD'S ESTATE. (Sac. 603.)

(Supreme Court of California. Jan. 3, 1900.)

LETTERS OF ADMINISTRATION—REVOCATION.

Code Civ. Proc. § 1511, provides that, where an administrator neglects for two months after his appointment to give notice to creditors, the court must revoke his letters, and appoint some other person in his stead. Section 1469 provides that where the estate does not exceed $1,500 the whole estate shall be assigned to the widow, and there shall be no further proceedings in the administration unless further estate be discovered. *Held* that, where the value of an estate is less than $1,500, letters of administration granted to the widow of deceased cannot be revoked, and another appointed in her stead, though she has failed to give notice to creditors.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county.

Proceedings by H. B. Sanders against Iturea Atwood to have her letters of administration as administrator of the estate of Benjamin E. Atwood, deceased, set aside, and petitioner appointed in her stead. From an order granting plaintiff's request, defendant appeals. Reversed.

C. L. Donohoe, for appellant. Seth Millington, for respondent.

COOPER, C. Appeal from an order removing appellant as administratrix, and appointing respondent as administrator in her stead. Deceased died December 7, 1894, leaving surviving him his wife, Iturea Atwood, but no children. On the 8th day of February, 1897, the superior court, upon proper petition, duly made an order appointing the said Iturea Atwood administratrix of the estate of deceased; and she thereupon qualified, and letters of administration were issued to her. Thereafter the administratrix procured the appointment of appraisers, and on the 23d day of June, 1897, an inventory and appraisement were duly returned and filed, which showed the entire estate to be community property, and of the value of $390. On the 18th of October, 1897, one H. B. Sanders, the respondent herein, at the written request of a sister and also of a niece of deceased, filed a petition asking to have the letters of administration issued to said Iturea Atwood revoked, solely upon the ground that she had failed and neglected for more than two months to have notice to creditors published as required by statute, and further asking that petitioner, Sanders, be appointed administrator of said estate. This petition did not show, or attempt to show, that the petitioner, or any one whom he represented, was a creditor of deceased; neither did it show that the said property was not community property. It stated the value of the estate to be less than $1,500, to wit, $650. On the 14th day of February, 1898, before any citation had been ordered, issued, or served on the said petitioner, the said administratrix applied to the court for an order directing proper publication of notice to creditors, and the court then and there refused to make the order. Thereafter the respondent asked for and procured a citation, upon his petition, directing the appellant to show cause on the 18th day of April why her letters should not be revoked, and respondent appointed administrator. On the day fixed in the citation the appellant filed her answer to the petition. The court proceeded to hear the evidence, documentary and otherwise, but the record does not show the date the said matter was heard. It does appear, however, that at the time of the hearing the notice to creditors had been published, because the record shows that the affidavit of the publishers of the Orland News was introduced in evidence, which showed that the notice to creditors was published in said paper in its "weekly issues of March 31, April 7, 14, and 21, 1898." On June 6, 1898, the court, after the publication of notice to creditors had been so made by appellant, made an order revoking the letters of appellant, and directing that letters of administration issue to respondent. This order was made without any proof that respondent had posted notices or given any notice whatever of his application, except that given by the service of citation upon respondent.

As we think the court erred in revoking the letters of appellant, and as no letters could issue to respondent until the letters of appellant had been revoked, it is not necessary here to discuss the question as to whether letters could be issued to respondent without giving the usual notice of his application as prescribed by statute. The court below evidently, without considering any other section of the Code, regarded section 1511, Code Civ. Proc., as mandatory. The section reads: "If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this chapter, the court must revoke his letters and appoint some other person in his stead, equally or the next in order entitled to the appointment." We think the section should be read and construed with section 1469, Code Civ. Proc., which provides that if, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole of the estate does not exceed the sum of $1,500, the court shall, after giving notice and upon hearing, if it finds the value of the estate does not exceed $1,500, "assign to the widow of deceased, if there be a widow, * * * the whole of the estate * * * and there must be no further proceedings in the administration unless further estate be discovered." In this case it not only appears from the inventory, but from the petition upon which the court acted, that the estate does not exceed $1,500. The widow is therefore entitled to the whole of the estate, and petitioners have no interest whatever in it. After the estate is set apart, "there shall be no further proceedings in the administration." Evidently notice to creditors is a proceeding in the administration, and therefore the statute is express that such notice must not be given after the estate is so set apart to the widow. It is true in this case that the estate had not been so set apart, but as the widow was and is entitled to have it set apart, and this regardless of the time that has elapsed, we cannot see any possible good that would be accomplished by publishing notice to creditors. The law does not require vain things. Neither does it allow parties to come into court and put the machinery of the law in motion in matters in which they have no possible interest. In Re Palomares' Estate, 63 Cal. 402, it appeared from the inventory that the whole of the estate did not exceed $1,500. After notice as directed by the statute, and on the 28th day of February, 1882, the court set apart the whole of the property for the support of the minor children. On July 12, 1882, one Briswalter, a creditor, filed a petition asking that the order of February 28th be set aside upon the ground, among others, that no notice to creditors had been given at the time said order was made. The lower court denied the prayer of the petition, and this court affirmed the order. In the opinion it is said, "For the decision of this appeal, it is necessary only to say that no notice to general creditors was required to be given." It clearly appears in this case that the widow is entitled to all the estate. There is no necessity for further administration. The appointment of another administrator, and the publication of notice to creditors, could have no possible effect, except to diminish and help to eat up the very small pittance left to the widow by the deceased. It could not possibly benefit creditors. Then why should notice be given to them? The cost of publication, the commissions of the administrator, and the fee of his attorney would have to be paid out of the widow's mite. It might benefit the administrator, his attorney, and the publisher of a newspaper; but the object of the law is to protect the widow and minor children, and not to pay out of the estate useless expenses to persons in no way interested in the estate, except to the extent they may be able to get money out of it. The order should be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

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127 Cal. 408

PEOPLE v. SOAP. (Cr. 564.)

(Supreme Court of California. Dec. 30, 1899.)

CRIMINAL LAW—WITNESSES—CONDUCT OF JURY—AFFIDAVITS—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where a witness, in speaking of acts of the deceased, used the word "presume" (meaning his best recollection), but said that he was not guessing, but that was his best information, the statement was properly admitted.

2. An affidavit of a juror relating to misconduct of the jury, other than their having arrived at a verdict by chance, will not be considered.

3. A new trial will not be granted on ground of newly-discovered evidence where such evidence was of little importance, and no diligence was used in discovering evidence before trial.

4. When the trial judge refused a new trial, it will not be granted on appeal, when the verdict was on conflicting evidence.

Department 2. Appeal from superior court, San Bernardino county.

A. F. Soap was convicted of manslaughter, and from the judgment, and from an order denying a new trial, he appeals. Affirmed.

Bledsoe & Bledsoe, for appellant. Atty. Gen. Ford, for the People.

McFARLAND, J. The defendant was accused by information of the crime of murder, alleged to have been committed by feloniously, etc., killing one John Larkin. He was convicted of manslaughter, and appeals from the judgment, and from an order denying the motion for a new trial.

Appellant contends that the verdict is against the evidence, because the evidence shows that the homicide was committed in justifiable self-defense. This contention cannot be maintained. The circumstances of the killing, as detailed by the appellant himself when on the witness stand, tended, no doubt, to a considerable degree, to show that the appellant killed the deceased in necessary self-defense; and it is contended that as the appellant was the only eyewitness of the killing, other than the deceased, and as it was uncontradicted by any other witness, and was not inconsistent with other facts proven, therefore it is to be taken as true. But one Spikes, a witness for the prosecution, testified that he saw the killing, and that the occurrences connected with it were different in some important respects from those testified to by the appellant. Appellant contends that the testimony of Spikes was "so manifestly corrupt and false as to forbid its consideration for any purpose, except in aid of defendant's vindication." This position, however, is not tenable. Although none of the other witnesses who came upon the scene immediately after the fatal shot was heard saw the witness Spikes there, still there was nothing in the evidence to preclude the jury from believing that he was there. It certainly could not be said, as a matter of law, that the jury should not have considered the testimony of Spikes. Of course, it does not appear how much, if any, weight the jury gave to his testimony. The jury were not bound to receive the testimony of the appellant as absolutely true; nor, if they believed the testimony of the appellant, can it be truly said that, taking his testimony together with the general facts proven, the jury were not warranted in finding that the homicide was not committed in necessary self-defense.

Appellant contends that the court erred in not striking out a certain expression used by the witness Spikes. The point arose in this way: The witness had been asked to describe the manner of deceased towards the defendant, and the witness testified as follows: "He was kind of waving one hand out that way, talking, and he had one hand down this way. He was kind of waving, that way. He was drunk and staggering, and he had this one down. I presume it was on his pants, I couldn't tell. Mr. Bledsoe: We don't want your presumptions. State what you saw. We move to strike out what the witness says about presuming. The Court: What do you mean by saying you presume? That you are merely guessing at it, or that it was your best information? Witness: That was my best information." There was no error in this. While a witness can testify only to facts which are within his knowledge, he is not required to testify with that certainty which excludes all doubt from his mind. The word "presume," as used by the witness, was nothing more than a statement of his best recollection.

Appellant contends that the judgment should be reversed on account of the alleged misconduct of the jury, by which they were prevented from giving the case a fair and due consideration. This misconduct is based upon the fact, which appellant sought to show by an affidavit of one of the jurors, that while the jury were in consultation over the case a statement was made by one of them that a verdict of manslaughter could only be followed by the punishment of imprisonment in the county jail for six months, and that such statement induced a large number of the jurors who had been voting for an acquittal to agree to a verdict of manslaughter. This contention cannot be maintained; for it has been definitely settled that the affidavit of a juror cannot be received to impeach the verdict, except where it is the result of a resort to the determination of chance. See People v. Azoff, 105 Cal. 632, 39 Pac. 59, and cases there cited.

The contention that a new trial should be granted on account of newly-discovered evidence is without merit. There was no diligence shown in discovering the testimony before the trial, and the alleged newly-discovered evidence was of little importance, even if it could be held admissible. No other errors are relied on for a reversal.

Appellant's counsel argues very strongly that the jury should have rendered a verdict of acquittal, and that, considering the great age and physical condition of appellant, and the conduct of the deceased, it should have been found that he committed the homicide in necessary self-defense. This argument has considerable support in the general facts of the case. In cases of this kind juries, no doubt, sometimes attach too much importance to the mere fact of the homicide, and convictions sometimes follow where the plea of self-defense should have been sustained. But the decisions in such cases rest with juries; and where in such a case the trial judge, who has heard all the evidence, declines to grant a new trial, it cannot be granted here, where, as in the case at bar, the testimony is fairly and substantially conflicting. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.

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127 Cal. 376

PEOPLE v. OLIVERIA. (Cr. 566.)

(Supreme Court of California. Dec. 29, 1899.)

CRIMINAL LAW—INFORMATION—DEFENDANT'S NAME—JURY—SPECIAL PANEL—CHALLENGE — EVIDENCE — CONFESSION — DEFENDANT COMPELLED TO STAND FOR COMPARISON—INSTRUCTIONS.

1. Pen. Code, § 959, provides that an information is sufficient if it can be understood therefrom that the defendant is named, and, if described by a fictitious name, that his real name is unknown. Section 960 declares that no information is insufficient, nor can the judgment thereon be affected by reason of any defect in form which does not prejudice a substantial right of defendant. Defendant's name appeared in the title of the information as "Frank Oliveria, Jr.," in the charging part as "Frank Oliveria" and "Frank Oliveria, Jr.," and in the indorsement thereon as "Frank Oliveria, Jr." *Held*, that it sufficiently appeared from the whole information that defendant was charged under the name of "Frank Oliveria, Jr."

2. Where part of the regular panel of jurors had been called in another case, and defendant expressly waived any irregularity in that regard, after the jury had been completed from a special panel and sworn, a challenge to the panel, for the reason that there was not in the box at any time during the drawing the full number of names, was properly denied, since the objection to the regular panel had been waived, and a challenge to the special panel can only be made, under Pen. Code, § 1064, on account of bias of the officer who summoned them, before a juror is sworn, as required by Id. § 1060.

3. A defendant charged with robbery may be compelled to stand up for comparison in size by the prosecuting witness with the party who robbed him.

4. Where the testimony of defendant that his confession was not free and involuntary is contradicted, the jury, under proper instructions, are

the sole judges of the credibility of the witnesses in regard to the matter, and their verdict will not be disturbed.

5. The failure of the court to instruct the jury in a criminal case on any proposition deemed essential by defendant is not error, unless he made a request for such instruction.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county.

Frank Oliveria, Jr., was convicted of robbery, and he appeals. Affirmed.

Bennett & Sawyer, for appellant. Atty. Gen. Ford, for the People.

COOPER, C. Appeal from judgment and order denying motion for new trial. Defendant was charged with the crime of robbery, committed on the 11th day of December, 1898, in the county of Alameda, by forcibly taking from the person of one Joseph Nevis $180 in gold coin. He entered his plea of "Not guilty," and after trial before a jury was convicted, and sentenced to a term of three years in the state prison at San Quentin. He does not claim that the evidence is insufficient to justify the verdict, nor that the court erred in giving or refusing any instruction to the jury. He specifies certain alleged errors which he claims are prejudicial, and which we will notice in the order presented. It is claimed that the information charges the defendant under the name of "Frank Oliveria," and that the evidence shows that the name of defendant is "Frank Oliveria, Jr.," and that defendant objected to the evidence on the ground of such variance. The information is entitled, "People of the State of California against Frank Oliveria, Jr." In the charging part it is stated: "The said Frank Oliveria, on the 11th day of," etc.; and concludes by stating: "And all of the acts of the said Frank Oliveria, Jr., in the premises, were and are contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California." The information was indorsed on the back thereof, "People of the State of California against Frank Oliveria, Jr." When it was read to defendant with its indorsements, and he was asked his true name, he answered that his true name "is Frank Oliveria, Jr." We think it sufficiently appears from the whole information that the defendant was charged under the name of "Frank Oliveria, Jr." The Penal Code provides (section 959): "The indictment or information is sufficient, if it can be understood therefrom: * * * (3) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or district attorney, as the case may be, unknown." Section 960 provides: "No indictment or information is insufficient, nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." In City of San Francisco v. Randall, 54 Cal. 410, it is said, "The addition 'Jr.' is no part of a name proper;" and it was accordingly held that where in one proceeding "Jr." was used, and in another it was not, it was wholly immaterial. In People v. Boggs, 20 Cal. 433, the indictment was against James B. Boggs, and the verdict was against "defendant, J. M. Boggs." It was held that the error was immaterial. See People v. Ah Kim, 34 Cal. 189; People v. Hughes, 29 Cal. 262. In 1 Bish. New Cr. Proc. § 687, it is said: "'Junior' and 'senior' are no part of a name, however commonly employed; so that neither the omission nor insertion of either, contrary to what would be deemed proper, will create a variance or otherwise injure the indictment." The text is supported by many cases cited in the foot note at page 407.

It is claimed that the court erred in overruling a challenge to the panel of jurors. It appeared during the drawing of the jury that a part of the regular panel of jurors, six in number, had been called in another department of the superior court in a case on trial in such other department, and for this reason did not answer to their names when called. The clerk informed the judge of the court that there were six names in the box, at the time of the commencement of the drawing of the jury, of jurors who were engaged in the trial of a case in another department of the court. The judge, addressing defendant's counsel, said: "Now, gentlemen, we will take this jury out of the box, take those six names out of the box, and draw again, or proceed as we have proceeded up to this point, as you please, addressing myself now to the defense. What is your pleasure about it? When we commenced to draw the jury for this case, there were the names of six jurors who were engaged in another department on a jury trying a case. Obviously, those names ought not to have been in the box. We will take them out of the box, and commence to draw again, or go on with the trial, as you please." The attorney for defendant answered: "I think we would rather have them taken out of the box." After some further remarks, the judge said to defendant's counsel: "What I want to do is simply to give you an opportunity to have a full panel drawn without those names in the box. I understand you, therefore, to waive any informality up to this point." Counsel for defendant answered, "Yes." No objection or exception appears in the record up to this point to the regular panel, or to taking six jurors out of the box. After the regular panel was exhausted, the court ordered a special venire to issue for eight jurors. No objection or exception was taken to the special panel before the jurors were sworn, the jurors were examined, the jury completed, and all sworn to try the cause. After the jury had been sworn, the defendant's counsel challenged the panel on the ground "that there was not in the box at the commencement of the drawing, or at any time during the drawing, the full number of names that should be there during the drawing." The court denied the challenge, and defendant excepted. We think the challenge was properly denied. It did not appear whether the challenge was to the regular panel or to the panel returned on the special venire, or to both panels. If it was the intent to challenge the regular panel, the defendant had expressly waived any irregularity in that regard. If the intent was to interpose a challenge to the panel called on the special venire, this could only be done on account of the bias of the officer who summoned them, which would have been good ground of challenge to a juror. Pen. Code, § 1064; People v. Durrant, 116 Cal. 195, 48 Pac. 75, and cases cited. Whether the intent was to interpose a challenge to either panel, or to both, it must have been taken before a juror was sworn. Pen. Code, § 1060.

While the witness Nevis was testifying, he referred to one of the parties who robbed him as a little man, about five feet high, more or less. The district attorney then said: "How did his size compare with this defendant's? Will you stand up, Mr. Oliveria (speaking to defendant)?" Counsel for defendant said: "We object to this question, and to his (the defendant) standing up, on the grounds that it is immaterial, incompetent, and irrelevant." The court overruled the objection, and defendant excepted, and now claims in his brief that it was error to make the defendant stand up, and thereby testify against himself. The record only shows that the district attorney asked defendant to stand up. It does not show that the judge told him to stand up, or that he did stand up. But, if it were disclosed by the record that he was compelled by the court to stand up for comparison, this would not be error. People v. Goldenson, 76 Cal. 347, 19 Pac. 161.

The confessions of the defendant to the effect that he was guilty of the crime, and that he assisted in forcibly taking the money from Nevis, were admitted in evidence. Defendant claims that such confessions were not free and voluntary, and were made under the inducement of a promise that it would go easier with him if he would confess. Three witnesses for the prosecution testified to the effect that the confessions were voluntary on the part of defendant, and not made under the influence of threats, intimidations, promises, or inducements of any kind. It was attempted by defendant's own testimony to show that promises were made to him that it would be made easier for him if he would confess. We do not think the defendant's evidence clearly shows any such promises, but, if it did, the jury, under proper instructions from the court, were the sole judges of the credibility of the witnesses in regard to the matter. It would be a strange rule that would allow the confessions of a defendant to be given in evidence upon clear proof that they were made voluntarily, and without any promise, threat, or inducement, and then allow them to be stricken out, upon the defendant testifying that they were made under the fear of a threat or the influence of a promise. If such were the law, it would always lie in the power of a defendant to clear away from the case all confessions by his own evidence, and this regardless of the truth of such testimony.

It is said that defendant was drunk at the time of the commission of the offense, and that the court erred in not instructing the jury fully as to drunkenness. The court of its own volition, and we think correctly, in its charge to the jury, stated pretty fully the law as to voluntary intoxication in criminal cases. No error is alleged as to the giving of the instruction. It may not have been as full a treatise on the law of drunkenness as defendant desired, but it certainly covered the law pertinent to the evidence in this case. Defendant does not complain of the refusal of the court to give any instruction asked by him. If he desired an instruction containing a correct rule of law upon the evidence and pertinent to the case, he should have asked it, and, if it had been refused, assign such refusal as error. The failure of the court to instruct the jury upon any proposition deemed essential by the defendant is not error, unless he made a request for such instruction. People v. Fice, 97 Cal. 460, 32 Pac. 531.

The remark made by the judge to defendant's counsel during the progress of the trial is not reversible error. The manner of counsel in asking many apparently immaterial questions and repeating them seems to have exhausted the patience of the judge, and to have merited, at least, some rebuke. The language used by the judge in addressing counsel evidently was not that of a Chesterfield. The same thing probably could have been said in language more courteous, and with more regard to feelings of counsel, yet we do not think the remark was such as to have prejudiced the rights of the defendant. The judgment and order should be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

127 Cal. 332

BROWNE v. SWEET et al. (Sac. 601.)

(Supreme Court of California. Dec. 29, 1899.)

MORTGAGES — FORECLOSURE — NECESSARY PARTIES—PRESENTATION TO ADMINISTRATOR—NECESSITY—PLEADING—PRESUMPTION.

1. The administrator of a deceased mortgagor is not a necessary party to a foreclosure, where his entire estate, including the mortgaged premises, has been regularly set apart to the use of his family as exempt from execution, or as a probate homestead, and the administration closed.

2. In an action to foreclose a mortgage executed by one since deceased, an averment that the court set apart a homestead does not authorize the presumption that it had been selected

prior to mortgagor's death, so that the debt must be allowed by his administrator.

3. Presentation of a claim secured by a mortgage to the mortgagor's administrator for allowance is not required when the mortgaged premises were not selected and declared a homestead prior to the mortgagor's death.

Department 2. Appeal from superior court, Modoc county.

Action by E. L. Browne against Urena Sweet and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Spences & Raker and C. A. Raker, for appellants. H. L. Sparger and G. F. Harris, for respondent.

TEMPLE, J. This appeal is from the judgment which was entered upon overruling defendants' demurrer to the amended complaint, the defendants declining to answer. The action was to foreclose a mortgage given by one J. R. Sweet to secure his promissory note for the sum of $500. In addition to the usual allegations in regard to the mortgage, it is averred in the complaint that J. R. Sweet died intestate on the 4th of October, A. D. 1895, leaving as his only heirs at law his wife, Urena Sweet, and two minor children, to wit, Celia Sweet and Alfred Kenneth Sweet, who are the defendants herein. It is further alleged that letters of administration were issued upon the estate of J. R. Sweet, deceased, to the defendant Urena Sweet on the 23d day of October, 1895, and that thereafter, to wit, on the 23d day of April, 1897, "the said Urena Sweet obtained her final discharge as administratrix of said estate, and said estate was settled, and the administration thereof was closed, without any provision whatever being made for the payment of said mortgage, and that at this date there is no qualified or acting administrator of said estate." It is further shown that at no time has there been property or money in the estate which could have been applied to the payment of the debt, and that the estate possessed no assets except the property set apart for the use of the family and the mortgaged premises; and, further, that on the 7th day of January, 1896, "the superior court in and for the county of Modoc, by its decree regularly made, set apart said lands described in said mortgage as a homestead to the defendant in this action," and these defendants are the only persons who have, or claim to have, any interest in said land. Plaintiff waives all claim to a deficiency judgment. A special demurrer was interposed, which was sufficient to raise the questions presented here.

The first point made is that the administratrix of the estate of J. R. Sweet should have been made a defendant. It appears from the complaint that the entire estate had been regularly set apart to the use of the family of the deceased, either as property exempt from execution, or as a probate homestead, and that the estate had never had other assets; and also that the administration has closed, and there is now no administrator, and no estate which could be administered. The estate of J. R. Sweet, therefore, if it can be said that there is such a thing, could not be interested in the matter.

It is also contended that the mortgage cannot be foreclosed, because it is upon the homestead, and it does not appear that it was ever presented to the administratrix for allowance. For this proposition, with other cases, Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375, is cited for authority. In that case the court found "that there are not now, nor were there ever, any assets * * * that could be charged with or subject to the payment of said note or mortgage." But this court held that, nevertheless, claims secured by liens upon a homestead selected and recorded prior to the death of decedent must be presented as other claims against the estate. The constitution and the laws have created a special tribunal, to wit, the probate court, to marshal the assets of a deceased person, and to determine whether there are assets which can be applied to the payment of debts, and it may well be held that in a suit to foreclose a mortgage the superior court has no jurisdiction to inquire into the matter, however obvious the fact may be; but it does not seem to me that is necessarily so if the probate court has in the proceedings in the estate determined that there never had been in the estate assets which could be applied to the debt. It may be admitted that the legislature could make the requirement general and absolute in all cases. But are we authorized in attributing such a design to the legislature? is the question. Section 1469, Code Civ. Proc., authorizes the probate court in certain cases to assign the entire estate for the use and support of the family, subject to liens and incumbrances, and provides that there must be no further proceedings in the administration. In such case no notice to creditors could be given, and no claims could be presented for allowance. True, this provision may refer to liens upon property other than the homestead, but, if a portion of the property thus assigned happened to be a homestead, we cannot suppose that it was intended that a creditor should lose his debt for not doing an impossible act. Apparently this estate might have been assigned in that mode, and, in effect, it was, though, perhaps, not upon the return of the inventory. Whether notice to creditors was ever given does not appear, but the court first set apart for the family all of the personal property, and then set apart the homestead, which comprised all the balance of the estate. It does not appear that the plaintiff ever could have presented his claim. In such case I think we are not warranted in supposing that it was intended that the debt should be lost. But we are not put to the necessity of determining that question here, for it is not averred in the complaint that the homestead had been selected and declared prior to the death of J. R. Sweet, and there is no presumption that it was. A pleading is to be taken most strongly against the pleader, in that it must be held that a plaintiff has fully stated his cause of action; but this does not warrant us in presuming facts not averred at all. The averment is simply that the court set apart a homestead. If there was no other fact in reference to the matter, this was a probate homestead, and in such case a presentation of the mortgage was not required. McGahey v. Forrest, 109 Cal. 63, 41 Pac. 817. The action is not barred by the sections of the Code relied upon. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

127 Cal. 275

In re HUELSMAN'S ESTATE. (Sac. 537.)

(Supreme Court of California. Dec. 22, 1899.)

EXECUTORS—HOMESTEAD—ACQUISITION—INCUMBRANCES—PAYMENT FROM DECEDENT'S PERSONAL ESTATE.

Code Civ. Proc. § 1475, provides that, where a homestead has been selected and recorded during coverture, it shall be set off to the surviving spouse, and that, if there are incumbrances on the homestead, the claims secured thereby must be presented as other claims, and, if the estate is not sufficient to pay such claims, they shall be paid pro rata with other claims, and the incumbrances enforced as to the homestead only for the deficiency; and section 1544 provides that lands specifically devised shall not be sold for the payment of debts of a decedent's estate if there be sufficient other property out of which to pay such debts. The testator devised to his wife a one-half interest in a farm, which was his separate property, and which had never been set aside as a homestead. Subsequent to the making of the will the testator mortgaged the property; and after his death, but before expiration of the time for proving claims, on the widow's application, the court erroneously set aside the farm to the widow as a homestead, in fee, which decree was not appealed from. *Held*, that since the widow deraigned her title from the decree, and not the devise, and the homestead was not one recorded during coverture, she was not entitled to an order requiring the executors to discharge the mortgage from the funds of the estate.

In bank. Appeal from superior court, Sacramento county.

Application by the widow of Charles H. Huelsman for an order directing the executors of said decedent to discharge a mortgage lien on the homestead. From an order awarding the relief prayed for, the executors appeal. Reversed.

Holl & Dunn, for appellants. A. L. Bruner and Bruner Bros., for respondent.

HENSHAW, J. This is an appeal from an order directing the executors of the above-entitled estate to pay off and discharge a mortgage lien on the probate homestead which had been set apart to the widow of the deceased. The deceased left a will in which he devised to his widow a one-half interest in a farm in Sacramento county, and also a one-half interest in the personal property on said farm. The remainder of his estate, with a trifling exception, was left to a daughter and son, children of a former wife. At the time the will was made, the farm, which was appraised at the value of $2,300, was unincumbered, but afterwards it was mortgaged by the deceased to secure the payment of $1,000. The entire estate was the separate property of the husband. Before the time for approving claims against the estate had expired, the court, upon application of the widow, set aside the whole farm as a homestead. The order so setting aside the homestead did not limit it to a life estate in the widow, but set it aside to her absolutely. This, of course, was erroneous; but the time to appeal from the order having expired, and no appeal having been taken, and the order, though erroneous, not being void, title in fee under the order vested in the widow. In re Moore's Estate, 96 Cal. 522, 31 Pac. 584; Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736. Notwithstanding the fact that the farm had been specifically devised, one half to the widow, the other half to the two children, it was competent for the probate court to set it aside as a homestead; for the right of a testator to devise is subordinate to the power in the probate court to sequester and set apart the property for the shelter, care, and support of the family. Sulzberger v. Sulzberger, 50 Cal. 385; In re Davis, 69 Cal. 458, 10 Pac. 671; In re Lahiff's Estate, 86 Cal. 151, 24 Pac. 850. Notwithstanding, then, the specific devise of one-half of the farm to the widow, her title to all of it is deraigned from the homestead order. The owner of the debt secured by the mortgage upon the farm never presented his claim against the estate. His recourse is therefore limited to the mortgaged property. Code Civ. Proc. § 1500; McGahey v. Forrest, 109 Cal. 63, 41 Pac. 817. The question thus presented is that of the power of the court to order the executors to discharge an incumbrance upon the probate homestead. Since the widow's title comes from the homestead order, and not from the devise, she is not in position to take advantage of the provisions of sections 1544 and 1563 of the Code of Civil Procedure relative to the exemption of specific devises from the payment of the debts of an estate. We have looked in vain to find any law authorizing the court to discharge liens upon such a homestead. Where a homestead has been selected and recorded prior to the death of one of the spouses, section 1475 of the Code of Civil Procedure makes provision for the extinguishment of liens and incumbrances upon it, but section 1475 has to do exclusively with homesteads declared during the lifetime of the spouses. The law has not seen fit to make the same provision as to probate homesteads. Therefore, however beneficent may be the power which the court exercised in making the order in question, we are constrained to hold that it was unauthorized. The order appealed from is reversed.

We concur: TEMPLE, J.; VAN DYKE, J.; HARRISON, J.

GAROUTTE, J. (concurring). If it appeared upon the face of the proceedings setting aside this property as a homestead that it was the separate property of the husband, then the order here made setting aside the property in fee as a homestead would be void,—at least, void as to any interest beyond a life estate; for the statute is the measure of the court's power in such a case, and the statute says the property may be set aside for a "limited period," and this court has declared that such limited period may not exceed a term for life. Hence an order would be void upon its face, to the extent, at least, of anything beyond a life estate, which purported to set aside separate property as a homestead in fee. But here we find nothing in the record of the proceedings for setting apart the homestead showing this property to be separate property, and, in support of the validity of the order made, we are bound to assume to the contrary. In the case of a probate homestead upon separate property set aside for a limited period,—for example, five years,—I see no legal objection to the court making an order that the general assets of the estate be applied to the satisfaction of a mortgage resting upon it, exactly the same as if it had not been set aside as a homestead. The fact that it is a homestead for a limited period is merely incidental to the main question, and the interests of the estate in such property may be protected by the satisfaction of a mortgage resting upon it. For the foregoing reasons, I concur in the judgment.

127 Cal. 453

DENNIS v. FIRST NAT. BANK OF SEATTLE. (L. A. 692.)

(Supreme Court of California. Jan. 17, 1899.)

ATTACHMENTS AGAINST NATIONAL BANKS.

1. The amendment of March 3, 1873 (Rev. St. U. S. § 5242), to section 57 of the national banking act of June 3, 1864, providing that no attachment shall be issued against a national bank or its property before final judgment in any suit, action, etc., is mandatory, and applies to attachments issuing from state courts against such banks.

2. The amendment of March 3, 1873 (Rev. St. U. S. § 5242) to section 57 of the national banking act of June 3, 1864, providing that no attachment shall be issued against a national bank or its property before final judgment, is constitutional.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by B. H. Dennis against the First National Bank of Seattle, Wash., a corporation. From an order dissolving an attachment, plaintiff appeals. Affirmed.

Dillon & Dunning, for appellant. Mulford & Pollard, for respondent.

COOPER, C. Appeal from order dissolving attachment. The complaint shows the defendant to be a corporation organized under the laws of the United States as a national bank. After the filing of the complaint and an affidavit on behalf of the plaintiff, a writ of attachment was issued, and placed in the hands of the sheriff. Defendant made a motion upon proper notice for an order dissolving the attachment upon the ground, among others, that the superior court was without jurisdiction to issue said writ, and that the same was improperly issued. By the amendment of March 3, 1873 (Rev. St. U. S. § 5242), to section 57 of the national banking act of June 3, 1864, an attachment cannot issue against a national bank before judgment. The amending act reads: "That section 57 * * * be amended by adding thereto the following: 'And provided further that no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding or municipal court.'" The words used are plain and mandatory. The supreme court of the United States, in construing the statute in Bank v. Mixter, 124 U. S. 726, 8 Sup. Ct. 721, 31 L. Ed. 571, speaking through the chief justice, after reviewing all the statutes bearing upon the subject, said "that no attachment should issue from state courts against national banks, and all the attachment laws of the states must be read as if they contained a proviso in express terms that they were not to apply to suits against national banks." This case has since been followed, and the same construction placed upon the statute, by the state and federal courts without a single exception that has been brought to our knowledge. Garner v. Bank (C. C.) 66 Fed. 369; Safford v. Bank, 61 Vt. 373, 17 Atl. 748; Bank v. La Due, 39 Minn. 415, 40 N. W. 367; Bank of Montreal v. Fidelity Nat. Bank, 112 N. Y. 667, 20 N. E. 414; Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn. Ch. App.) 46 S. W. 1026; Freeman Mfg. Co. of North Adams v. National Bank of the Republic, 160 Mass. 398, 35 N. E. 865.

The section is not unconstitutional. It is not claimed that the act of congress authorizing national banks is unconstitutional. If congress has power to authorize the creation of the national banks, it has power to protect them, and to regulate their trade and intercourse with others, by granting them special immunities, and protecting them against suits or proceedings in state courts by which their efficiency would be impaired. Chesapeake Bank v. First Nat. Bank of Baltimore, 40 Md. 269; Freeman Mfg. Co. of North Adams v. National Bank of the Republic, 160 Mass. 398, 35 N. E. 865.

The process of attachment under our Code is a creature of the statute. It has always been held that the legislature might provide, not only the cases in which an attachment might issue, but the classes of property upon which it might be levied. It has accordingly been held that money in the custody of the law is not the subject of attachment. This court has held that an act providing for the dissolution of attachments levied within two months before the filing of a petition in bankruptcy is constitutional. Baum v. Raphael, 57 Cal. 361. The legislature of this state has provided, among other things, that court houses, certain public buildings, and many classes of property shall be exempt from execution. It might provide that no attachment should issue in any case. We see no reason why the legislature of the nation has not the power to provide that no attachment shall issue against any bank created and existing under its authority. The order should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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6 Cal. Unrep. 376

BAKER v. VARNEY et al. (WILLIAMS, Intervener. Sac. 567.)

(Supreme Court of California. Jan. 13, 1900.)

APPEAL—PARTIES INJURED—EVIDENCE.

1. A party who is not injured by a judgment cannot be heard to complain on appeal from an order denying him a new trial.

2. Where an objection to testimony, which is admissible for some purposes, is general, the court's failure to limit it is not error if counsel do not ask that it be limited.

Commissioners' decision. Department 1. Appeal from superior court, Sutter county.

Action by G. W. Baker, as receiver, against Mabel Brett Varney and others. There was a judgment for plaintiff, and from an order denying her motion for a new trial defendant Mabel Brett Varney appeals. Affirmed.

J. H. McKune and R. Platnauer, for appellant. Richard Belcher, for respondent. A. M. Johnson, for intervener and respondent.

CHIPMAN, C. Plaintiff brings this action, as receiver in the foreclosure suit brought by the intervener against defendant Ellwood Varney, to recover possession of certain live stock, claimed to be rents, issues, and profits of the mortgaged premises, for an accounting with defendants, and for an injunction to restrain defendants from disposing of said live stock or dividing the same among defendants, and for general relief. Plaintiff had judgment. Defendant Mabel Varney moved for a new trial, and appeals from the order denying her motion. There is no appeal by any other defendant, and no appeal from the judgment. Mabel Varney was made a defendant because she claimed to own the property the subject of the action. The court found that the property belonged to defendant Ellwood Varney, and that appellant at no time had any interest in it. A careful examination of the evidence convinces us that it justifies this finding. Whether the receiver was properly appointed, and could, under his appointment, take possession of and hold the rents, issues, and profits of the mortgaged land, and apply them to the payment of the mortgage debt, are questions which do not concern appellant in view of the finding referred to above. If the court erred in its conclusions, appellant was not injured, and hence cannot be heard to complain. This view of the matter makes it unnecessary to discuss the numerous interesting questions presented in the briefs.

The witness Smith was asked whether she heard Ellwood Varney say anything about the ownership of the live stock now claimed by his wife, Mabel, and, if so, what he said. Defendant Mabel Varney objected to the question as irrelevant and incompetent, and that what was said does not purport to be in presence of Mabel Varney, who claimed to own the live stock. The principal question of fact was whether the husband or the wife owned the property. When this testimony was offered, the husband had not testified in the case, and therefore it was not admissible to contradict or impeach him. Nor was it admissible as against his wife. It was only competent as a declaration affecting him and his rights, and should have been so limited by the court. The objection, however, was general, and, when made in that form, and the court failed to limit the application of the testimony, it was the duty of counsel to ask to have it so limited, since it was admissible for some purposes. What has been just said applies to the ruling made when plaintiff was called as a witness, and was asked to state a conversation he had with Ellwood Varney.

It appeared from the evidence that the receiver was awarded possession of the rents which had accrued prior to his appointment, and which had not as yet been paid over to Varney by the tenant, as well as rents accruing and to accrue after his appointment. We very much doubt his right to rents which had accrued prior to his appointment. But, as there is no appeal by Varney, or by any one other than Mrs. Varney, who the court found had no interest in or right to the property, the question need not be determined. Whatever may be the right of the receiver to the property, Mrs. Varney has none, and cannot be heard to complain of the judgment. If it be claimed that she got some right by the division of the rents made on October 17, 1896, referred to in the findings, it must rest upon the assumption that the cattle were hers when first purchased for the purpose of stocking the farm. But the court found, and the evidence justified the finding, that her husband was the real purchaser and owner at that time, and the court also found that it was community property, which is justified by the evidence, even though it be conceded that the property was purchased for her account. The evidence showed that it was paid for from the rents of the farm. In no view of the case can we see that appellant is personally concerned in or injured by the judgment. It is advised that the order denying the new trial be affirmed.

We concur: BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the new trial is affirmed.

127 Cal. 423

PEOPLE v. McINTYRE. (Cr. 553.)

(Supreme Court of California. Jan. 3, 1900.)

CRIMINAL LAW—COURT REPORTERS—QUALIFICATIONS—CERTIFICATE—VARIANCE — MATERIALITY — WITNESSES — EVIDENCE AT FORMER TRIAL.

1. A certificate that a transcript of evidence contains a "full and complete record of the testimony" is a substantial compliance with Pen. Code, § 869, requiring the certificate to state that the transcript is a "correct statement of the testimony."

2. Where accused was charged with robbing a roommate in a hotel, and the evidence tending to show accused left the room at 5 o'clock in the morning, as claimed by him, is not in the record, a variance between the shorthand notes of the roommate's former testimony and the transcript thereof, leaving it in doubt whether witness retired at 7 o'clock or arose at that hour, will be treated as immaterial.

3. Code Civ. Proc. § 270, requiring official reporters to possess certain qualifications, refers to the official reporter of superior courts, and not to reporters authorized by Pen. Code, § 869, in hearings before magistrates.

4. Where accused was represented by counsel at his preliminary hearing, he cannot object for the first time on the trial that the reporter appointed to take testimony before the magistrate did not possess the necessary qualifications.

5. Where an officer serving a subpœna went to the hotel occupied by a witness, and was there told that he had left the state, and he then went to one of witness' haunts, and received the same reply, and to another, where he was informed that witness was liable to return at any time, and he made further efforts to locate him, without success, such showing was sufficient to authorize introduction of the witness' testimony on a former preliminary examination.

Department 1. Appeal from superior court, city and county of San Francisco.

George McIntyre was convicted of grand larceny, and he appeals. Affirmed.

George N. Smith, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Defendant was convicted of the crime of grand larceny. He appeals from the judgment of conviction and from the order denying his motion for a new trial. When the case was called for trial, the complaining witness failing to appear, the district attorney was permitted to read in evidence, against defendant's objection, the deposition of said witness given on the preliminary examination of defendant in the police court. The only question involved in this appeal is as to the correctness of this ruling.

1. It is objected that the transcript was not certified as required by law. Section 869, Pen. Code, provides: "The deposition or testimony of the witness must be authenticated in the following form: * * * When taken down in shorthand, the transcript of the reporter appointed as aforesaid, when written out in longhand writing and certified as being a correct statement of such testimony and proceedings in the case shall be prima facie a correct statement of such testimony and proceedings." The certificate in question reads: "I hereby certify the foregoing to be a true and correct transcript from the shorthand notes taken by me, and a full and complete record of the proceedings had and testimony given in the above-entitled case." While the stenographer was grossly careless in not consulting the statute when formulating his certificate to the transcript of the evidence, still, after careful consideration, the court has arrived at the conclusion that the certificate is made in substantial compliance with the form demanded by the statute. It is certified that the transcript contains a full and complete record of the testimony given in the cause. A complete record of the testimony of the witness may fairly be said to be a correct statement of his testimony.

2. When the deposition of the witness was being read, the defendant demanded a comparison of it with the shorthand notes. It was disclosed that the deposition was not a correct transcript of the reporter's notes in several particulars, and it was objected to for that reason. The only difference between the deposition and the notes of apparent significance related to what occurred at the hotel where the prosecuting witness had testified that he and defendant went to lodge on the night the larceny is alleged to have taken place. The two went together to this hotel, as it appears by the deposition. The witness was asked by the district attorney to give the exact text of his notes. "The witness: A. Yes, and we got a two-bed room there, and I went to my bed, and at seven o'clock I got up in the morning, and I missed my money." Counsel for defendant read from the transcript, addressing the witness: "Q. I will read it again, and I read the punctuation: 'Yes (comma), and we got a two-bed room (period). And I went to my bed at seven o'clock (period). And I got up in the morning and I missed my money.' Is that correct? A. That is not correct." The witness was asked if there was anything in his notes that he (the prosecuting witness) got up at 7 o'clock, to which he replied, "No, sir." The dispute seemed to be whether the witness had said he went to bed at 7 o'clock, or had said that he got up at 7 o'clock. Defendant contends that the fact was important, because there was evidence that the defendant left the room where he and the witness were sleeping at 5 o'clock in the morning. The evidence is not before us, and we cannot say whether the variance between the shorthand reporter's notes and the transcript of them was material to defendant's case. Whether the fact was that the prosecuting witness went to bed at 7 o'clock or got up at 7 o'clock may have been entirely immaterial, and, if material, the defendant should have embodied enough of the evidence in the record to show

its materiality. Injury will not be presumed from error which on its face is harmless.

3. Appellant contends that the deposition was not taken by a reporter appointed according to law. Section 869, Pen. Code, provides that the magistrate before whom the examination is had "may * * * order the testimony and proceedings to be taken down in shorthand, * * * and for that purpose he may appoint a shorthand reporter." It is claimed that the magistrate may not, under this section, appoint except the appointee possesses the qualifications prescribed for official reporters of superior courts by chapter 3, tit. 4, Code Civ. Proc. Stress is laid upon section 270 of that Code, which provides that "no person shall be appointed to the position of official reporter of any court in this state, except," etc.,—then follow the prescribed qualifications. This chapter relates exclusively to the official reporter of superior courts. Id. § 269 et seq. Appellant would read these sections into section 869 of the Penal Code. We can find nothing in the provisions of the two Codes to warrant us in doing so. No doubt the legislature contemplated that the official reporter referred to in the civil procedure should possess certain qualifications, and so should a shorthand reporter called in by a magistrate be competent to do the work, for its importance is even greater than in civil cases; but the legislature nowhere in section 869 has intimated that the shorthand reporter there mentioned should be an official reporter of some superior court, or that he should possess the qualifications of some reporter. Furthermore, it appears that the defendant had an attorney present at the preliminary examination, who then made no objection to the reporter appointed by the magistrate. It must be presumed that he was satisfactory to the court and to the accused, and possessed the necessary qualifications; and when, therefore, at the trial, counsel asked the reporter (the witness) whether there had been a committee appointed to examine him, the court properly refused the question as immaterial. The time to test his qualifications and to object that he did not possess them was at the preliminary examination.

4. It is claimed that the showing was insufficient that the witness could not be found in the state. The officer who served the subpœna testified that he went to the hotel where Berti, the prosecuting witness, stopped. "I went there, and inquired of the proprietor, who told me that Berti was not stopping there; that he had left, and gone to Montana. Acting on information received, I went to a saloon near by, on Montgomery avenue, kept by Mr. Conti, and inquired for Berti, and got the same reply,—that he had gone to Montana." He was then directed to inquire of a fellow countryman who kept a razor-sharpening place, who told the witness that he knew Berti. "I asked him if he knew when Berti would be back into town again. He said he could not say; that Berti had some business in Sonoma county, and was liable to come at any time." He also testified to further efforts made by him, which resulted in a failure to locate the witness. The evidence discloses the showing to be sufficient. For the foregoing reasons, the judgment and order are affirmed.

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6 Cal. Unrep. 370

HENNE v. LOS ANGELES COUNTY.

(L. A. 760.)

(Supreme Court of California. Dec. 29, 1899.)

TAXATION—MORTGAGES—DEDUCTION—PRESUMPTIONS.

1. Neglect or refusal of a landowner to return a mortgage on his land for taxation does not authorize the assessor to arbitrarily assess it to him, since Pol. Code, § 3629, requires the landowner to return only property belonging to himself; and section 3633, authorizing arbitrary assessment on refusal of the owner to make a statement, applies only to property belonging to him; and section 3650, subd. 15, requires the assessor to deduct mortgages and assess them to their owner.

2. Where the assessor fails to enter the value of mortgages on land assessed, in the proper column, and deduct the same, as required by Pol. Code, § 3650, subd. 15, it cannot be presumed that he made the proper deductions, but failed to so state on the assessment roll.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by C. Henne against the county of Los Angeles. From a judgment for defendant, plaintiff appeals. Reversed.

R. L. Horton, for appellant. J. C. Rines, for respondent.

CHIPMAN, C. Action to recover certain taxes claimed to have been illegally exacted. Plaintiff alleges ownership of certain real estate situated in the city of Los Angeles; that said property was assessed for the fiscal year 1898–99 as of the value of $96,530; that at the time of said assessment there was a mortgage resting upon said property, executed by plaintiff to the regents of the University of California, for the sum of $35,000, no part of which had been paid, and that the same remained unpaid on the first Monday of March, 1898; that no deduction or credit was made or given plaintiff upon the assessment roll on account of said mortgage, and the assessor failed and refused to treat said mortgage as an interest in the property affected thereby, or to deduct the value of said mortgage security from the value of said property, but assessed the entire value thereof to plaintiff; that on July 23, 1898, plaintiff made a demand in writing upon the assessor that he correct said assessment by deducting from the value of said property assessed to plaintiff, and affected by said mortgage, the value of said mortgage, alleged to be $35,000; that the assessor refused; that thereafter, on November 3, 1898, plaintiff filed his verified petition before the board of supervisors of defendant county, requesting the said board to correct, or order to be corrected, on the assessment roll of said county, the assessment of plaintiff, by deducting from the value of said property assessed to plaintiff, and affected by said mortgage, the value of said security, and that said board denied said petition; that on November 19, 1898, plaintiff paid said taxes, amounting to $1,287.06, under a written protest addressed and delivered to the tax collector of said county, specifying therein the portion of said assessment claimed to be void, and the ground on which said claim was founded. Then follow allegations showing what was contained in said protest, which appears to have set out a copy of the assessment as shown by the assessment roll, a copy of which is found in the complaint, and specifically setting forth the facts as above. The alleged offer was, upon failure to grant the deduction claimed, to pay the whole of said tax under protest, "under and by virtue of the provisions contained in section 3819, Pol. Code." The alleged excess payment amounted to $466.66⅔. It is alleged that on November 21, 1898, plaintiff presented his verified demand in writing upon the treasury of the county, to said board of supervisors, which was rejected by the board January 5, 1899, and that no part of said claim has been paid. Defendant demurred to the complaint on several grounds. The only ground now urged is insufficiency of facts. Defendant had judgment of dismissal on the demurrer, from which this appeal is prosecuted.

Under the provisions of section 4, art. 13, of the constitution of this state, and subdivision 15 of section 3650 of the Political Code, it was the obvious duty of the assessor to deduct the amount of the mortgage held by the regents of the university from the assessed valuation of the land, the subject of the mortgage. Hollister v. Sherman, 63 Cal. 38; People v. Board of Sup'rs, 77 Cal. 136, 19 Pac. 257. In effect, plaintiff was assessed, not only on his own property, but upon that of the mortgagee. To the extent that plaintiff's assessment was increased by the assessor's failure to deduct the amount for which the mortgage was assessable, the assessment was void, and may be recovered back, under section 3819 of the Political Code. Respondent does not dispute the liability as a general proposition, but it contends that, because the complaint does not allege that plaintiff made to the assessor the statement required by section 3629, such neglect subjected plaintiff to the arbitrary assessment provided for by section 3633. Section 3629 provides that the assessor "must exact from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person," etc. In six separate paragraphs are pointed out the facts required to be shown by the statement. They are all designed to compel from the taxpayer a disclosure of the taxable property owned by him, not taxable property owned by some other person. Paragraph 5 makes it the duty of the owner of mortgages, deeds of trust, etc., to return the same. It is not made the duty of the owner of the mortgaged land to return the mortgages held by his mortgagee. Section 3630 makes provision for blank forms for statements mentioned in section 3629. Section 3631 provides that "the assessor may fill out the statement at the time he presents it, or he may deliver it to the person and require him, within an appointed time, to return the same to him, properly filled out." Section 3632 gives the assessor power to require every person found within his county to subscribe an affidavit, giving his name and residence; to subpœna and examine any person in relation to any statement furnished to him; and, under certain restrictions, a refusal to make the statement required by law, or to appear or to make the affidavit above referred to, may for each refusal work a forfeiture of $100 to the people of the state. Section 3633 provides that "if any person, after demand made by the assessor, neglects or refuses to give, under oath, the statement herein provided for," etc., the assessor must estimate the value of the property of the person so refusing, and transmit the same to the board of supervisors, with a statement of the facts. The board must thereupon require each taxpayer affected by such assessment to make a statement under oath, etc., and if any taxpayer, after demand, shall neglect or refuse to deliver to the board the statement provided for under oath, etc., the board, sitting as a board of equalization, "must increase such assessment and valuation to such an amount as the said board shall deem just; but the value fixed by the assessor must not, in any case, be reduced by the board of supervisors." Section 3650 provides that the assessor "must prepare an assessment book * * * in which must be listed all the property within the county, under the appropriate head: 1. The name of the person to whom the property is assessed." Then follow numerous subdivisions designating the various kinds of property, real and personal. "15. When any property, * * * is subject to or affected by a mortgage, deed of trust, contract or other obligation by which a debt is secured, he [the assessor] must enter in the proper column the value of such security, and deduct the same," etc. Section 3627 provides: "* * * In case of debts so secured, the value of the property affected by such mortgage, * * * less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof," etc. Section 3678 provides: "To assist the assessor in the performance of his duties, the recorder must annually transmit to the assessor, * * * a complete abstract of all mortgages * * *. Such abstract shall be written under appropriate headings, to embrace all information requisite for the assessor," etc.

It is claimed by respondent that the property owner who fails to make the statement under section 3629 is in no position to complain of any error the assessor may make unless the assessment is void upon its face; citing City and County of San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; Orena v. Sherman, 61 Cal. 101. It is also claimed that it is the duty of the taxpayer to disclose to the assessor the nature and amount of the mortgage secured by his land, failing in which he cannot be heard to complain, and the assessor may make the arbitrary assessment contemplated by section 3633. Orena v. Sherman is very briefly reported, but I think it sufficiently appears to be a case where the assessor had demanded a statement under section 3629, and the taxpayer had refused to make it. In City and County of San Francisco v. Flood the question was whether the term "mining stock" was a good description of personal property. Respondent relies upon the following remarks in the opinion: "If the description was taken from a list furnished by the defendant, * * * he ought not to be heard to complain of the insufficiency of the description. If made by the assessor without the aid of such list, the assessor has given a description as certain as could reasonably be required of him, and under such circumstances the defendant's objection to the assessment should be disregarded." The case goes no further than to hold that, where the description is intelligible, the taxpayer cannot complain if he has failed to make the statement mentioned in the statute. It does not decide, nor was the question involved, that the taxpayer who neglects to make a statement is conclusively bound in all respects by the statement made out by the assessor. We do not think the assessor is authorized to make an arbitrary assessment under section 3633 except upon the neglect or refusal of the taxpayer to give the statement "after demand made by the assessor." The statute plainly so declares. There is no question here of overvaluation of plaintiff's property, and an appeal by plaintiff to the board of equalization would not have resulted in reducing the assessed valuation of his land; for he did not, and does not, complain of the valuation. The board would have had the power to direct the assessor "to enter upon the assessment book any property which has not been assessed" (section 3679), which would have included the mortgage in question; but, in this case had the board so directed, the mortgage, which was omitted from the assessment book, could not have been taxed, as it was state property. Hollister v. Sherman, supra. And the board of equalization is nowhere given authority to direct the assessor to enter on the assessment book the value of any security resting upon land which is taxed, and deduct the same from the assessed value of the land. That is a duty directly devolved upon the assessor, which we think the taxpayer has a right to presume has been performed or will be performed, whether the taxpayer makes a statement or not. If the assessor should demand a statement, the law only requires the taxpayer to include therein all his taxable property; and an omission on his part to call attention to a mortgage resting upon his land would not relieve the assessor from discharging his duty, which is to assess the land to its owner at its value, and to assess the mortgage thereon to the holder, and deduct the value of the mortgage from the value of the land as assessed. It is the duty of the assessor to enter the facts upon the assessment of the owner of the land. Knott v. Peden, 84 Cal. 299, 24 Pac. 160. There is no power given the assessor by section 3633 to arbitrarily assess the mortgage to the owner of the land, by way of penalty or otherwise, nor to refuse or neglect to deduct it from the value of the land, because the landowner has omitted to make a statement, or to do so even where he has refused, upon demand, to make a statement. The assessor may in the latter case fix his own valuation on the land, but he must also deduct therefrom the value of the mortgage, and assess it to the holder.

It cannot be presumed, as respondent urges, that the assessor has actually made the proper deductions, although he failed to so state on the assessment roll. The law requires the assessor to enter the value of the security in the proper column for such entry, and deduct the same. The copy of the assessment set out in the complaint shows that there was an appropriate column for such an entry, but the assessor failed to enter therein the value of the security, or make any deduction on account of it. There was no excuse for this, for he is furnished by the county with a list of all mortgages. So far from his being protected by a presumption that he discharged his duty, the complaint shows a plain neglect of duty.

If the assessor willfully omits to assess a mortgage, he is liable on his bond for the taxes (section 3660); and, if the mortgage escapes taxation, it may be doubly taxed the following year, if still owned by the same person (section 3649). But, while these provisions are intended to protect the tax fund, they do not relieve the mortgagor, who has not received the benefit of the deduction. If he pays his tax under protest, in compliance with the provisions of section 3819, he may recover back the tax paid by him upon the amount of the mortgage which he was entitled to have deducted from the assessment against his land. The judgment should be reversed, and the cause remanded.

We concur: HAYNES, C.; GRAY, C.

McFARLAND, J. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

TEMPLE, J. I concur in the judgment solely upon the ground that the taxpayer is not subjected to the penalty of a so-called arbitrary assessment for failure to furnish to the assessor a list of his taxable property unless such list has first been demanded by the assessor. It does not appear in this case that such a list was demanded. I do not concur in the apparent intimation that, though such list has been demanded, the taxpayer could complain if he did not furnish a list which would show the mortgages to which the property is subject. If the list does not show the mortgages, in my opinion, it would not constitute such a list of his taxable property as is required. If the opinion can be understood as holding that only when the taxpayer has failed to return a list is the assessor entitled to value the property, or change values made by the taxpayer, I also dissent from that view. In my opinion, it is always the duty of the assessor to value the property for himself, and that in all cases he not only may, but should, refuse to be bound by the valuations made by the taxpayer. I doubt the propriety of the term "arbitrary assessment." See People v. National Bank of D. O. Mills & Co., 123 Cal. 55, 55 Pac. 685.

I concur: HENSHAW, J.

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127 Cal. 450

In re McDERMOTT'S ESTATE. (L. A. 821.)

(Supreme Court of California. Jan. 16, 1900.)

EXECUTORS AND ADMINISTRATORS—APPEAL—APPEAL BOND—NECESSITY—APPEAL BY SURETY—PARTIES AGGRIEVED.

1. Code Civ. Proc. § 965, providing that, when an administrator who has given an official bond appeals from a judgment affecting his estate, his bond shall stand in lieu of an appeal bond, does not exempt a former special administratrix who had resigned prior to her taking the appeal.

2. An administrator who invokes an order accepting his resignation and appointing his successor cannot complain that the order was made before his accounts were settled.

3. A surety on an administrator's bond, who is not a party to a judgment against his principal, cannot appeal therefrom, since he is not a party aggrieved, as required by Code Civ. Proc. § 938.

In bank. Appeal from superior court, Los Angeles county.

Judicial accounting of Carrie McDermott, special administratrix of the estate of William McDermott, deceased. From an order disallowing her account, she and the Fidelity & Deposit Company of Maryland, a surety on her bond, appeal. Dismissed.

Miller & Brown and A. J. Sherer, for appellants. Z. Montgomery, for respondent.

McFARLAND, J. The transcript shows two appeals,—one by Carrie McDermott, who was at one time the special administratrix of the estate of William McDermott, deceased, and the other by the Fidelity & Deposit Company of Maryland, a corporation, claiming to have been surety on a bond of said Carrie as such special administratrix; and the case is now before the court on a motion to dismiss said appeals. The appeals are from an order of the lower court made June 23, 1899, disallowing an account of said Carrie as such administratrix.

There is no bill of exceptions as provided for in rule 29 of this court, and no attempt to otherwise identify the papers and evidence used on the hearing of the motion in the court below, and therefore one of the grounds of the motion to dismiss, applicable to both appeals, is want of a properly authenticated record on appeal; but we do not deem it necessary to determine whether in this particular case the defect in the record is ground for dismissing the appeals, or whether it would only have been ground for affirming the judgment had the whole case been submitted, because we think that each appeal must be dismissed upon other grounds stated in the motion.

One of the grounds for dismissing the appeal of Carrie McDermott is that she gave no undertaking on appeal. The fact that she gave no such undertaking is admitted; but she contends that her bond as special administratrix stands in lieu of an undertaking on appeal, under section 965, Code Civ. Proc., which provides that when an executor, administrator or guardian, who has given an official bond appeals from a judgment or order made in proceedings had in the estate of which "he is the executor, administrator or guardian," his official bond shall stand in the place of an undertaking on appeal. But when this appeal was taken the said appellant was not the administratrix of said estate. On June 13, 1899, she filed her written resignation as administratrix, and in said resignation requested that C. G. Kellogg, public administrator, be appointed special administrator of the estate. On the same day Kellogg filed his petition for appointment as special administrator, in which he stated that appellant Carrie, who was the widow of the deceased, requested his appointment; and on the next day, June 14th, the court appointed Kellogg as such administrator. This appeal was not taken until August 17, 1899, more than two months after she had resigned, and her successor had been appointed at her request. The covenants of an administrator's bond do not make it, on its face, an undertaking on appeal, and it becomes such, under certain circumstances, only by virtue of the provision of said section 965; and, as a surety always stands strictly on the terms of his contract, he cannot be charged by virtue of the section of the Code relied on unless he be within its strict terms. But the Code provision covers only the case of an appeal taken by one who at the time of the appeal is administrator, and does not include a case where the appealing party is not an administrator. Nor are we called upon to examine the point, now made here by appellant, based upon section 1427, Id., that the action of the court in accepting her resignation and appointing her successor before her accounts had been settled was erroneous or invalid. Having herself invoked that action by the court, she cannot now be heard to assail it. For the foregoing reasons, her appeal must be dismissed.

2. The appeal of the Fidelity & Deposit Company must be dismissed because it is not

a "party aggrieved," who has a right to appeal within the meaning of section 938, Code Civ. Proc. It bases its right to appeal upon the fact that it was surety on the bond of the other appellant, Carrie. The transcript does not really show, by anything that is properly a part of the record on this appeal, that said company was surety on said bond; but, if we assume that to be a fact, it has still no standing here as an appellant. A surety, merely as such, has no right to appeal from a judgment against the principal. In order to be entitled to an appeal under the section of the Code above referred to, a person must have been a party to the action or proceeding in the court below. This does not mean that he must have been an original party when the action or proceeding was first instituted, but he must have made himself a party afterwards by some appropriate action, and the record must show that he was such a party. This is the general rule, and this case is not an exception. Hayne, New Trials & App. § 203, and cases there cited; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082. In the case at bar this appellant did not seek to intervene or to appear in any way in the court below before the decision from which he seeks to appeal, nor did he afterwards move to set aside or in any way attack the order. The transcript contains a copy of what is called a "petition in intervention" made by the appellant after the order appealed from, in which it prays "that it be permitted to intervene in the above court and cause, and become a party thereto, for the purpose of appeal from said order to the supreme court of the state of California, and that it be permitted to so appeal"; and there also appears in the transcript what purports to be a copy of an order of the court giving permission to file the intervention, "and to appeal from the order of the superior court," etc. It can hardly be gravely claimed that this petition and order are authenticated parts of the record on this appeal; but, even if they could be so considered, there can be no intervention after trial and judgment, and an order of the court below allowing the appeal has no significance whatever. The motion to dismiss said two appeals is granted, and both said appeals are hereby dismissed.

We concur: HARRISON, J.; VAN DYKE, J.; GAROUTTE, J.; HENSHAW, J.; TEMPLE, J.

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127 Cal. 347

PEOPLE ex rel. BARKER v. SHAVER.

(L. A. 749.)

(Supreme Court of California. Dec. 29, 1899.)

SUPERVISOR — ELECTION — NOTICE — FORFEITURE—OFFICIAL BOND—TIME FOR FILING—VACANCY.

Pol. Code, pt. 3, tit. 2, c. 11, provides for the canvass of election returns by the board of supervisors. Section 1284 provides that the county clerk, on the result of the election being ascertained by the supervisors, shall deliver to the successful candidates certificates of election. Section 907 provides that the oath of office of a supervisor must be subscribed and filed within 10 days after he has notice of his election, or within 15 days from the commencement of his term of office, when no such notice has been given. Respondent was re-elected to the office of supervisor, and, as chairman of the board, signed the minutes of that body so certifying. The term to which he was elected began on the 1st day of January, 1899. Prior thereto he filed an official oath and bond. The bond was void. The county clerk had never issued a notice of election to respondent. Within 15 days after the commencement of his term, respondent executed and filed a sufficient bond. *Held* that, though a member of the canvassing board, he was entitled to notice from the clerk, and his abortive attempt to file a bond and oath of office did not work a forfeiture of his right thereto; and hence, a sufficient bond having been filed within 15 days after the commencement of the term, there was no vacancy in the office, to which the governor could appoint another.

Department 2. Appeal from superior court, Riverside county.

Proceedings in the nature of quo warranto in the name of the people, on the relation of one Barker, against John Shaver, to determine the title to the office of supervisor of the Fifth district of Riverside county. From a judgment in favor of respondent, relator appeals. Affirmed.

Atty. Gen. Ford, W. C. Van Fleet, and John G. North, for appellant. Purington & Adair and Thos. H. Parteone, for respondent.

HENSHAW, J. This action is prosecuted, under section 803 of the Code of Civil Procedure, to have it declared that the defendant unlawfully holds and exercises the office of supervisor of the Fifth supervisor district of Riverside county, and that the relator, Barker, is entitled to the office. The facts are not in dispute. They are the following: The defendant was elected to the office at the general election in 1898. At that time he was a supervisor and the chairman of the board of supervisors of the county. As required by law, the board canvassed the returns of the election, and entered the result in its minutes. Shaver presided as chairman of the board, participated in the canvass, and in the action of the board declaring the result, and signed the minutes of the board to that effect. On November 21, 1898, with the purpose and intent of qualifying for the office, he executed and filed an official bond in which it was declared that he had been elected to the office. The bond was insufficient and void. He did not take the oath of office until December 24, 1898, on which date, with the same purpose and intent to qualify for the office of supervisor, he took the oath of office; and on December 26, 1898, it was filed in the office of the county clerk. The new term of office commenced upon the —— day of January, 1899. Thereafter, on January 5, 1899, Shaver executed and filed an official bond sufficient in form, and took and filed his official oath of office, which was attached to the bond. On March 7, 1899, the governor appointed the relator to fill the vacancy caused by the failure of the defendant to file his official oath and bond within the time required by law. The relator made and filed his official oath and bond within 10 days after his appointment. Upon these facts, judgment passed for Shaver. Upon this appeal it is contended that upon the face of the record it is made to appear that Shaver had actual notice of his election sufficient to meet the requirements of section 907 of the Political Code; that thereupon it became incumbent upon him, under the provision of that section, to take, subscribe, and file his oath of office within 10 days; that this, admittedly, Shaver failed to do, or, if it was not his duty to act under the notice, still, by acting as evidenced by his abortive attempt to file an undertaking and oath of office, he waived any right which he might otherwise have had to any other notice, and is bound by the result of his own conduct; that in either aspect of the case he forfeited his right to the office to which he had been elected, and a vacancy therein existed, to which the relator was duly appointed, and for which he had duly qualified; that the judgment of the trial court should therefore be reversed, and it should be directed to enter a judgment upon the admitted facts in favor of the relator.

Chapter 11, tit. 2, pt. 3, of the Political Code deals with the canvass of returns in elections, provides for a meeting of the supervisors for that purpose, for the mode of making the canvass, for the entering of the result in their minutes, with a declaration of the names of the persons elected. Section 1284 of the Political Code then provides, "The county clerk must immediately make out and deliver to such person * * * a certificate of election signed by him and authenticated with the seal of the superior court." Section 907 of the Political Code provides: "Whenever a different time is not prescribed by law, the oath of office must be taken and subscribed and filed within ten days after the officer has notice of his election or appointment, or before the expiration of fifteen days from the commencement of his term of office when no such notice has been given." The notice here contemplated and provided for is the notice contained in the certificate of election required to be delivered by the county clerk. People v. Perkins, 85 Cal. 512, 26 Pac. 245. Each officer elect is entitled to receive such notice, and actual knowledge will not supply the place of it. The requirement that the county clerk shall issue a certificate, and thus bring notice home to the successful candidate, is something more than a provision designed for his private advantage, and which may therefore be waived by him at pleasure. It is the mode prescribed for the orderly announcement of the result of an election, and is as much a part of the machinery of the election as are the provisions for the canvassing of the returns and the registration of the result. All are parts of the same scheme, and all are based upon considerations of public policy. State v. Meder (Nev.) 38 Pac. 669; People v. North, 72 N. Y. 128. No potency attaches to the circumstance that Shaver was chairman of the board of supervisors and signed the minutes, so that, as appellant states, it appears of record that he had notice of the result. The records of the board of supervisors were not designed to charge any person with notice of the result of the election, and should not be held to do so in the case of a member of the board of supervisors, any more than in the case of any other officer elect whose interest and curiosity might prompt him to read them. Each officer was entitled to the notice provided for by law, and could rest secure until such notice was given. Shaver's attempt, admittedly abortive, to anticipate this notice by filing a bond and oath of office, should not be held to work a forfeiture of his right. The notice not having been given, it became the duty of Shaver, under section 907 of the Political Code, to qualify before the expiration of 15 days from the commencement of his term; and this, admittedly, he did. It resulted therefrom that there was no vacancy in the office. The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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127 Cal. 327

MILLER et al. v. CARLISLE et al. (Sac. 584.)

(Supreme Court of California. Dec. 29, 1899.)

MECHANICS' LIENS — SEVERAL CLAIMANTS — JOINT ACTION — PERSONAL JUDGMENT — RENDITION — JURISDICTION OF SUPERIOR COURT.

1. Where a mechanics' lien is defeated in an action to enforce the same in the superior court, it cannot render a personal judgment in favor of the claimant for a sum less than $300, its minimum jurisdiction under Const. art. 6, § 5.

2. Where several mechanics' lien claimants join in an action under Code Civ. Proc. § 1195, in the superior court, a personal judgment rendered, where their liens are defeated, must be several in favor of each plaintiff, where there is no evidence of a joint debt; and hence the demands cannot be aggregated to give the court jurisdiction to render judgment where each separate claim falls below the amount required by Const. art. 6, § 5.

Commissioners' decision. Department 2. Appeal from superior court, Butte county.

Action by William T. Miller and others against J. O. Carlisle and others. There was a judgment for plaintiffs, and defendant Carlisle appeals from an order denying a new trial. Reversed.

Hudson Grant, for appellant. Warren Sexton, for respondents.

BRITT, C. The plaintiffs, five in number, united in this action to enforce their several alleged liens for labor done by them, respectively, upon certain mining ground at the instance of the defendants Carlisle and Boggs. Such liens are asserted in virtue of the statute relating to liens of mechanics and others upon real property (Code Civ. Proc. § 1183 et seq.). The demand of each plaintiff is set forth in a separate count of the complaint, and the sum claimed is in each instance less than $300, though the aggregate of the several claims is above $1,100. After trial the court below made findings declaring, among other things, that "the liens of plaintiffs do not attach to said land," but that there is due to the plaintiffs from the defendants Carlisle and Boggs personally the sum of $652. Judgment against said defendants was accordingly entered in favor of the plaintiffs jointly. Carlisle moved for a new trial, which was denied, and he has appealed from the order made in that behalf.

The statute pertaining to this subject provides that "any number of persons claiming liens may join in the same action, and when separate actions are commenced the court may consolidate them." Code Civ. Proc. § 1195. Under the constitution (article 6, § 5) the superior court has no jurisdiction in cases at law for the recovery of pecuniary demands below $300 in amount; and the appellant insists that since the plaintiffs failed to establish their liens, and the sums of money claimed by them being severally less than $300, the court should have refused to consider any evidence of the personal liability of defendants, for the reason that the claims against them personally were not within the jurisdiction. The matter is of some importance, since claims of the class here involved are very commonly for less than $300, and the holders must proceed in the superior court to enforce their liens if they proceed for that purpose at all. It is convenient that the jurisdiction to enforce the personal liability of any defendant, although the lien fails, should be upheld in such cases, if the constitution permits. We regret that we have not been favored with a brief presenting the views of respondents on the question.

The cumulation of the several claims in one action we take to be a false quantity in the case. If the court has no jurisdiction to render personal judgment under such circumstances on one demand less than $300 in amount, then the aggregation of any number of similar, but independent, demands of different plaintiffs cannot confer jurisdiction; for, of course, the judgment, if rendered, must be several in favor of each plaintiff. The cases of Larrieux v. Slaughter-House Co., 30 La. Ann. 609, and Railroad Co. v. Hopkins, 33 La. Ann. 806, explained somewhat in Succession of Justus, 47 La. Ann. 304, 16 South. 841, are much in point; and see Derby v. Stevens, 64 Cal. 287, 30 Pac. 820; Thomas v. Anderson, 58 Cal. 99. If, then, Miller, for instance, had sued alone to enforce the lien claimed for the amount due him from defendants, which he alleged to be the sum of $208.50, and which the court found to be $158.80, the question is whether the court had power, the lien being defeated, to render judgment against defendants personally for the latter sum. It is in the exercise of its jurisdiction in equity that the superior court entertains suits to enforce the liens of mechanics and others provided for in the present statute. Curnow v. Gravel Co., 68 Cal. 262, 9 Pac. 149; Brock v. Bruce, 5 Cal. 279. In those courts where the sphere of equity remains distinct from that of law, if a complainant fails to establish at the trial the allegations of his bill which on their face appear to entitle him to some equitable relief, the rule is to dismiss his suit, although he may prove also that he has a demand cognizable at law; the reason being that the court is without jurisdiction to proceed further. Accordingly, in a suit in a federal circuit court to foreclose a mortgage made to secure a promissory note, the proof at the trial showed that the mortgage was invalid, and it was held that the court, sitting in equity, had no power to render judgment for the sum due on the note, and should dismiss the bill without prejudice. Dowell v. Mitchell, 105 U. S. 430, 26 L. Ed. 1142. To similar effect are Kramer v. Cohn, 119 U. S. 355, 7 Sup. Ct. 277, 30 L. Ed. 439; Rose v. West, 50 Ga. 474; Gamage v. Harris, 79 Me. 531, 11 Atl. 422, and cases cited; Daniell, Ch. Prac. (6th Am. Ed.) pp. *555, *630, and notes. Of course, that rule can have no general application under our system, where law and equity are amalgamated and administered in but one form of action, and in the same tribunal. With us it is nothing uncommon to render judgment for money due to the lien claimant from a defendant personally liable to him, although the lien itself fails of enforcement. Lumber Co. v. Priet, 113 Cal. 291, 45 Pac. 336; Lacore v. Leonard, 45 Cal. 394; Boisot, Mech. Liens, § 653. But in no such instance to which our observation has extended did it appear that the pecuniary demand involved was less than the court had jurisdiction to consider in an action founded on that alone; and the rule in equity illustrated by Dowell v. Mitchell, and other cases above cited, is certainly not more peremptory than the provision of the constitution which forbids the superior court to take cognizance of an action at law to recover money less than $300 in amount. We must hold, therefore, that, since the right of the superior court to entertain the present action arose solely from the incident of the liens and the foreclosure asked, then, on proof and findings at the trial that no lien existed, the court was without jurisdiction to give judgment for money against the defendants.

We do not overlook the principle that in ordinary legal actions the so-called ad damnum clause of the complaint, when stated in good faith (Fix v. Sissung [Mich.] 21 Am. St. Rep. 616, and note [s. c. 47 N. W. 340]) affords the test of jurisdiction, and if the amount equals or exceeds $300 the superior court obtains jurisdiction, and may render judgment for any lesser sum the evidence may justify (Dashiell v. Slingerland, 60 Cal. 653). In such case, however, the money demand is the substantive ground of jurisdiction, and the relief allowed does not differ in kind from that prayed for. It is the larger demand which is litigated, not alone the part of it which is recovered. But in the present case the sum of money involved is not the substantive ground on which the jurisdiction of the superior court rests in any degree. The jurisdiction must be supported, if at all, on a mere incident of the debts claimed by the plaintiffs respectively, viz. the lien and the equitable remedy of foreclosure; and since the lien fails, and the court can administer no equitable relief whatever, it must logically follow that the residue of the action—a dispute concerning money less than $300 in amount—can no longer engage the attention of the court. It may be added that there was no evidence of any indebtedness of the defendants to the plaintiffs jointly. The finding of the court on which followed the judgment that plaintiffs together recover the sum of $652 was therefore without support. The order denying a new trial should be reversed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is reversed.

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127 Cal. 431

BLYTHE v. HINCKLEY. (S. F. 1,548.)

(Supreme Court of California. Jan. 4, 1900.)

STATUTES—CONSTRUCTION—RIGHT OF ALIEN TO TAKE LAND—CONSTITUTIONAL LAW.

1. Since Civ. Code, § 671, declaring that any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within the state, is not in conflict with the provisions of any treaty between the United States and Great Britain, and is not an invasion of the treaty-making powers of the government, a nonresident British subject may inherit land in the state.

2. Since Const. art. 1, § 17, declaring that foreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state, shall have the same rights in respect to the acquisition, transmission, and inheritance of property as native-born citizens, is not a limitation on the right of the legislature to extend similar privileges to other foreigners or aliens, Civ. Code, § 671, providing that any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within the state, is not in conflict therewith.

3. Since Civ. Code, § 671, providing that any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within the state, confers a right to be enjoyed within the state, it is operative to cast descent on a nonresident alien.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Boswell M. Blythe against Florence Blythe Hinckley. From a judgment in favor of defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

S. W. & E. B. Holladay (L. D. McKisick, of counsel), for appellant. W. H. H. Hart, Garber, Boalt & Bishop, and W. W. Foote (A. R. Cotton, of counsel), for respondent.

HENSHAW, J. The purpose of this action was to recover from defendant certain land in the city and county of San Francisco. Plaintiff claims as an heir at law of Thomas H. Blythe, deceased. Without setting forth in detail the matters charged, it will be sufficient to say that the complaint pleads the proceedings and the judgments of the superior and supreme courts of this state, under which it was decreed that Thomas H. Blythe had instituted Florence Blythe (now Florence Blythe Hinckley) as heir, and the subsequent decree of the court distributing the property in question to her. The facts and the judgment to which reference has thus been made will be found at length in the action entitled "Florence Blythe v. Abbie Ayres et al." (96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40). It is contended by this bill that the judgments of the superior court and of this court so decreeing are absolutely void, and that plaintiff, as one of the heirs at law of Thomas H. Blythe, deceased, should have judgment to that effect. A general demurrer was sustained to this bill, and plaintiff, declining to amend, appeals from the judgment thereupon entered against him.

In support of the complaint it is urged that Florence Blythe at the time of descent cast was an alien and British subject, who had never been within the jurisdiction of the United States or of the state of California, and that the state of California had and has no power to extend to such nonresident aliens the right to inherit real estate within its territorial domain, in the absence of a treaty provision to that effect between the United States and the country of such alien; that sections 230 and 1387 of the Civil Code, as applied to the case of such a nonresident alien, are without effect; that section 671 of the Civil Code is in violation of section 10 of article 1 of the constitution of the United States, which declares that "no state shall enter into any treaty, alliance or confederation," and is in violation of section 17 of article 1 of the constitution of the state of California, which, it is argued, limits the right of succession to the classes designated in the following language: "Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property as native born citizens."

It has been affirmed and reaffirmed in the decisions of the supreme court of the United States that the question of the possession, enjoyment, and inheritance of property is the proper subject-matter of treaty by resident or nonresident aliens. Thus, to employ but one quotation, in Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642, it is said (page 266, 133 U. S., and page 296, 10 Sup. Ct., and page 645, 33 L. Ed.): "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries." This principle was early recognized in this state in the case of People v. Gerke, 5 Cal. 381. It need scarcely be said that at common law an alien was not of inheritable blood, and that disability still attaches in this state, saving where it has been removed by express law. By section 671 of our Civil Code it is declared that "any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state." Here is an express removal of the disability to which we have referred, and, if it be a valid law, it is determinative of appellant's contention. It is conceded that the treaties between Great Britain and this country are silent upon the subject. We are not, then, confronted with the case of a state law in declared conflict with the provision of a treaty, in which instances it is, of course, uniformly held that the treaty is the paramount law. Opel v. Shoup, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Orr v. Hodgson, 4 Wheat. 453, 4 L. Ed. 613. But by appellant it is insisted that the very silence of our treaties with Great Britain upon the question is the equivalent of an express denial to its subjects of the right to inherit within our republic, and that therefore a conflict arises, and section 671 becomes void, as an illegal attempt to encroach upon the treaty-making power of the general government. But this view, we think, finds little favor either in principle or in authority. A state has the undoubted right to regulate the tenure and disposition of the real property within its boundaries, and such regulations always have been and should be held valid except where they conflict with the express provisions of a higher law. Thus, in U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192, it is said: "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established rule of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." See, also, Investment Co. v. Caldwell, 152 U. S. 65, 14 Sup. Ct. 504, 38 L. Ed. 356; Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; Beard v. Rowan, 9 Pet. 301, 9 L. Ed. 135. And this right to regulate the tenure and disposition of real property within its boundaries is not only in the state, but it is primarily in the state (Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628), and is subject only to such control as may be exercised by the general government within its treaty-making power. Therefore it will be found that the supreme court of the United States nowhere declares state laws upon the subject to be void as an invasion of the treaty-making power, but uniformly upholds the laws when not in conflict with the express provisions of a treaty, as in the case of Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396, where the question was of the right of an alien subject of Great Britain to inherit, and the court held that the laws of Texas governing the rights of aliens to inherit property in that state were of controlling force. And, even in those cases where there is a conflict between the provisions of the state law and those of the treaty, it is not held that the state laws are void as an unwarranted interference with or encroachment upon the powers of the federal government. It is held merely that such laws, in so far as they conflict with the treaty provisions, are suspended during the life of the treaty. Thus, in Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642,—the question being as to the effect of the provisions of a treaty with France upon the laws of Maryland which were in operation in the District of Columbia,—it is said: "The treaty, being part of the supreme law of the land, controls the statute and common law of Maryland whenever it differs from them. * * * The treaty expired by its own limitation in eight years, pursuant to an article inserted by the senate. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States, but after its expiration that right was limited as provided by the statute and common law of Maryland." It is concluded, therefore, upon this proposition that the sections of our Civil Code which have been under consideration are not in conflict with the provisions of any treaty between the United States and Great Britain, and are not an invasion of the treaty-making powers of the United States government.

The argument that section 671 is inoperative to cast descent upon defendant, for the reason that the laws of the state can have no extraterritorial force, seems to be fully answered by the language of this court in State v. Smith, 70 Cal. 153, 12 Pac. 121, where it is said, discussing this very section: "It is suggested that, inasmuch as laws can have no extraterritorial operation, the legislature has no power to provide for succession by foreigners who had never been residents, but the section of the Code provides a rule with respect to property within the state. It confers a right to be enjoyed within the jurisdiction."

The further contention that section 671 of the Civil Code is void because in conflict with section 17 of article 1 of the constitution of the state of California rests for its support upon the argument that the language of the constitution is a limitation upon the power of the legislature. But to give it such an interpretation would be to do violence to fundamental rules of construction. By section 17, foreigners of the indicated classes may not be deprived of the rights which the constitution secures to them. But there is in this no withdrawal from the legislature of its general powers, nor any limitation upon its right to extend similar privileges to other foreigners or aliens. State v. Rogers, 13 Cal. 160. It follows from the foregoing that the order of court sustaining defendant's demurrer was properly made, and the judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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127 Cal. 417

SOUTHERN CALIFORNIA RY. CO. v. SUPERIOR COURT OF SAN DIEGO COUNTY. (S. F. 1,262.)

(Supreme Court of California. Dec. 30, 1899.)

CERTIORARI—APPEALABLE ORDERS—REVIEW.

Under Code Civ. Proc. §§ 939, 1068, authorizing appeals from special orders after final judgment, certiorari will not lie to review an order of a trial court striking a stay bond, on appeal from a final judgment, from the files, and directing the sheriff to turn over to the judgment creditor money received by him on an execution on the judgment appealed from prior to the filing of the bond.

In bank. Petition by the Southern California Railway Company against the superior court of San Diego county for a writ of certiorari to review the action of the court in striking an order from the files, and ordering the sheriff to pay over certain moneys to a judgment creditor. Writ dismissed.

C. N. Sterry and H. J. Stevens, for petitioner.

VAN DYKE, J. In an action by Amelia B. Baker and husband against the Southern California Railway Company, petitioner herein, tried in the superior court of San Diego county, plaintiffs recovered judgment, from which judgment, and an order denying a new trial, the petitioner, as defendant therein, appealed on October 9, 1897; and on October 21st said defendant filed an undertaking on appeal, which, by reason of certain defects, was insufficient to stay execution of the judgment. Prior to the filing of said undertaking, execution was issued on the judgment, and notice of garnishment served upon the First National Bank of San Diego. On October 22, 1897, upon notice served, the judge of the superior court ordered the garnishee to pay to the sheriff an amount of money sufficient to satisfy the judgment, being about $150; but before any payment was made under said order the defendant therein, petitioner here, filed another bond, sufficient in form to stay the execution of the judgment. Thereafter, upon motion of plaintiffs' attorney in said action, the court made an order striking said last undertaking from the files of the court, and directing the sheriff to turn over the money received by him under such garnishment to the plaintiffs. The defendant in said action seeks, under writ of review issued herein, to have these orders annulled.

Respondent urges the dismissal of this proceeding on the ground that certiorari or review is not the proper remedy, inasmuch as the writ of review cannot issue where there is an appeal, and that, the orders complained of being special orders after final judgment, an appeal lies therefrom. Code Civ. Proc. §§ 939, 1068. This contention is practically conceded on the part of the petitioner, provided the case of Harron v. Harron, 123 Cal. 508, 56 Pac. 334, decided since this proceeding has been pending, is to apply in this case; but it is claimed by petitioner that at the time of filing the petition here, and up to the decision of Harron v. Harron, it has been uniformly held by this court that an appeal would not lie in a case like this, and that therefore the old rule should govern. The following cases are referred to in support of petitioner's contention: Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864; Langan v. Langan, 83 Cal. 618, 23 Pac. 1084; Id., 86 Cal. 132, 24 Pac. 852; Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795; Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101; Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740; Foley v Horseshoe Co., 115 Cal. 184, 47 Pac. 42. Oullahan v. Morrissey was an appeal from a judgment of the superior court, and the court say: "The plaintiff, having consented to the entry of the judgment against himself, cannot appeal from it, or, if he can, can be heard only as to that portion as to which he did not consent. That in this case is, at the most, the demand for costs, which, being less than three hundred dollars, does not give this court jurisdiction." Langan v. Langan was an appeal from an order pendente lite directing the defendant to pay plaintiff $25 per month alimony, and another order to pay $150 counsel fees, which appeals were dismissed, as stated by the court, "because the amount in dispute is too small to give the court jurisdiction." The second appeal in the same case, in 86 Cal. and 24 Pac., was also for temporary alimony and counsel fees entered before judgment. Sellick v. De Carlow was an appeal from an order denying motion to strike out plaintiff's cost bill, and the court (department 2), in its opinion, says: "We deem it proper to say, however, for future guidance, that the question whether or not this court has jurisdiction of an appeal from a separate, independent order made after final judgment, involving money only, and in an amount less than three hundred dollars, must be considered at least an open question." Fairbanks v. Lampkin was also an order taxing a cost bill, the amount of which was $171.20, and the court (department 2) say: "An order made after final judgment is a separate, independent proceeding, and when it involves money only, and the amount involved is less than three hundred dollars, this court has no jurisdiction, under the constitution, of an appeal from such order." The court, after referring to former decisions, say, "And, assuming the question to be an open one, we are satisfied that we have no jurisdiction of this appeal." This is the first instance where it is clearly held that in an order made after final judgment, even in a separate, independent proceeding involving money only, in an amount less than $300, an appeal will not lie. Perry v. Quackenbush was an appeal from the judgment, and from an order refusing to strike out the cost bill. After considering the appeal from the judgment, Commissioner Temple, who wrote the opinion, in reference to the appeal from the order, says, on the authority of Fairbanks v. Lampkin, supra: "The amount of the costs claimed was less than three hundred dollars. This court, therefore, has no jurisdiction to hear the appeal." Foley v. Horseshoe Co. was an appeal from a judgment and order denying a new trial, and from an order denying a motion to set aside the judgment taxing costs, and the separate appeal from the order taxing costs was dismissed on the authority of Fairbanks v. Lampkin.

As said in Harron v. Harron, Fairbanks v. Lampkin was decided mainly upon the authority of Langan v. Langan, and was based upon the proposition that the amount of money involved in the appeal was determinative of the jurisdiction of this court; but the appellate jurisdiction of this court includes all appealable orders that may be taken in a case which is within its jurisdiction, and it follows therefrom that the amount of money involved in an appealable order is not the test for determining its jurisdiction. And the court adds: "The correctness of the decision in Fairbanks v. Lampkin, supra, was, moreover, never brought before the court in bank; and, as it establishes no rule of conduct or of property, we have less hesitation in holding that, to the extent that it is inconsistent with the views here presented, it is not to be regarded as authority." The constitution confers upon this court appellate jurisdiction, among other matters, "in all cases at law which involve the title or possession of real estate," and this without regard to the money value involved. The action of Baker v. Railway Co. falls under this branch of jurisdiction, as was determined in the appeals taken from the judgment therein in 110 Cal. 455, 42 Pac. 975, and 114 Cal. 501, 46 Pac. 604, and (L. A. 483; opinion filed Oct. 31, 1899) 58 Pac. 1055. Under the former practice, as well as under the Code, all special orders made after final judgment are made appealable, without reference to any amount in value that may be involved in the order. And also, under the former practice, as well as under the Code, the writ of certiorari or review would not lie where there was an appeal. Gilman v. Contra Costa Co., 8 Cal. 52, was an appeal from an order overruling a motion to quash an execution and discharge a levy. The court say: "The first question presented is whether an appeal will lie in such a case. The 336th section of the practice act gives an appeal from 'any special order made after judgment';" and, after defining what an order is, within the meaning of the law, the court held that the one in question was appealable. In McCullough v. Clark, 41 Cal. 298, the court held an order directing the application of certain property in proceedings supplemental to execution appealable. In Mayor, etc., v. Fulton, 45 Cal. 317, an order refusing to vacate an order granting a writ of assistance was held appealable. In Livermore v. Campbell, 52 Cal. 75, an order setting aside the judgment on the ground that it was invalid was held appealable. Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, was prohibition to prevent fixing the compensation and paying a receiver on an order previously made; and it was held that the writ should not issue, "for the reason that the petitioners have a plain, speedy, and adequate remedy by appeal." Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278, was an application to this court for a writ of certiorari or review, and to annul an order of the superior court granting an injunction after judgment; and in the opinion it is said: "It may be readily admitted that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only where 'there is no appeal,'" —citing Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270, where it is said: "The writ [certiorari] will not lie when there is an appeal from the action complained of; the writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie," Proceeding further, the court say: "We have been referred to no case in which it has been held that under our Code the writ of certiorari will lie to reverse an appealable order. That the appeal does not offer a plain, speedy, and adequate remedy makes no difference. The provision of the statute governs." White v. Superior Court, 110 Cal. 54, 42 Pac. 471, was also an application to review and prohibit execution of an order of the superior court requiring a receiver to sell the property of the petitioner; and the court say: "It is very clear that the facts do not make a case wherein certiorari may be availed of. That writ will lie only where there is no appeal from the judgment or order complained of. [Citing a number of cases.] The order in question is a special order made after final judgment, and as such it is made the subject of appeal by express terms of the statute."

From the foregoing it will be seen that the petitioner's assumption that the decisions of this court prior to Harron v. Harron held that orders like the ones in question were not appealable, and that certiorari is the proper remedy, is not sustained.

The main grievance in this case consists in striking from the files the undertaking on appeal; for, the stay bond being out of the way, it was not improper on the part of the court to direct the application of the money in the hands of the sheriff to the satisfaction of the judgment. In other words, that order was a mere incident of the former proceeding. But both the orders are special orders made after final judgment, and as such are made appealable by express language of the Code; and as to the former, which involves no question of money value, no decision of this court can be found in which it is held that it is not appealable. For the foregoing reasons, the writ must be dismissed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.; TEMPLE, J.

127 Cal. 355

CHURCHILL v. FLOURNOY et al.

(Sac. 577.)

(Supreme Court of California. Dec. 29, 1899.)

NEW TRIAL—STATEMENT—PARTIES—OPINION—FINDINGS OF TRIAL COURT—PRESUMPTIONS.

1. Where, on the hearing of a motion for a new trial, no objection was made to the plaintiff's delay, in filing his application, beyond the time limited, it will be presumed on appeal that the time was extended by consent.

2. Where a statement on which a motion for a new trial was heard left a space for, but did not contain, a map, which had been in evidence, and which plaintiff had been given permission to file, but the parties stipulated that the statement was correct, and no objections were raised thereto on hearing, it will be presumed that the map was before the court on the hearing of the motion, and defendant cannot raise the objection on appeal that the motion was heard on an incomplete statement.

3. Where one of the defendants disclaimed all interest in the subject-matter of the suit, and the court found that he had no interest, he is not a necessary party to a motion for a new trial, though the judgment was that "defendants" recover their costs.

4. Though Code Civ. Proc. § 660, does not make the opinion of the trial court a part of the statement on which a motion for a new trial should be based, the fact that at the hearing of such motion plaintiff presented the opinion, and it was received, is not prejudicial to defendant, since the opinion could not alter the facts found.

5. On appeal from an order granting a new trial the appellate court is not confined to the grounds on which the motion was granted, but may review the entire record, and the order will be affirmed if the record shows any statutory grounds sustaining it.

6. It being the duty of the trial court to grant a new trial when dissatisfied with the findings, and it not being bound by findings on conflicting evidence, on the granting of a new trial it is presumed that the court changed its opinion as to the effect of the evidence, and this though the motion for new trial was heard by a judge who did not try the case.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county.

Action by Jerome Churchill against George R. Flournoy and others. Judgment for defendants. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

Goodwin & Goodwin, for appellants. Spencer & Raker, for respondent.

CHIPMAN, C. Action to abate a certain dam and enjoin the diversion of water, with damages. As conclusion of law the court found that plaintiff was entitled to take nothing by the action, and that defendants were entitled to judgment for their costs, and judgment was accordingly entered. The court made an order granting plaintiff's motion for a new trial, from which defendants appeal.

1. Appellants contend that the court abused its discretion in granting the motion upon a record showing laches by the moving party in making his application. We do not think it necessary to state the facts presented by respondent as accounting for the delay complained of. The record contains nothing to show that appellants, at the hearing of the motion, made the objection now urged. The Code does not prescribe the time within which the application for a new trial shall be heard further than to provide that it "shall be heard at the earliest practicable period after notice of the motion," etc. Code Civ. Proc. § 660. In Boggs v. Clark, 37 Cal. 236, cited by appellants, the plaintiff gave notice of a motion to dismiss defendant's motion for a new trial on the ground that defendant had not presented his motion in reasonable time, and the two motions were heard together. In the present case the objection was made for the first time in this court. We must presume that the time was extended by consent of the parties. Patrick v. Morse, 64 Cal. 462, 2 Pac. 49; Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Hayne, New Trial & App. § 145, subd. 3, § 146.

2. It is claimed that the motion was heard on a skeleton statement, and should have been denied for that reason; citing District v. Hamilton, 112 Cal. 603, 44 Pac. 1074, and other cases. Counsel for plaintiff at the trial offered, without objection, certain portions of a map for the purpose of explaining the evidence given by witnesses. The court stated that counsel would be allowed at any time to remove the map and file a copy. The transcript then reads: "(Here insert tracing of map.)" This map does not appear in the transcript. The cause was tried by Judge Clough, of Plumas county, sitting by request of the judge of Modoc county. When the proposed statement came before him for settlement, it was in the same condition as now with respect to the map; i. e. the tracing had not been inserted. Counsel for both parties, however, stipulated "that the foregoing engrossed statement * * * is true and correct, according to the order settling the same, * * * and ordering that the original statement made by the plaintiff, and the amendments thereto proposed by the defendants, be engrossed as set out in this engrossed statement." Judge Clough, in the order settling the statement, recited the agreement of counsel, and proceeded: "And, the same having

been duly and timely engrossed as directed by the judge, the same is hereby settled, and allowed as true and correct." The cause was transferred to Lassen county before the motion for a new trial was heard, and came before Judge Kelley, and was heard without any objection being made by either party that the map referred to in the statement was not engrossed or inserted at the proper place, or referred to, or identified. In certifying defendants' supplemental bill of exceptions the clerk added to his certificate a statement that no map was among the papers in the action when transferred from Mondoc county to Lassen county on August 22, 1896, "and no such map has been received for filing or filed in said court." We do not see how defendants can take advantage of this situation. They stipulated that the engrossed statement was true and correct without the map being inserted. By agreement of the parties, the motion was heard with the statement in the condition we now find it, and we must presume, if the court had occasion to consult the map, that it was before the court. We cannot consider the certificate of the clerk that no map was on file, for he had no authority to certify to such fact, and his certificate forms no part of the bill of exceptions. But, if we can look to the clerk's certificate, it does not go far enough to rebut the presumption that the map was used at the hearing, although not filed. It may have been used and not filed.

3. It is contended that all the parties necessary to the hearing were not before the court on May 6, 1898, when the court heard the motion, and the court had no jurisdiction to grant the motion. The contention rests upon the alleged fact that defendant William S. Flournoy, Sr., died on January 4, 1897,—about three months before the motion was noticed to be heard,—and that there has been no administration of his estate. Affidavit of the fact was made by defendant J. D. Flournoy October 31, 1898, was served on plaintiff's counsel October 31, 1899, and was filed here November 15, 1899. No motion has been made to substitute any person as the representative of the deceased. Flournoy, Sr., appeared, and answered the complaint, but before the trial he, with two other defendants, Painter and Isaac Slippey, withdrew his answer, and filed an answer disclaiming all interest in the subject of the controversy, and alleged that all his acts in diverting and using the waters involved were done as the agent of his co-defendants William S. Flournoy, Jr., and George R. Flournoy, and through their authority. The court made findings as to the defendants who had not disclaimed, and found as to Flournoy, Sr., and the other two disclaiming defendants, that they had no interest, and claimed none, in the water or ditch involved. The judgment, however, is that plaintiff "take nothing as against the defendants, * * * and that the defendants do have and recover * * * from plaintiff their (said defendants') costs in this action." The papers of plaintiff on the motion for new trial were served upon, and service acknowledged by, the attorneys of record for defendants. The order granting the motion recites that it was "duly argued by the respective counsel for litigants, and submitted to the court for decision." On April 28, 1898, the attorneys who appeared for defendants at the trial gave notice of appeal from the order. So far as appears, the same attorneys represented the defendants up to the time the transcript was filed,—July 19, 1898. After that date the defendants were represented by Messrs. Goodwin & Goodwin, one of whom was an attorney for defendants at the trial. Respondent brings to our attention some additional facts, which tend to show that appellants knew of the death of Flournoy, Sr., before the motion was heard, and failed to call attention to the fact at the hearing of the motion, or to notify appellants' counsel until after the transcript was filed here, and showing that respondent had no personal knowledge of Flournoy's death. Respondent claims, upon the authority of Moyle v. Landers, 78 Cal. 99, 20 Pac. 241, that appellants are estopped from raising the point at this time. In the case cited there was a fraudulent design shown to conceal the death of a party with a purpose to take advantage of the fact in this court. In the case at bar there is no evidence showing fraud or willful concealment of the death of Flournoy by appellants. It also appears that prior to March, 1895, Flournoy, Sr., conveyed all his interest in the lands and water and ditches involved in the action to one Hershey, and that the action was continued in Flournoy's name, with Hershey's consent, and with the knowledge of defendants' attorneys. The circumstances are not such as to take the case out of the rule that the death of a party revokes the authority of his attorney, and that service upon the attorney after the death of the party is ineffectual for any purpose. Hayne, New Trial & App. § 210; Moyle v. Landers, supra; Pedlar v. Stroud, 116 Cal. 462, 48 Pac. 371. As to defendant Flournoy, Sr., the court was without jurisdiction to make the order. He was not, however, a necessary party, and was not an adverse party, for he disclaimed any interest in the controversy. The case of Herriman v. Menzies, 115 Cal. 25, 44 Pac. 25, 46 Pac. 730, and 35 L. R. A. 318, cited by appellants, is not in point, for there the party was adverse, and was a necessary party to a determination of the issues. We do not think that the affirmance of the order would have the effect to vacate the judgment as to Flournoy, Sr. No exception need, therefore, be made with reference to him.

4. At the hearing of the motion the plaintiff presented and asked the court to identify and use the opinion rendered by the judge who tried the case in deciding the same. It was received, and forms part of defendants' bill of exceptions. Defendants objected at the time, and now claim, that the court erred

in its ruling. The opinion of the judge who granted the motion is also made part of the record, from which it appears that he made use of the opinion objected to, and based his order, in part at least, upon certain views therein expressed with which he disagreed. The presence of the judge's opinion in the transcript, conceding that it forms no part of the record under section 660, Code Civ. Proc., cannot be prejudicial. The most that can be said is that it entailed needless cost upon appellants in compelling them to print it. It is not unusual for counsel to embody the opinion of the lower court in the briefs, the better to enable the appellate court to fully comprehend the points involved and the views of the trial court. Whether appearing in the briefs or in the record, however, the opinion cannot be considered to affect or change the facts as found.

5. Although the cause was tried by one judge, and the order was made by another judge, the latter possessed the same power, and was charged with the same duty, as though the motion had come before the former. Garton v. Stern, 121 Cal. 347, 53 Pac. 904. The failure to find upon a material issue is no ground for granting a new trial. Whether the judgment is authorized by the pleadings or findings is a question not involved in a re-examination of the facts. Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299. Nor is the trial court authorized to grant a new trial upon the ground that the conclusions, from the facts found, are a decision against law. Pierce v. Willis, 103 Cal. 91, 36 Pac. 1080. The examination is limited to a consideration of the sufficiency of the evidence to sustain the findings of fact (Brison v. Brison, 90 Cal. 323, 27 Pac. 186), and whether any errors of law occurred at the trial (Water Co. v. Gage, supra). Plaintiff claimed the right to the waters of Pine creek in Modoc county, both as riparian owner of the lands through which the creek runs and as an appropriator of the waters. Plaintiff sought to enjoin defendants from maintaining their dam located in Pine creek, above plaintiff's point of diversion and above his riparian lands, and from diverting the waters of said creek through their ditch leading from said dam, and prayed that the said dam be permanently removed. Defendants state in their brief that they "did not plead title by adverse possession, but merely the bar of the statute to plaintiff's cause of action. The plea was defensive merely, and would not support a judgment for defendants to any amount of water." Nevertheless defendants' evidence was directed to their prescriptive right by prior appropriation and user for the statutory period and longer. Plaintiff moved upon all the statutory grounds. The record is voluminous, and the briefs discuss with ability and much detail every phase of the case. It is only necessary for us to discover whether any of the grounds are sufficient, for the rule is well settled that the order granting a new trial will be affirmed if it can be justified on any ground made by statute the subject of a motion for a new trial; and this court is not confined to the ground on which the court below placed its order; for, as was said in Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124, the court below "cannot, by stating in its order [and, we may add, or in its opinion] that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record." See, also, Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; In re Kingsley's Estate, 93 Cal. 576, 29 Pac. 244. We are, therefore, not confined to the reasons "expressly set forth" by the judge in his opinion as the grounds on which the motion was granted. Besides, the order itself is general, and discloses no grounds upon which it is based. There are 67 separate findings of fact, many of which, if not all of them, are material, and rest upon conflicting evidence. This fact is so manifest from an examination of the opinion of the trial judge and the elaborate briefs of counsel that we deem it unnecessary to specify particulars. It was said in a recent case here: "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court; and he is not bound by the rule as to conflicting evidence, as is this court." Condee v. Gyger (Cal.) 59 Pac. 26. And it was further therein said: "In support of the order, we must presume that the court changed its opinion as to the effect of the evidence, and reached a different conclusion upon the hearing of the motion." The same presumptions must be indulged, although the motion was heard by a judge who did not try the case. It may be that the judge who tried the case would have adhered to his decision on all points, and that defendants have been placed at a disadvantage by having the motion heard by a judge who could only gain his impressions from the statement. Still the rules of law place him in the shoes of the trial judge, clothed with all his powers and duties, and we are not permitted to otherwise regard him or his order made in the case. We advise that the order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

127 Cal. 460

MORE v. MORE et al. (S. F. 1,104.)

(Supreme Court of California. Jan. 20, 1900.)

ADMINISTRATOR—REMOVAL—JUDGMENT.

A judgment rendered against an administrator, after his removal from office, is invalid, though rendered during the pendency of an appeal by him from the order of removal.

In bank.

For opinion in department, see 53 Pac. 1077.

Whitcomb & Boyle and F. R. Whitcomb, for appellant. Thos. McNulta, Alex. G. Eells, and John B. Mhoon, for respondents.

PER CURIAM. The plaintiff, H. Clifford More, as administrator of the estate of Lawrence W. More, deceased, brought this action against John F. More, administrator of the estate of Alexander P. More, deceased, to establish his claim of $13,670.14 against the estate of said Alexander P. More, deceased, under section 1498 of the Code of Civil Procedure. On January 15, 1897, judgment was entered for plaintiff for the full amount of his claim. Afterwards John F. More, and Eliza M. Miller, who had been appointed special administratrix of the estate, moved to vacate and set aside the judgment upon the ground that at the time it was rendered the said John F. More was not administrator of the estate. Upon the hearing of the motion it appeared by stipulation that the said John F. More had been on the 1st day of June, 1896, suspended as administrator, and that on June 4, 1896, Eliza M. Miller had been appointed special administratrix of the estate, and that on the 21st day of September, 1896, the court had revoked and annulled the letters of administration which had been issued to John F. More, and that on the 20th day of November, 1896, the said John F. More had taken an appeal to this court from the order revoking his letters, and that such appeal is still pending. On April 13, 1897, the court granted the motion to vacate the decision and judgment, and made an order annulling and setting the same aside. From this order the plaintiff appealed, and this appeal is the one now before the court, being designated as No. 1,104.

When this appeal was submitted to this court in department, there was also another appeal, designated as "No. 897," submitted, which was an appeal taken by certain interveners from the original judgment and from an order striking out their intervention. In an opinion submitted to the court by the commissioners, which covered both appeals, it was recommended that the appeal No. 897 be dismissed, and that in this present appeal (No. 1,104) the order appealed from be affirmed. This opinion was approved by the department, and judgment was entered accordingly. 53 Pac. 1077. Upon a petition for hearing in bank of both appeals the petition was denied as to No. 897, although the order dismissing the appeal was modified, and based upon a ground other than the one taken in the opinion of the commissioners. See 54 Pac. 263. The appeal No. 1,104 is therefore the only one now pending here in the case.

Upon further consideration of the case, we think that the order appealed from should be affirmed, for the reasons given in the following part of the opinion of the commissioners, which is hereby adopted. That part of the opinion which we hereby adopt is as follows: "The question involved in the appeal No. 1,104 is, was the judgment rendered against 'John F. More, as the administrator of the estate of Alexander P. More, deceased,' invalid, he having been removed from his trust, and having ceased to be administrator of the estate some months before the judgment was entered? If it was, there was clearly no error in setting the judgment aside on motion. * * * It has also been held in other jurisdictions that, where an executor or administrator is removed from his trust, he ceases to have any connection with the estate, and no judgment relating to its affairs can be rendered against him. In Wiggin v. Plumer, 31 N. H. 251, it is said, on page 266: 'He ceases to be a party to the action on removal from his trust as absolutely as if he were dead, and the action must either be prosecuted against the new representative of the estate, or it will be discontinued. * * * When the administrator is displaced, he ceases to have either interest in or power over that estate, and a judgment to reach the estate must be rendered against the party entitled to represent it. The judgment must also be for a sum to be levied of the goods and estate of the deceased in the hands of the defendant administrator, to be administered. Such a judgment cannot be rendered against one who appears by the record not to be administrator.' In Bank v. Stanton, 116 Mass. 435, it is said: 'Upon her removal from the office of executrix, her ability to and right to defend against this action ceased. It follows that no judgment therein can be rendered against her.' In Re Dunham's Estate, 8 Ohio Cir. Ct. R. 162, it is said: 'We are of the opinion that the judgment, having been rendered after the cessation of the powers of Mrs. Dunham as executrix, was wholly void as evidencing the existence of a claim against the estate.' And in Taylor v. Savage, 1 How. 282, 11 L. Ed. 132, it is said by the supreme court of the United States, Taney, C. J., delivering the opinion: 'By this removal from the office of executor he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in, or be a party in, this or any other court to a suit which the law confided to the representative of the deceased.' It is objected, however, for the appellant that the effect of the order removing More from his trust as administrator was suspended by his appeal therefrom until the final determination of the appeal, and that meantime he continued to be the administrator of the estate; citing In re Moore's Estate, 86 Cal. 72, 24 Pac. 846. That case simply holds that, pending an appeal from an order removing an administrator of an estate, he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal becomes final. It is true that, pending the appeal from the order removing More, he was only suspended from the office of administrator. But after the removal he ceased to be practically and in effect the administrator of the estate. He could exercise no powers, and perform no duties, as such. 'He was as completely separated from the business of the estate as if he had been dead.' The appeal did not revive, or in any way restore, his powers. 'The effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. * * * The Code does not provide that an order appealed from shall cease to exist,—be annulled,—but that it cannot be further enforced by a proceeding upon it. Here the revocation of probate and the surcease of appellant's functions as executor became complete eo instanti the order of revocation was entered.' In re Crozier's Estate, 65 Cal. 332, 4 Pac. 109. We conclude, therefore, in view of the well-settled rules of law, that, after More was removed from his office as administrator, no judgment could properly be entered against him as such administrator, and that there was no error in setting the judgment in question aside." For the reasons above given, the order appealed from in this appeal (No. 1,104) is affirmed.

127 Cal. 217

SACRAMENTO COUNTY v. SOUTHERN PAC. R. CO. et al. (Sac. 586.)

(Supreme Court of California. Jan. 19, 1900.)

In bank. Affirmed.

For opinion in department, see 59 Pac. 568.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this case, because in my opinion, the decision rests necessarily upon a doctrine destructive of essential safeguards of important public rights. The essence of the decision is that a contract, void for want of compliance with the conditions and limitations upon and under which alone boards of supervisors have power to bind their counties, acquires all the force and obligation of a valid contract, if the contractor commences work and expends money in pursuance of its terms before he is notified that the county repudiates it. This doctrine sweeps away at once all limitations upon the power of the board, for it can readily be seen that the contractor must always have it in his power to commence work just as soon as he has induced the board to enter into a contract in defiance of the regulations intended to govern their action, and it is also apparent that the board which desires to make contracts in disregard of the law will have the same motive to allow the commencement of work that they have to enter into the illegal contract.

And how can the equitable doctrine of estoppel apply in such a case against the public? The facts are all known to the contractor. There has been no misrepresentation, —no concealment. He knows what the contract is and how it has been obtained. If it is illegal and void, he knows it, and if he goes to work under it he does so with his eyes open. In such case there can be no estoppel.

The expression quoted in the department opinion from Argenti v. City of San Francisco, 16 Cal. 266, was never the law even of that case. It was but the opinion of a single judge, not concurred in by his associates, and expressly repudiated by him in the later case of Zottman v. City and County of San Francisco, 20 Cal. 109, where he lays down the doctrine which this case sets aside. It is true that some decisions have been made in other jurisdictions which sustain the present ruling here, but it is certainly opposed to the views which have heretofore prevailed in this court, and to the weight of authority elsewhere. The judgment of the superior court should have been affirmed.

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6 Cal. Unrep. 378

CLARKE v. MOHR et al. (KOWALSKY et al., Interveners. S. F. 1,771).

(Supreme Court of California. Jan. 18, 1900.)

APPEAL—ALTERATION OF RECORD—DISMISSAL.

Where, after numerous motions to supply the defects in a record in the supreme court, appellant's attorney makes alterations in the printed record, by underscoring various passages, and by marginal notes and interlineations in writing, for the purpose of directing attention to particular parts of the record, and, without leave of court, alters his reply brief by pasting therein numerous leaflets containing citations of authorities, and comments thereon, of which no service is made on opposing counsel, thus imposing upon the court more labor than would have been required to dispose of the case on its merits if presented in an orderly manner, and there appears to be no substantial merit in the appeal, it will be dismissed.

Department 2. Appeal from superior court, city and county of San Francisco.

Action on a promissory note by J. F. Clarke against Henry Mohr, Kate C. Byrne, Florence B. Hinckley, and others. Complaints in intervention were filed by Henry I. Kowalsky and Timothy Hurley. From a judgment in favor of the intervener Kowalsky, plaintiff and the intervener Hurley appeal. Motion by intervener Kowalsky to dismiss the appeal. Appeal dismissed.

Alfred Clarke, for plaintiff. Wilson & Wilson and H. Wilkins, for defendants. T. J. Crowley and A. R. Cotton, for interveners.

PER CURIAM. A printed transcript of a portion of the record of this case was filed here January 12, 1899, and since that date the court has been simply deluged with motions to supply its defects, and to dismiss the appeals from the judgment and order denying a new trial. At present the printed record and briefs make a very modest show by the side of the bulky mass of papers of every shape and hue —in manuscript and typewriting—which constitute the files of the case. The faults of procedure on the part of counsel have cost the court far more trouble than would have been required to dispose of the case upon its merits if it had been presented in the simple and orderly manner provided for in our rules, and the court is brought seriously to consider whether we are justified in devoting more of our time to the unraveling of the legal tangles gratuitously imported into this case at the expense of litigants who present the merits of their appeals unembarrassed by such superfluous difficulties.

Some months ago, in department 1, an order was made dismissing the appeals herein from the order denying a new trial, and overruling the motion to dismiss the appeals from the judgment. 58 Pac. 176. Since the order was made the attorney for appellants has taken the liberty of making a number of alterations in the printed record on file here by underscoring various passages, and by marginal notes and interlineations in writing. It is true that none of these alterations is of much consequence; for, in spite of them, the court can easily see what the real record is. The transcript is simply marred and defaced, without being materially altered or changed in meaning, and it is evident that the alterations were made, not with any intention of practicing an imposition upon the court, but rather for the purpose of directing attention to particular parts of the record, and to papers among the files which counsel supposes to have an important bearing upon his assignments of error. Besides these alterations in the record counsel for appellants has altered his reply brief by pasting therein numerous leaflets, containing citations of authorities and comments thereon. As to these additional citations, the court would have permitted them in accordance with its usual practice, if leave had been asked, but it would have required service of the amendments on the opposing parties. It will thus be seen that, although the fault of counsel in making these unauthorized changes in the record and printed brief is not a trivial one, it is doubtful whether it is a sufficient ground for dismissing the appeals from the judgment, as we are again asked to do.

But one result of these alterations, and the motion to which they have given rise, is that we have been compelled again to go on through the papers in the case, and to make a pretty thorough examination, not only of the record proper, but of many of the loose papers which have been added to it. The result is the discovery that there is no substantial merit in the appeal. All that is left is the appeal from the judgment, which is fully in accordance with the substantial rights of the parties; it being plain from the unquestioned and unquestionable findings of the superior court that neither of the appellants was ever entitled to any relief in the action. On this point they make no serious contention that the superior court erred, but they attack the judgment for the intervener on various purely technical grounds. We cannot see what concern it is to them whether the intervener is entitled to a judgment or not. They do not have to pay it, and the defendants, who do have to pay, consented to it. Such being the case, we do not feel obliged to waste more time upon it. The appeals are dismissed.

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127 Cal. 438

GRUNDEL v. UNION IRON WORKS et al.

(S. F. 1,779.)

(Supreme Court of California. Jan. 9, 1900.)

JOINT TORT FEASORS.

That some of the defendants, in an action in a state court for the wrongful death of plaintiff's intestate on a sailing vessel, made application, as the owners of the vessel, to a federal court, for a limitation of their liability under the United States statutes relating to the merchant marine, and that the federal court enjoined plaintiff from further proceedings in the state court against these defendants, is not a bar to the plaintiff proceeding in such court against the other defendants, where he has received no satisfaction for the wrong complained of.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Henry Grundel, administrator, etc., against the Union Iron Works and others. From a judgment dismissing the complaint as to four of the defendants, plaintiff appeals. Reversed.

Sullivan & Sullivan, for appellant. Wilson & Wilson and Andros & Frank, for respondents.

VAN DYKE, J. The plaintiff brings this action under section 377 of the Code of Civil Procedure of this state, as administrator of the estate of Frank Grundel, deceased, to recover damages on account of the death of the latter, occasioned by the wrongful acts of the defendants. Eighteen defendants were named in the complaint, five of whom are fictitious, and no person appeared or answered in their names. The corporation defendant answered separately, and the twelve other defendants, represented by other attorneys, also appeared and answered. Nine of these twelve subsequently filed a supplemental answer, setting forth that they were the owners of the schooner Gracie S, on or about which the injury occurred, and had made application in the United States district court of the Northern district of California for limitation of liability under the provisions of the Revised Statutes of the United States in reference to American merchant marine, and that upon filing their petition in said court a monition was issued in the usual form, and served upon the plaintiff and his attorneys, and all persons claiming damages resulting from the accident mentioned in the plaintiff's complaint, and the said court enjoined plaintiff from any further proceedings in the suit in the superior court against the nine defendants claiming to be the owners of said vessel. An appraisement of the schooner was made, the value being fixed at $12,500. The plaintiff filed his answer in the United States district court to the petition of said nine defendants, but said cause has never been tried in the admiralty court, and is still pending.

The plaintiff made no further attempt to proceed in the superior court against the alleged owners of the vessel, but as to the other defendants who had appeared, to wit, the Union Iron Works, Barber, Castle, and Swanson, the plaintiff elected to proceed to trial in the said court. The case was regularly on the calendar of the superior court for trial December 2, 1897; whereupon the defendant the Union Iron Works moved the court to dismiss the action as to it, on the ground that nine of the defendants had instituted proceedings in the federal court for limitation of liability, and that said defendant Union Iron Works was sued as a joint tort feasor with said nine defendants in whose behalf the restraining order had been issued against the plaintiff from proceeding to trial. The court took the motion under advisement, and the trial of the action was continued till April 4, 1898, at which time plaintiff endeavored to proceed with the trial as to said defendants other than the nine who were the owners of said vessel. The Union Iron Works thereupon renewed its motion to dismiss the action upon the grounds stated, and said defendants Barber, Castle, and Swanson, also on the same grounds, moved to dismiss the action. The court granted the motion of said four defendants, and a judgment of dismissal was accordingly entered. The appeal is from this judgment of dismissal, on a bill of exceptions.

The question presented on the appeal is whether the plaintiff, with a cause of action alleged in the complaint to be for $50,000 damages, is barred from recovery of a proper measure of damages, as against the respondents herein, in consequence of the proceedings in the federal court by the nine defendants, the owners of said vessel, in which their liability is limited to the appraised value of said vessel. The plaintiff has not actually received satisfaction in any amount, nor what in law is deemed the equivalent of satisfaction. The law as to the liability of joint tort feasors is thus stated by Black on Judgments: "The general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently a judgment recovered against one of two joint tort feasors, remaining unsatisfied, is no bar to an action against the other for the same tort." 2 Black, Judgm. § 777. Judge Cooley, in his work on Torts (2d Ed. p. 159), says: "The rule laid down by that eminent jurist, Kent, in Livingston v. Bishop, 1 Johns. 290, which has since been generally followed in this country, is that the party injured may bring separate suits against the wrongdoers, and proceed to judgment in each, and that no bar arises to any of them until satisfaction is received. * * * It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has received satisfaction, or what in law is deemed the equivalent." In Dawson v. Schloss, 93 Cal. 199, 29 Pac. 31, the plaintiff had recovered a judgment in the sum of $5,000 against Schloss and Hinkle in an action for malicious prosecution. A new trial was granted as to defendant Schloss, which resulted in a verdict and judgment against Schloss for $3,000, and he appealed from the judgment. At the time of the second trial, the original judgment for $5,000 against Hinkle was of record and unsatisfied. It was contended by the appellant that no judgment should have been rendered against Schloss on the new trial, so long as the original judgment existed against Hinkle; that, while separate suits may be brought against each of several joint tort feasors, yet, if the defendants are sued jointly, there can be but one verdict and judgment. This court answered this contention that "such is not the prevailing rule in the United States," quoting from Judge Cooley the above-cited paragraph. The court, continuing, says: "There is no pretense that any part of the judgment against Hinkle has been paid or satisfied, or even that execution has been taken out upon the judgment." Nichols v. Dunphy, 58 Cal. 605, was an action in tort. A judgment had been obtained against defendants. One of the defendants appealed, and secured a reversal of the judgment. Thereupon the other defendant, against whom execution had been taken out, moved for an order quashing the execution. That motion was granted, on the theory that there could not be a several judgment when the action had been joint. Discussing the action of the court below, this court says: "We think the court erred in quashing the execution against Carmen. The judgment against her was unaffected by the appeal of her co-defendant and the subsequent proceedings thereon." In Butler v. Ashworth, 110 Cal. 614, 43 Pac. 386, it is said: "If one be injured by a tortious act, he is entitled to compensation for the injury suffered, and if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tort feasors, and may, at his election, sue them individually or together." In case one of the wrongdoers has become bankrupt or insolvent, the effect as to him would be to limit the liability to the available assets of his estate, which might be merely nominal. His bankruptcy proceeding, however, would not have the effect of discharging the solvent wrongdoers. Nothing short of satisfaction in some form constitutes a bar in a proceeding like the present. The judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; GAROUTTE, J.

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127 Cal. 290

RUGGLES v. CANNEDY et al. (Sac. 244.)

(Supreme Court of California. Dec. 23, 1899.)

In bank. Affirmed.

For opinion in department, see 53 Pac. 911.

PER CURIAM. Upon further consideration, we adhere to the opinion and judgment heretofore rendered in department.

GAROUTTE, J. I dissent from the conclusion declared in this case. I do not believe the bar of this state construe the law upon this question as it is here construed, and, owing to the important principle involved, I feel compelled to briefly indicate why this case should be decided the other way.

The true solution of the question raised upon this appeal is dependent upon the construction to be given section 2957 of the Civil Code, which provides: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers in good faith and for value, unless: (1) It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors; (2) it is acknowledged or proved, certified and recorded in like manner as grants of real property."

By virtue of the foregoing provision of the Code it is now held that a chattel mortgage must be immediately recorded upon its execution, or ipso facto it is void as to creditors, and the fact that the mortgage may be recorded before any creditor takes a single step towards judicially enforcing his claims is a matter wholly immaterial. The inevitable result flowing from this decision will be to stamp many chattel mortgages as worthless property when, up to the present moment, their genuineness has never been doubted. The serious results to follow from thus holding should lead the court to an opposite conclusion, if a fair construction of the statute justifies it. For the simplest of reasons, it is apparent that it would be work well done to declare the principles of law governing the recording of chattel mortgages to be similar to those governing the recordation of mortgages of real estate; for the law as to the effect of recordation of mortgages upon real estate is well defined and understood. And now, if in the case of chattel mortgages we declare the same principles to be controlling, a broad road is marked out, which all may follow. But a decision to the contrary simply blots out all roads. If it be held under this statute that chattel mortgages similar to the one here involved are void as to creditors, the decision will produce an abundant crop of litigation. This litigation will not only arise upon the rights of creditors as bearing upon chattel mortgages now outstanding, but as long as the statute stands it will be a prolific source of litigation as to the respective rights of creditors and mortgagees.

I am satisfied the provisions of the Code only mean that unrecorded chattel mortgages are void as to creditors who assert their claims by attachment or otherwise before a recordation is bad. This construction may be maintained without violating any principle of statutory interpretation, and for the reasons already suggested, if for no other, the court should so declare. I know of no reason, based upon sound policy, which may be urged in favor of a contrary construction. It is suggested in the majority opinion that such a construction of the statute cannot be declared, because the policy of our law is opposed to secret liens. But my construction of the statute is directly in line with a policy opposed to secret liens. Until the chattel mortgage is recorded, it is void as to third parties, and is only valid between the parties. A mortgage only valid between the parties is in no sense a secret lien as to third parties, and public policy is in no way concerned in such a mortgage. Men may pass their days and nights in mutually giving each other chattel mortgages upon their property, and it is no concern of the public. The public has no interest in that kind of a transaction, but is a totally indifferent party.

In a great many of the states the statute does fix the time when a chattel mortgage must be recorded. In Ohio, where the statute even declares that a chattel mortgage shall be recorded "forthwith," under the penalty of being void as to creditors if not so recorded, the highest court of that state held such a mortgage valid as against all creditors whose rights had not attached previous to the recordation. Wilson v. Leslie, 20 Ohio, 161. But we will not attempt a review of the authorities of other states bearing upon the question here involved. It is sufficient to say they are irreconcilable, although it may be safely claimed that a large preponderance are favorable to the conclusion we here declare. Some of these authorities are incidentally enumerated in the case of Fassett v. Wise, 115 Cal. 322, 47 Pac. 47, 1095, 36 L. R. A. 505.

Section 3440 of the Civil Code, among other matters, declares: "Every transfer of personal property, * * * and every lien thereon, other than a mortgage, when allowed by law, * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." It is now sought, by a process of reasoning by analogy from the provisions of section 3440, to construe the aforesaid section upon chattel mortgages as requiring an immediate recordation of the mortgage. Reasoning by analogy is not the best mode of reasoning, and conclusions thus deduced are often unsound. It may be further suggested that in a proceeding purely and entirely statutory the word "immediately" should not be construed into the statute by a process of analogous reasoning. If quasi judicial legislation is ever justified, it should rest upon a stronger foundation. If the legislature thought that chattel mortgages should be recorded immediately, it was a very easy matter for that body to have said so; and we see no authority to justify this court in invoking the provisions of section 3440 as to sales of personal property for the purpose of assisting in the construction of section 2957 as to chattel mortgages.

Section 2957 of the Civil Code was ingrafted therein in lieu of an act of the legislature of 1857 covering the whole question of chattel mortgages, and not, as the main opinion declares, in place of the statute of 1850. Whatever analogy existed under the act of 1850 between sales and mortgages of personal property was completely annihilated when the chattel mortgage act of 1857 was passed. An examination of a few of the provisions of that act shows this to a demonstration; for those provisions are directly opposed to the principles of law declared in the act of 1850, and likewise directly opposed to the decisions of this court, cited in the main opinion, rendered under the act of 1850. And I feel assured they are likewise opposed to the principles recognized and approved upon which the present decision of the court is rested. The act of 1857 (section 7) provides: "The mortgagee in all mortgages made under this act shall be allowed one day for every twenty miles of the distance between his residence and the county recorder's office where such mortgage ought by law to be recorded to conform to the provisions of this act, before any attachment shall be valid made by the creditors of the mortgagor." This was the law at the time the Code was adopted, and it is therefore evident that the statute at the time pertaining to the sale and transfer of personal property had no relationship whatever with the execution and recordation of chattel mortgages. Again, the subject-matter of section 2957 of the Civil Code is found in this chattel mortgage act of 1857. Yet that act itself, in section 7, which I have just quoted, places a construction upon those provisions entirely in line with my conclusion, and that construction should have great weight in deducing the proper conclusion in this case. Section 7 provides that the mortgagee shall have a certain number of days, dependent upon the distance he lives from the recorder's office, in which to record his mortgage, before it shall be void as to "attaching creditors." If respondent's position be the sound one, then that provision of the act should have simply said "creditors," and should have omitted any qualifications whatever as to "attaching creditors." Indeed, the substance of this identical provision of the chattel mortgage act of 1857 was carried into the first edition of Civ. Code, § 2937. This section conclusively demonstrates that the close relationship existing in the early legal history of this state between chattel mortgages and sales of personal property never existed after 1857.

Let us see into what deep water this reasoning by analogy leads us. If by analogy we are justified in inserting the word "immediately" in the chattel mortgage act, then, by the same analogy, it must be held that a chattel mortgage is void as to all creditors of the mortgagor having claims at any time during the period between the execution of the chattel mortgage and its recordation. Indeed, it has been held by this court in Cardenas v. Miller, 108 Cal. 258, 39 Pac. 785, that "the term 'creditors' is general and applies to creditors existing prior to the mortgage as well as subsequent." Yet it is not even claimed here that this mortgage is void as to creditors existing at the time it was executed, and no such claim can be made, for then the whole superstructure of the court's reasoning, builded story after story upon the theory of the creation of a false credit in the mortgagor and a public policy opposed to secret liens, would come down with a crash; for, as to creditors in existence prior to the execution of the mortgage, there would be no false credit in the mortgagor, and no secret lien in existence, at the time their debts were created. If these two sections of the Code are required to fill the same measure, and that a measure furnished by principles of analogous reasoning, the transfer of personal property and the chattel mortgage are each void as to the same class or classes of creditors; and, in the absence of an express legislative enactment to the contrary, this court has no right to hold otherwise.

In a transfer of personal property there must be an immediate delivery; ergo, it is argued the chattel mortgage must have immediate recordation. Such a construction of the statute in numberless cases demands an impossibility. The statute says that a chattel mortgage must be recorded in the county where the mortgagor resides, and also where the property is situated. This express demand of the statute often requires weeks to carry out. It is impossible that the two recordations shall take place immediately, or even at the same time. Section 2962 of the Civil Code allows a chattel mortgage to be given upon personal property situated in different counties. It is impossible to see how such a mortgage could be recorded immediately. What would be said as to the immediate recordation of a chattel mortgage executed in the county where the mortgagor resides, and where the property is situated, but 100 miles distant from the recorder's office? If a mortgage of that character is to be declared void as to creditors because not recorded immediately, it is probable that such a conclusion would invalidate recorded chattel mortgages in many counties of the state. Again, if a chattel mortgage may not be executed 100 miles from the recorder's office because an immediate recordation under such circumstances would be impossible, then how near to the recorder's office must the execution of the mortgage take place in order that it may be recorded immediately? This interrogatory presents an interesting question, and suggests a broad and fertile field for future litigation.

It is also insisted that a construction of the statute demanding an immediate recordation of a chattel mortgage is justified from general language found in Berson v. Nunan, 63 Cal. 550, to the effect that the recordation of a chattel mortgage is an equivalent of the immediate delivery demanded by section 3440 of the Civil Code. There was no element of immediate recordation of the chattel mortgage involved in that case, and the court never for a moment thought it was declaring the law upon that important question when it used the language to which we are referred. The language used by the court was as clearly in point upon the case of a future recordation of a chattel mortgage as in the case of an immediate recordation. At that time the court was speaking of the effect of the recordation of the mortgage, entirely disconnected from any question as to the time of recordation. This is conclusively apparent when we find the court upon the very same page of the opinion declaring: "The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgages." In view of this language, Berson v. Nunan affords but a foundation of sand upon which to rest the weighty results flowing from this decision. As distinguished from Berson v. Nunan, it is said in Martin v. Thompson, 63 Cal. 4, that the chapter of the Civil Code treating of mortgages of personal property "substitutes the record of a mortgage for the actual and continued change of possession in case of other transfers, required by section 3440. The purpose of the actual delivery in the one case, and of the record or registry in the other, is to give notice to those who shall deal with the vendor or mortgagor." In speaking of the chattel mortgage act in Beamer v. Freeman, 84 Cal. 556, 24 Pac. 170, this court said: "This law substitutes the record of the mortgage for the actual delivery and continued change of possession made essential to effect transfers in other cases by section 3440 of the Civil Code." It would seem that the word "immediate" was intentionally omitted by the court in the language quoted in the two foregoing cases, and the language there used entirely and accurately expresses the law upon this question.

In conclusion, it may be suggested that section 3431 of the Civil Code provides: "In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such a contract." In this case there is no actual fraud. Neither is there any constructive fraud, for the law has not so declared. In the face of this provision of the statute, it is impossible to see how the mortgagor's creditors have any rights as to the mortgaged property until they have first secured a lien upon it. In this case, before they took any steps to secure the lien the chattel mortgage was recorded. For the foregoing reasons, I dissent from the judgment.

We concur: VAN DYKE, J.; HARRISON, J.

(127 Cal. 207)

PEOPLE v. LEWIS. (Cr. 549.)

(Supreme Court of California. Dec. 15, 1899.)

CRIMINAL LAW—CONFESSION OF ERROR BY STATE—DETERMINATION OF MOOT QUESTIONS.

Where, on appeal from a conviction for obtaining money under false pretenses, the state admits that, if defendant is guilty of any crime, it is that of larceny, and not of the crime charged, and it is evident that defendant will not again be tried upon the charge of which he was convicted, the court will not consider moot questions arising upon the evidence, but will reverse the case.

Department 2. Appeal from superior court, city and county of San Francisco.

Defendant was convicted of obtaining money under false pretenses, and he appeals. Reversed.

P. J. Mogan and J. J. Guilfoyle, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Defendant was charged with and convicted of the crime of obtaining money by false pretenses, and he appeals from the judgment, from the order denying his motion for a new trial, and from an order denying his motion in arrest of judgment.

At the oral argument the attorney general stated that he was satisfied that if, under the evidence, the appellant was guilty of any crime, it was that of larceny, and not of obtaining money under false pretenses, and thereupon he confessed error. Counsel for appellant, however, contended that there were questions arising out of the evidence, and out of the admissibility of certain evidence, which should be determined here, for the benefit of the lower court upon another trial; and thereupon the cause was submitted. Section 1110 of the Penal Code provides that, where the false pretense is not evidenced by writing, it must be proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. In this case there was no written evidence, and the testimony to the false pretenses was that of one witness alone; and appellant contends—First, that there were no such corroborating circumstances as the law contemplates; and, second, that the court erroneously admitted certain evidence touching the matter of corroboration. And these are the questions which he asks to have determined. But, upon further consideration of the case, it is evident that it will not be tried again upon the present charge, and that therefore these are merely moot questions, not calling for determination. Upon the confession of error of the attorney general, the judgment and orders appealed from are reversed.

(127 Cal. 166)

NELLIS v. PACIFIC BANK et al.

(S. F. 1,942.)[1]

(Supreme Court of California. Dec. 13, 1899.)

LIMITATION OF ACTIONS — CORPORATIONS — LIABILITY OF STOCKHOLDERS OF INSOLVENT BANK — PLEADING — AMENDMENTS TO PETITION—NEW CAUSE OF ACTION.

Where, in an action to recover upon a stockholder's statutory liability to the depositors of an insolvent bank, the plaintiff sues as assignee of certain depositors who had assigned their respective claims to parties who had assigned them to plaintiff before the commencement of the action, a mistake in describing plaintiff's immediate assignor as the depositor through whom he derives title is not so material as to make the correction by amendment the statement of a new cause of action, which is barred after three years, under Code Civ. Proc. §§ 359, 338, subd. 1, providing that an action against a stockholder must be brought within three years after the liability was created.

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[1] Rehearing denied January 12, 1900.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by C. S. Nellis, plaintiff, against the Pacific Bank, R. H. McDonald, and others, defendants, to recover upon their statutory liability as stockholders in said bank for the demands of certain depositors whose claims had been assigned to plaintiff. Plea of the statute of limitations, and judgment for defendants as to part of plaintiff's claim. Plaintiff appeals. Modified.

Wm. H. Chapman, for appellant. Sawyer & Burnett, for respondents.

CHIPMAN, C. Plaintiff sues for himself, and as assignee of certain 20 other depositors in defendant bank, to recover from its stockholders upon their statutory liability as such stockholders. Plaintiff had judgment against defendant James M. McDonald upon certain of the causes of action pleaded, but as to the causes of action assigned to plaintiff by Lewis Merrill, B. G. Ruhl & Co., and Annie White, and as to his own claim, the court gave judgment for defendant. Plaintiff appeals from the judgment only as to the assigned claims of Merrill, Ruhl & Co., and White.

The original complaint was filed June 19, 1895, and the amendments were filed May 19, 1897. The court below held the last-mentioned assigned causes of action barred by subdivision 1, § 338, and section 359, Code Civ. Proc. It is conceded by appellant that, if the amendments state a new cause of action, the judgment should be affirmed; otherwise, all parties agree that it should be reversed. The three-years statute of limitations applies to deposits made more than three years before the commencement of the action. Wells v. Black, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619. And it is settled law that a new cause of action cannot be introduced into a complaint under the guise of an amendment, so as to evade the statute. Atkinson v. Canal Co., 53 Cal. 102; Meeks v. Railroad Co., 61 Cal. 149. It is equally well settled that, if no new cause of action is stated in the amendments to the original complaint, the amendments simply supersede the original by more fully setting forth the cause of action defectively alleged in the original complaint, whose identity is in no way affected. Barber v. Reynolds, 33 Cal. 501; Vanderslice v. Matthews, 79 Cal. 277, 21 Pac. 748; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100.

The court found that on June 22, 1893, the Pacific Bank was indebted to Ruhl & Co. in the sum of $2,286.18 on account of money deposited with the said bank; that in plaintiff's original complaint he alleged that Ada P. Ruhl on June 22, 1893, deposited in the bank the sum of $1,143.09, and also that L. Dallman on the same day deposited a like sum, which was within three years from the filing of the original complaint (these two sums equal the deposit made by Ruhl & Co.); that on May 19, 1897, plaintiff obtained leave to amend his complaint in respect of said two deposits, "on the ground of mistake in the statement of the names in which the original deposits were made," and the amendment was accordingly made, "wherein it was alleged that the said Pacific Bank was on the 22d day of June, 1893, indebted to B. G. Ruhl & Co. in the sum of $2,286.18 for and on account of money delivered to and deposited with said Pacific Bank by said B. G. Ruhl & Co. within three years prior to the commencement of this action"; that Ruhl & Co. assigned their claim to B. G. Ruhl and Minnie Dallman, and Ruhl and Dallman assigned to Ada P. Ruhl, and she to plaintiff, all prior to the commencement of the action. The court finds "that all of said sum was delivered to and deposited with said Pacific Bank by said B. G. Ruhl & Co. prior to June 22, 1893, and more than three years prior to the date of filing of said amendments, and that neither said Minnie Dallman nor said Ada P. Ruhl was a member of said firm of B. G. Ruhl & Co., but said B. G. Ruhl and L. Dallman were members thereof." The cause of action as to Annie White is in a similar situation. The court found that on June 22, 1893, the bank was indebted to C. W. Burgess in the sum of $463.30, deposited by him within three years prior to the commencement of the action; that, when the action was commenced, plaintiff alleged in his complaint that on June 22, 1893, the bank was indebted to Annie White in the sum of $463.30, deposited by her within three years prior to the commencement of the action; that on May 19, 1897, plaintiff obtained leave to amend his complaint on the ground of mistake in the statement of the name in which the original deposit was made, and an amendment was filed, alleging the indebtedness to Burgess as the depositor, and that he had assigned his claim to Annie White, and she to plaintiff,—both assignments being prior to the commencement of the action. It appears from the findings that the bank failed and closed its doors June 23, 1893, and ever since has refused to pay its depositors.

Appellant claims that he was not called upon to plead the chain of title to this money; that, had he alleged the ultimate fact of the indebtedness of the Pacific Bank to him at the commencement of the action, it would have been sufficient; that he erroneously stated that the particular money sought to be recovered was deposited by one of plaintiff's assignors, rather than another prior assignor, which was but an error in description; and that the description was necessary only to identify the claim sued on, and was not necessary in the pleading, for the fact was, as alleged, that plaintiff was the owner of the claim when the suit was commenced. Furthermore, it is claimed that no injury could have accrued to defendant from this error in description. Respondent replies that the complaint correctly states each claim as a separate cause of action; that the bank was not indebted to plaintiff on the assigned claims, as himself a depositor, but that the claim of every depositor was a chose in action belonging to him, which the depositor alone could assign; that the bank was liable to the depositor in the first place, and defendant, as a stockholder, was liable for his proportion of that particular debt; that the assignee could recover only by proving the particular liability of the bank, and that he was owner of the claim, and to prove this he must allege the facts, because the plaintiff must allege every fact that he is required to prove,—citing Green v. Palmer, 15 Cal. 411, that a suit to recover the proportion of the debt due to A. will not lie to recover the proportion of the debt to B., for the causes of action are different.

It is true that plaintiff derives his right to sue from the depositor; but it is also true that before the action was commenced he obtained the assignment of the real depositor, and in his complaint he correctly described and identified the deposit or indebtedness for which he sued. He failed to state correctly the name of the depositor, while correctly stating the name of his assignor, who was in fact the depositor. The cause of action was the debt owing by the bank, and by the amendment this cause of action was not changed, but was identical, in point of amount and time when accrued, with that stated in the original complaint. That plaintiff made a mistake in describing the person through whom he derived title was not so material as to make the correction by amendment the statement of a new and different cause of action. In Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24, where the complaint in ejectment described the land as in range 19 E., the court allowed an amendment showing the range to be 20 E., and held that the correction of the mistake was authorized by section 473, Code Civ. Proc., and did not substitute a new and different cause of action. See, also, Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 613, 23 Pac. 1109. In the case of Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, an amendment was allowed by which there was added to the original cause of action for the contract price of services a claim on quantum meruit for the same services. The principle upon which the court proceeded was that no new facts were stated in the amendment upon which a new cause of action was based. And so here we find no new facts, except a mistake in the name of the depositor. The bank's indebtedness and the indebtedness sued upon are the same. The amendment could in no way have prejudiced respondent, for the indebtedness of the bank and the statutory liability of the stockholders therefor, as shown by the amendments, fully appeared in the original complaint. Respondent could have shown at the trial, if it were the fact, that the amendments alleged a different deposit or indebtedness from that pleaded in the original complaint, and this would have shown a cause of action different in its nature from that alleged. But the fact was that they were the same, except as to the misdescription of the depositor, which we do not think went to the nature or scope of the cause of action. The court found that the claim of Lewis Merrill had not been assigned to plaintiff, and that he was not the owner or holder thereof. This finding is not questioned in plaintiff's brief, nor can it be on this appeal. The judgment should be reversed as to the claims represented by the depositors B. G. Ruhl & Co. and Annie White, and as to the remaining portion of the judgment it should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed as to the claims represented by the depositors B. G. Ruhl & Co. and Annie White, and as to the remaining portion of the judgment it is affirmed.

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127 Cal. 162

CONNICK v. HILL et al. (S. F. 1,765.)

(Supreme Court of California. Dec. 13, 1899.)

MORTGAGES—FORECLOSURE—SALE IN LOTS—SETTING ASIDE SALE—INADEQUACY OF PRICE—REFUSAL TO POSTPONE SALE.

1. Where the commissioner appointed to sell land on foreclosure at the mortgagor's request offers the land in parcels, and receives no bid for either parcel, he may offer and sell the land in one parcel, though the mortgagor requests him to again offer it in parcels.

2. While the judgment debtor, under Code Civ. Proc. § 694, may direct the order in which land shall be sold under foreclosure, when it consists of lots and parcels, it must be made clearly to appear, in a motion to set aside the sale for refusal to sell in parcels, that the property consisted of separate known lots or parcels.

3. Where the evidence as to whether a request was made by the debtor in foreclosure proceedings to have the land sold in combinations of parcels is conflicting, the court, on appeal, will presume, in favor of the order of the trial court, that no such request was made.

4. Inadequacy of price is not sufficient ground on which to annul a foreclosure sale, since the judgment debtor is allowed to redeem.

5. Where no reason is given for which a foreclosure sale should have been postponed, the sale will not be set aside because of a refusal to postpone, since such refusal is not per se an abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county.

Foreclosure proceedings by John S. Connick against Charles W. Hill and another. A decree of foreclosure was granted, and from an order refusing to set aside a sale thereunder defendants appeal. Affirmed.

John W. Turner, for appellants. Gregor & Connick, for respondent.

COOPER, C. This is an appeal from an order made by the superior court of Humboldt county refusing to set aside a sale made under foreclosure. The plaintiff had regularly obtained a judgment and decree of foreclosure against defendants and others, and the court in the decree appointed one Belcher a commissioner for the purpose of making the sale. No directions were given in the decree as to the manner in which the property should be sold. The tract of land, as a whole, consisted of one body of 1,340 acres. The commissioner, after receiving the order of sale, gave due and proper notice that on the 7th day of June, 1898, the said lands and premises would be sold, in pursuance of the decree and order, at public auction, to the highest bidder, at the court-house door, in the city of Eureka, at 10 o'clock a. m. of said day. At the time and place of sale the defendant Charles W. Hill, who was one of the judgment debtors, requested and directed the commissioner to offer the said lands for sale in 63 separate parcels. The commissioner complied with the request, and offered the lands in the different parcels. He received no bid for either of the first 41 parcels, but the parcels from 42 to 63, inclusive, were sold to different bidders, and no complaint is made as to the sale of any of these parcels other than the first 41. After the parcels from 42 to 63 had been sold, the commissioner again offered the first 41 lots or parcels for sale as a whole. The judgment debtor requested the commissioner to again offer the 41 parcels separately, which request was refused. He then asked the commissioner to postpone the sale, which the commissioner refused to do. The first 41 parcels were then offered as a whole in one lot, and sold to plaintiff for the sum of $10,430, which was about the balance due him after first applying the proceeds of the sales of the lots other than the 41. The appellants gave due notice that they would move the superior court to set aside the sale to plaintiff upon several different grounds.

It is claimed that the sale of the 41 lots or parcels as a whole and in one parcel was an irregularity for which the sale should be set aside. We do not think so. The commissioner had complied with the request of appellants, and, without regard to the question as to whether or not the 41 parcels were "separate known parcels," had offered them for sale separately, and received no bids. After the other parcels had been sold, the appellants claim that they had the right to have him repeat what he had just done, and again offer the parcels separately. If they had the right to have him again offer the parcels the second time at the same sale, and before the same bidders, why not a third or a fourth? He had obeyed the dictates of the appellants to the letter, and, after receiving no bids, then did what he had a right to do under the circumstances,—offered the property in a lump, and received a bid sufficient to satisfy the judgment. He was not required to go through the idle ceremony of again offering the parcels separately. It is now the settled rule in this state that whenever separate known parcels of land are offered for sale separately in foreclosure proceedings, and no offer or bid made for either parcel, then the property may be offered and sold in one parcel. Marston v. White, 91 Cal. 40, 27 Pac. 588; Society v. Behnke, 121 Cal. 341, 53 Pac. 812. The same rule is laid down by the supreme court of the United States. White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113. The rule is to consider every sale made by an officer of court under the mandate thereof as final. Hopkins v. Wiard, 72 Cal. 262, 13 Pac. 687. When a party comes into court, and asks to set aside a sale, the burden is upon him to show such an irregularity or material departure from the statute as will justify the court in setting it aside. It is provided in the Code (Code Civ. Proc. § 694): "The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels."

It nowhere appears in the affidavits or record that the 41 lots were "known lots or parcels." It does appear that the appellant requested the sale of 41 different descriptions, but it does not follow that these 41 different descriptions were 41 different known lots or parcels. They may have all constituted one known lot or parcel. In a motion to set aside a sale on this ground, it must be made clearly to appear that the land consisted of several "known lots or parcels."

It is said the commissioner should have offered the lots in "combinations of parcels." If the law were such that appellants could require the property to be sold in combinations of parcels, the number of which might be infinite, there was a square conflict of evidence as to whether or not any request was made of the commissioner to offer the lots in such manner. We must presume in favor of the order of the court below, made upon conflicting testimony, that no such request was made. Particularly is this so when no such ground is stated in the notice of motion given by appellants, nor in their opening affidavit. And the appellants' attorney in his affidavit states that, after the sale of the lots from 42 to 63, "affiant then directed said commissioner, orally, to again offer said 41 parcels separately once more."

Inadequacy of price is stated as one of the reasons why the sale should be set aside. This is not sufficient ground upon which to annul a sale, particularly under our practice, when a judgment debtor is allowed to redeem. Smith v. Randall, 6 Cal. 53; Railroad Co. v. Creed, 70 Cal. 501, 11 Pac. 772. But the evidence as to the value was conflicting, and we must presume, in favor of the order of the lower court, that $10,000 is and was the full value of the property, as stated by plaintiff in his affidavit. This being true, the property sold for $430 more than its value.

It is said that the commissioners should have postponed the sale, and that his refusal to do so is ground for setting it aside. It appears that the commissioner was requested to postpone the sale of the 41 parcels to 2 o'clock of the same day, and after consultation with his attorney refused to do so. No reason is given why the sale should have been postponed. While there may be circumstances that would justify an officer in postponing a sale, it clearly is not an abuse of discretion in all cases to refuse such postponement. We advise that the order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

127 Cal. 189

BARCLAY v. BLACKINTON. (L. A. 766.)

(Supreme Court of California. Dec. 13, 1899.)

LIMITATIONS—ACTIONS AGAINST ADMINISTRATORS—CLAIMS AGAINST ESTATE—NEW TRIAL—STATEMENT—FILING—APPEAL—DISMISSAL.

1. Code Civ. Proc. § 337, provides that an action on a written instrument must be commenced within four years; and section 353 declares that if a person against whom an action may be brought die before the expiration of the time limited therefor, and the cause survive, an action may be commenced against his representative within one year after the issuing of letters of administration. Defendant's intestate died in 1896, leaving plaintiff's claim, due January 17, 1893, evidenced by a written contract, unpaid. March 2, 1896, letters of administration were issued to defendant; and on June 11, 1896, plaintiff presented his claim to defendant, who held it until August 16, 1897, when he rejected it, and plaintiff sued thereon October 2, 1897. *Held* that, since more than one year had elapsed after defendant's letters were issued before the action was commenced, the claim was barred, as the action could have been commenced after defendant had neglected for 10 days to pass on it, under Code Civ. Proc. § 1496, providing that, when the administrator neglects to allow or reject a claim for 10 days after it is presented, such neglect may by the claimant be deemed equivalent to a rejection on the tenth day.

2. The fact that the statement on motion for a new trial and the amendments were not presented in time is not ground for a dismissal of the appeal.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by H. A. Barclay against J. C. Blackinton, as administrator of the estate of S. C. Blackinton, deceased. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

M. W. Conklin, for appellant. E. W. Camp, for respondent.

COOPER, C. Judgment was rendered in the court below upon findings in favor of plaintiff and against defendant as administrator. This appeal is from the judgment and an order denying defendant's motion for a new trial. The facts are not disputed, and, so far as pertinent to the question to be here decided, are substantially as follows: On the 17th day of January, 1893, Mrs. S. C. McLellan made a promise in writing to pay plaintiff on said day the amount in controversy, married the defendant, and died in February, 1896, leaving the amount unpaid. On the 21st day of February, 1896, the defendant was appointed administrator of the estate of deceased, and on March 2, 1896, letters of administration were duly issued to him. On June 11, 1896, the plaintiff duly made out and presented his claim in writing to defendant as such administrator. The defendant kept the claim, and did not notify the plaintiff of his action upon it until August 16, 1897, when he returned it with his indorsement in writing rejecting it. On the 22d day of October, 1897, this action was commenced. The only question to be here determined is whether or not the plaintiff's cause of action was barred by the statute of limitations at the time the action was commenced.

It is provided in our Code (Code Civ. Proc. § 337) that "an action upon any contract, obligation or liability, founded upon an instrument in writing executed in this state," must be commenced within four years. The action was commenced more than four years and nine months after the written promise was made and due, and the cause of action was therefore barred by the statute, unless within the exception of some other section of the Code. It is claimed that the case is within the saving clause of Id. § 353, which, so far as applicable here, is as follows: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." The defendant's intestate, against whom the action might have been brought, died before the expiration of the time limited for the commencement thereof; and the plaintiff, under the provision of the section quoted, had one year after the issuance of letters of administration to the defendant in which to commence his action. He did not commence it within one year after the issuance of letters, but more than one year and seven months elapsed before the commencement thereof. The cause of action is therefore not within the saving clause of section 353, and was barred at the time the complaint was filed. In McMillan v. Hayward, 94 Cal. 360, 29 Pac. 774, it is said: "The statute had, therefore, commenced to run, and would continue to run, unless the case is brought within some express exceptions of the statute; and death is not made such, further than that the suitor may in such case commence his action within one year after letters are issued. This action was commenced neither within four years after the maturity of the note, nor within one year after letters were issued. * * * The evident purpose of section 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time." In this case the time would have expired January 17, 1897, but the statute quoted extended the time to March 2, 1897;

thus giving respondent 1 month and 15 days more time in which to bring his action than he had under the general statute.

The opinion of the learned judge of the court below is printed by plaintiff's counsel, and adopted by him as his brief. In the opinion it is said that the action was stayed by statutory prohibition, under section 356, Code Civ. Proc., which provides: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibtion is not part of the time limited for the commencement of the action." After discussing the section quoted, and sections 1496, 1498, 1500, Code Civ. Proc., the judge said: "It appears clear, therefore, that the effect of section 1500 and the other sections above quoted is to prohibit the holder of any claim against an estate from beginning any action thereon until the claim has been presented to the administrator, and rejected by him." It appears clear to us that such is not the effect of the sections quoted. Section 1496 expressly says: "If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day." And it has been held by this court that such action can be brought after the tenth day without any formal rejection of the claim. Bank v. Shoemake, 67 Cal. 148, 7 Pac. 420; Roddan v. Doane, 92 Cal. 558, 28 Pac. 604; Cowgill v. Dinwiddie, 98 Cal. 481, 33 Pac. 439. Therefore plaintiff could have brought this action any time after June 21, 1896, up to March 2, 1897. It was his own laches not to have done so. The theory of the statute of limitations is that a creditor has the full statutory time, whatever that may be, on any day of which he may of his own volition commence an action. Hoff v. Funkenstein, 54 Cal. 235.

It is said that under Code Civ. Proc. § 1498, the plaintiff had three months after the claim was formally and officially rejected by the administrator in which to bring his action. We do not so construe the statute. The section may shorten, but cannot be held to lengthen, the general statutes of limitations. The special limitations of time within which suit must be brought against the estates of deceased persons are called in many states statutes of nonclaim, or of short or special limitation. These limitations exist independent of and collateral to the general law of limitations. 2 Woerner, Adm'n, § 400, and cases cited.

After the 2d day of March, 1897, the claim was barred by the statute of limitations, and thereafter neither the administrator nor the court had the power to allow it. On the contrary, they were expressly prohibited from doing so. Code Civ. Proc. § 1499. If it could not be allowed because barred by the statute, it is difficult to conceive how it could be allowed by a rejection of it, and suit brought within three months after the rejection. If it was barred by the statute when rejected, it continued to be barred when suit was brought upon it. Any other construction would enable a claim against an estate to be kept alive for years, or until all the witnesses were dead, simply by the neglect of the administrator to act upon it. He might forget it, or by accident or negligence mislay it, and the estate be closed and distributed; and yet, under the interpretation of the statute claimed by plaintiff, suit could be brought upon it, and the assets taken from the heirs, though years had passed. If the contention of plaintiff is correct, the administrator by his negligence could add over seven months to the general statutes of limitation. If he could add seven months, there is no reason why he could not add seven years or any other time in the same manner. The right of a claimant to enforce his claim under our statutes of limitations depends upon his own vigilance, and is often lost by his own laches. We know of no principle that will preserve it by the carelessness or laches of the party against whom it is sought to be enforced. If the deceased had lived, and the plaintiff had presented his claim to her and demanded its payment on the 11th day of June, 1896 (the day of its presentation to the appellant), and she had kept it and never returned it, certainly it would not be claimed that the demand or written claim so made of her would prevent her from pleading the statute. Was the demand or written claim made of her administrator after her death of any greater effect? In the one case suit could have been brought without making or presenting any claim; in the other, a written claim is made requisite by the statute. It has been many times decided by this court that, when a claim is duly presented and allowed by the administrator and the judge, it stops the running of the statute. It has never been held that the mere presentation of it has the same effect. The statute of Illinois required all claims to be exhibited against the estate within two years from the grant of letters, or be forever barred. In discussing this statute the supreme court said in the case of Reitzell v. Miller, 25 Ill. 69: "It was not the design of the general assembly that the filing of the claim should arrest the general statute of limitations, which had previously begun to run, nor to prevent it from afterwards running upon a claim not due at the time of its presentation. The object of this section is to facilitate and produce speedy settlement of estates of deceased persons, and it could not have been the design to give creditors an unlimited period of time within which to establish the justice of their claims after they had been exhibited in the probate court. Such a construction would defeat the manifest intention of the enactment." The case is cited and approved in Morse v. Clark, 10 Colo. 219, 14 Pac. 327. In Toby v. Allen, 3 Kan. 413, in speaking of a claim where the debtor had died, the court said: "Whether the law shall operate to bar his claim is made to depend entirely upon his own action, subject to the conduct of the debtor as to absence, concealment, payment, etc. Its operation in no event is made to depend upon the action of third persons. No matter who shall commence a suit, or who shall forbear, the operation of the statute depends wholly, subject to the exceptions above referred to, upon the action of the owner of the claim sought to be enforced." Section 164 of the Code of North Carolina is similar to section 353 of our Code of Civil Procedure. The supreme court of that state, in construing the section in Benson v. Bennett, 112 N. C. 507, 17 S. E. 432, said: "The object in view is that when the cause of action survives, and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that, if the party die before the claim is barred, action may be brought after the expiration of the time limited, and within one year."

The law, in its wisdom, prescribes periods of limitation, during which actions must be commenced against persons while living, or they will be barred. The reasons are much greater for requiring diligence in the prosecutions of claims or actions against the estates of deceased persons. It is the everyday experience of almost every lawyer that fictitious or doubtful claims are often presented against estates, that never would have been presented against the party if living. The claim may have been paid, and the only knowledge of such payment possessed by the deceased, whose lips are closed by death. The policy of the law is to settle up the estates of deceased persons as speedily as possible, to pay the just debts and expenses, and distribute the property to the rightful heirs or devisees. For this reason statutes are justified and upheld that shorten the period and time of presenting and bringing suits on claims against estates. The language of the supreme court of the United States in U. S. v. Wiley, 11 Wall. 513, 20 L. Ed. 211, may well be applied to respondent: "Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed." In this case the time was defined and allowed, and the respondent had the power to sue. The result may be a hardship, but it is not different from any other case where the party loses through mistake or ignorance of the law. It is of much greater importance that laws should be general and uniform in their operation, and enforced by uniform rules, applied alike to all cases, than that a particular hardship should be averted.

Plaintiff claims that the appeal should be dismissed because the statement on motion for a new trial and the amendments were not presented and filed with the clerk in time. This is no ground for the dismissal of the appeal. Neither does the case come within the rule of Wheeler v. Karnes (Cal.; filed June 13, 1899) 57 Pac. 893, cited by plaintiff. The statement was settled by the judge on the 10th day of March, 1899, and there is nothing in it to show whether or not any objection was made to its settlement in any manner, nor whether any exception was taken. There is a statement printed in the transcript, immediately after the settled statement, as to certain objections, but it is signed by the attorney for respondent only. This is no part of the record, and has no place in the transcript. People v. McMahon, Id. 224. Even if the statement should be disregarded, the facts appear from the judgment roll. The judgment should be reversed, and the cause remanded, with directions to the court below to enter judgment on the findings in favor of appellant, and in accordance with the views herein expressed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to enter judgment on the findings in favor of appellant, and in accordance with the views herein expressed.

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127 Cal. 99

PEOPLE v. TERRILL. (Cr. 557.)

(Supreme Court of California. Dec. 5, 1899.)

FORGERY—INDICTMENT—SUFFICIENCY—DESCRIPTION OF INSTRUMENT.

Under Pen. Code, § 470, providing that one who, with intent to defraud another, falsely makes, forges, or counterfeits any deed, indenture, or "writing obligatory," is guilty of forgery, an information which fails to show whether a mortgage alleged to have been forged was given on real or personal property, or on any property, or whether it was given to secure a note or indebtedness of any kind, charges no offense.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county.

Samuel B. Terrill was indicted for forgery. From an order sustaining his demurrer to the indictment, the people appeal. Affirmed.

Atty. Gen. Ford and James H. Campbell, for the People. Jackson Hatch and H. L. Partridge, for respondent.

COOPER, C. This is an appeal from an order sustaining defendant's demurrer to an indictment. The grand jury of Santa Clara county, on the 9th day of May, 1899, presented an indictment against the defendant in the following language: "The said Samuel B. Terrill is accused by the grand jury of the county of Santa Clara, state of California, by this indictment, found this ninth day of May, A. D. one thousand eight hundred and ninety-nine, of the crime of forgery, committed as follows: The said Samuel B. Terrill, on the first day of December, A. D. eighteen hundred and ninety-six, at the county and state aforesaid, uttered, published, and passed as true and genuine a certain false, forged, and counterfeit mortgage of said date, purporting to be made and executed by one George Donlan in favor of Clara A. Fread, said Samuel B. Terrill then knowing the same to be false, forged, and counterfeit, with the intent on the part of said Samuel B. Terrill to prejudice, damage, and defraud said Clara A. Fread, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California." To this indictment the defendant interposed a demurrer upon the grounds that it does not substantially conform to sections 950, 951, and 952 of the Penal Code, and that the facts stated do not constitute a public offense. The court below sustained the demurrer. "Forgery" is defined in section 470 of the Penal Code as follows: "Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * deed, lease, indenture, writing obligatory, * * * is guilty of forgery." The word "mortgage" is not used in the section nor elsewhere in the Code in defining "forgery." Conceding that a mortgage is included in the words, "indenture or writing obligatory," the indictment must show that the mortgage is such in its legal character as if genuine might injure or defraud another. The only description of the mortgage alleged to have been forged is the date, December 1, 1896, "purporting to be made and executed by one George Donlan in favor of Clara A. Fread." Whether the mortgage was one which could in any manner have injured any one is, when measured by the indictment, a matter of conjecture. Whether it was given upon real or personal property, upon any property, or upon the planets is not disclosed. It is not shown that it was given to secure any promissory note or indebtedness of any kind or any obligation. It may have been void on its face, or given in direct contravention of some statute, or it may have been given for an unlawful purpose, and yet the information be true. It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute or its equivalent, or by stating facts which show that such crime has been committed. In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and, if the facts stated may or may not constitute a crime, the presumption is that no crime is charged.

It may be that the defendant is guilty of some offense, perhaps of forgery, but we have nothing to guide us except the indictment. The officer intrusted by the law with the duty of drawing the indictment should have set forth facts showing that a crime had been committed. The order should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

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127 Cal. 177

KEECH v. BEATTY et al. (L. A. 590.)

(Supreme Court of California. Dec. 13, 1899.)

REPLEVIN—PLEADINGS—SUPPLEMENTAL ANSWER—JUDICIAL RECORDS—OWNERSHIP—POSSESSION—RES JUDICATA.

1. To allow defendants in an action of claim and delivery to file supplemental answers alleging a final judgment against the plaintiff in another suit against two of said defendants, brought by him in the same capacity, to recover the same goods, as a plea in bar, was not error, where such answers showed that the issuable facts in the other suit were the same as in the case at bar.

2. The written opinion filed by the trial court in a case, being no part of the record, is not competent evidence to show what the issues were.

3. No recovery can be had by an insolvent's assignee in an action against an execution creditor for claim and delivery, where it is found that the plaintiff is not, and never has been, the owner of the property, and was not entitled to the possession of it, and that none of it was in defendant's possession at the commencement of the action.

4. That a judgment in an action for claim and delivery may be erroneous does not render its effect as res judicata less binding.

Commissioners' decision. Department 2. Appeal from superior court, Orange county.

Action by E. E. Keech, as assignee of the firm of Beatty Bros., insolvents, etc., against Richard Beatty and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. James G. Scarborough and Brousseau & Montgomery, for respondents.

COOPER, C. This is an appeal from a judgment made and entered in the superior court of Orange county in favor of defendants, and comes here on the judgment roll and a bill of exceptions. The action was brought to recover the possession of specific personal property, or, in case a delivery cannot be had, the value thereof. The findings show the facts substantially as follows: On the 10th day of May, 1895, John Beatty, Jr., and Robert Beatty, as co-partners, being the owners of a stock of merchandise, notes, and accounts of the value of $5,650, were insolvent and unable to pay their debts as they became due, and on said day they procured the said stock of merchandise to be levied upon and seized by virtue of two executions against them issued on two separate judgments which had been duly given and made, one in favor of the First National Bank of Santa Ana, and the other in favor of one Richard Beatty. That the said co-partners procured the said property to be levied upon with a view of giving the said judgment creditors a preference, and that the said judgment creditors, at the time of the issuing and levy of the said executions, had reasonable cause to believe that said co-partners were insolvent, and that the said levy under said executions was made to prevent the property from coming to the assignee in insolvency, and to delay and impede the operation of the insolvent act of 1880. On the 18th day of May, 1895, more than five creditors of the said co-partners filed their petitions in the superior court, in due form and properly verified, asking to have said co-partnership adjudged insolvent under the provisions of the insolvent act of 1880. On the 23d day of May, 1895, the defendant Crookshank, at sheriff's sale, under the executions hereinbefore referred to, became the purchaser of the property described in the complaint, and took possession thereof at said time; and at the time of said sale the said Crookshank had notice of the fact that the said co-partners were insolvent, and that a petition had been filed to have them adjudged insolvent, as herein stated. This action was commenced April 13, 1896, and at the time of its commencement the defendant Crookshank had in his possession only a remnant of the said goods and merchandise, the total value of which did not exceed $750, and neither of the other defendants had any part of the said property in their possession. On March 18, 1896, the plaintiff, having been duly elected assignee of the said insolvent co-partners, took the proper oath, duly qualified, and entered upon the discharge of his duties as such assignee; and on the same day the clerk of the court, in pursuance of the statute, duly conveyed by instrument in writing all the property of said insolvent co-partners to the plaintiff as such assignee. On the 8th day of June, 1896, the plaintiff, as assignee, commenced an action against the defendants Crookshank and the defendant bank, in the superior court of Los Angeles county, to recover the value of the same property described in the complaint in this action, and the said defendants in said last-named action duly filed their answer. That the said action so commenced in the superior court of Los Angeles county was by the same plaintiff who is the plaintiff in this action, and in the same right, and was against two of the same defendants who are defendants in this action, and involved the same property and subject-matter as that in litigation here. That the said action so brought in the superior court of Los Angeles county resulted in a judgment on the 16th day of March, 1897, duly given and made in favor of the defendants therein and against the plaintiff, and by the judgment it was duly adjudged and decreed that the defendant Crookshank was the owner of, and had valid title to, the said property, and that plaintiff was not, and never had been, the owner of the said property, nor any part thereof. The court in this case further found that the plaintiff is not, and never has been, the owner of the property described in the complaint, nor any part thereof, nor entitled to the possession thereof. As conclusions of law, the court found that the judgment so rendered on the 16th day of March, 1897, in the superior court of Los Angeles county, was and is final, and is a bar to the present action as to defendant Crookshank and the defendant bank; that plaintiff is not entitled to recover; and that defendants are entitled to judgment. The judgment is clearly the legal conclusion from the facts found. The greater portion of the plaintiff's brief is devoted to arguing the insufficiency of the evidence to support portions of findings Nos. 5, 6, and 7. We have carefully read the evidence, and we think the evidence supports the findings.

The defendants, by leave of court, were allowed to file supplemental answers, in which they set up by way of plea in bar a judgment rendered against plaintiff by the superior court of Los Angeles county on March 16, 1897. The plaintiff objected to the filing of the supplemental answers on the ground that they were immaterial, and demurred to them after they were filed upon the ground that they did not state facts sufficient to constitute a defense. The objection was overruled, and so were the demurrers. It is now urged that the rulings were erroneous because "the supplemental answers reveal the lack of identity of issuable facts." The supplemental answers show that the same plaintiff who is now plaintiff, and in the same right, commenced the action in the superior court of Los Angeles. The answers each set up a copy of the complaint in the action commenced in Los Angeles. The description of the property in that case, as contained in paragraph 2 of the complaint, is of the identical property described in the complaint in this case, and in each case the goods and merchandise are described as in "the business, store, and salesroom No. 202 West Fourth street, at the southwest corner of Fourth and Sycamore streets, in the said city of Santa Ana." The answers show that in the Los Angeles case the plaintiff made the same allegations as to his appointment as assignee, qualification, etc., as he has made in the present case. The supplemental answers further expressly allege that the persons, property, and transactions set forth in plaintiff's complaint in Los Angeles "are identically the same as those described and set forth in the complaint filed in this action." The orders of the court allowing the supplemental answers to be filed, and overruling the plaintiff's demurrers thereto, were correct. The answers showed that the issuable facts in the case in which the final judgment was rendered were the same as in the case at bar. The record does not show that any objection was made to the answers being filed on the grounds urged by plaintiff in his brief. The objection was that they were immaterial. Neither does the record show that any such ground was urged on demurrer. The demurrers were solely upon the ground "that the same did not state facts sufficient to constitute a defense."

The plaintiff at the trial offered in evidence the written opinion of the judge of the superior court of Los Angeles county in the action which resulted in a final judgment against plaintiff in that county, "for the purpose of showing the nature of that action and the issues which were submitted to the court for its consideration." The defendants objected upon the ground that the opinion was incompetent, irrelevant, and immaterial, and no part of the record in that case. The court sustained the objection, and the ruling is now claimed to be error. The opinion of the judge was no part of the record. If it be conceded that parol evidence may be given as to what the issues were in the former suit, the parol evidence would have to be competent. The written opinion, without even the form of having been made under oath, was not competent evidence for the purpose for which it was offered. It is urged that the estoppel in the former case could not apply to defendant Beatty, for the reason that he was not a party thereto. The court below did not find, as a conclusion of law or otherwise, that the former judgment was a bar as to defendant Beatty. It did find, however, that defendant Beatty did not have in his possession at the time of the commencement of this action any of the property described in the complaint. In such case, in an action in claim and delivery, the plaintiff cannot recover. Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414. It further found that plaintiff is not, and never has been, the owner, or entitled to the possession, of the property. In such case he is not entitled to recover. Cardinell v. Bennett, 52 Cal. 476; Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750.

The findings are not inconsistent. Finding 5 shows that defendant Crookshank purchased the property described in the complaint at sheriff's sale on May 23, 1895, and took possession of it, but that he had sold and disposed of all of it, except a remnant worth about $750, prior to the time this action was commenced. This is not inconsistent with the finding of estoppel by reason of the former suit, neither is it inconsistent with finding 7, that plaintiff is not, and never has been, the owner of, or entitled to the possession of, the property. The finding that defendants the bank and Beatty seized the property upon executions, with a view to obtain a preference, and that at the time they had reasonable cause to believe the co-partners to be insolvent, is not inconsistent with the finding of the estoppel by reason of the former judgment between the same parties, and involving the same subject-matter. The former judgment may have been erroneous, but, it being a final judgment, its effect as res judicata is none the less binding in this case. Freem. Judgm. § 249; Bigelow, Estop. (5th Ed.) p. 261. We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

127 Cal. 456

In re HEYDENFELDT'S ESTATE.

(S. F. 1,753.)

(Supreme Court of California. Jan. 18, 1900.)

EXECUTORS AND ADMINISTRATORS—PETITION FOR SALE OF REAL PROPERTY—SUFFICIENCY—JUDGMENTS — ESTOPPEL — APPEAL AND ERROR.

1. A petition by an executor for the sale of real property for the payment of debts cannot be assailed on the ground that it does not state facts sufficient to constitute a cause of action, unless it exhibits a total failure to state the necessary facts; and a petition which shows a substantial compliance with Code Civ. Proc. § 1537, prescribing what such a petition should contain, is sufficient.

2. A petition by an heir to require executors to pay a mortgage indebtedness of their testator, which averred that the executors had sufficient funds to discharge such indebtedness, was opposed by the widow and executors. The court found "that the amount realized as proceeds of the sale of unproductive property, inclusive of the unproductive property still unsold, largely exceeded the amount of the mortgage debt." *Held*, on a subsequent petition by the executors for the sale of real estate to pay debts, taxes, and costs of administration, that the above finding did not operate as an estoppel against the second proceeding, since it was not necessary to the judgment on the first petition, and was, moreover, simply that the proceeds of sales, "together with the unproductive property then unsold," was sufficient to pay the indebtedness, whereas it appeared that most of said unsold property had been used for other purposes.

3. Under Code Civ. Proc. § 1910, providing that, as to judicial orders creating disputable presumptions between the same parties, the parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and judgment could have been rendered between them alone, a widow, who joined with the executors of her husband in resisting an application for directions to the executors to pay a mortgage, and charging that they held funds sufficient for that purpose, cannot, on a subsequent petition by the executors for the sale of real estate to pay debts, set up the finding against the executors in the former proceeding as an estoppel against the second petition, since she and the executors in the first proceeding were on the same side.

4. Where a testator directs that his debts be paid from the sales of his unproductive property, an order directing the executor to sell property, a part of which is productive, will not be reversed on appeal, where the sale was not for the payment of debts alone, but also for payment of taxes and large expenses of administration.

Department 2. Appeal from superior court, city and county of San Francisco.

Petition by the executors under the will of S. Heydenfeldt, deceased, for an order to sell real estate for the payment of debts and costs of administration. Objections were filed by Elizabeth A. Heydenfeldt, widow of the testator, and certain other heirs. From an order directing a sale the widow appeals. Affirmed.

Knight & Heggerty and Geo. D. Collins, for appellant. Evans & Meredith and Lester H. Jacobs, for respondent.

McFARLAND, J. The executors filed a petition for an order directing the sale of certain real property of the estate in order to redeem from sale under a decree of foreclosure certain property that had been sold for indebtedness of the testator, and in order to pay charges and expenses of administration, to pay taxes on the property of the estate, etc. Written objections to the petition were filed by Elizabeth A. Heydenfeldt, widow of the testator, and certain other heirs. After a full hearing of the matter, the court, on the 12th of January, 1898, made an order directing certain real property to be sold. From this order the widow, Elizabeth A. Heydenfeldt, appeals.

The points mainly relied on here for a reversal are based on asserted insufficiencies of the petition for the sale. No objections of that character were made in the court below; but appellant contends that the petition occupies the position of a complaint in an ordinary action, which may be assailed at any time on the ground that it "does not state facts sufficient to constitute a cause of action." Assuming, for the purposes of this decision, that this is so, still a complaint cannot be successfully attacked on that ground unless it exhibits a total failure to state the necessary facts. The point that a statement is insufficient which is easily understood as an attempted statement of a particular fact, and is merely shadowed by some uncertainty or want of fullness or aptness of expression, can be reached only by a special demurrer or objection in the court below. And in this case, without enumerating here the various objections to it, it is sufficient to say that the petition shows a substantial compliance in all respects with section 1537, Code Civ. Proc., which prescribes what a petition for the sale of property should contain; and "a substantial compliance is enough." Stuart v. Allen, 16 Cal. 474; Richardson v. Butler, 82 Cal. 174, 23 Pac. 9; Burris v. Adams, 96 Cal. 666, 667, 31 Pac. 565; Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458.

The will of the testator directs that his debts be paid from proceeds of sales of his unproductive property; and appellant contends that the court was estopped, by a finding in a former proceeding, from finding in this present proceeding that the executors have no such proceeds in their hands. The former proceeding was a petition of Zeila O. Hellings, a daughter of the testator, for a direction to the executors to pay and discharge certain mortgage indebtedness of the testator, in which she averred that the executors had sufficient funds in their hands to discharge said indebtedness. The executors filed a written opposition to the granting of said petition, and so did the present appellant. In that proceeding the court found, among other things, "that the amount realized as proceeds of sale of the unproductive property of said estate, inclusive of the unproductive property of the estate still unsold, largely exceeds the amount of said mortgage indebtedness, the same amounting in fact to the sum of over seventy thousand ($70,000) dollars." That finding was made on May 27, 1896, and it did not estop the court from finding that there were no funds in the hands of the executors at the time the order now appealed from was made, for various reasons. In the first place, it was not a finding that the executors, even at that time, had, as a product of the sale of unproductive property, the sum of $70,000, but only that the proceeds of sale, together with unproductive property then still unsold, amounted to that sum; and it appears that much of the property has since then been used for other purposes. In the second place, the finding was not necessary to the judgment in that proceeding, and therefore is not an estoppel as against any one. See Lillis v. Ditch Co., 95 Cal. 553, 30 Pac. 1108. In the third place, the present appellant, and the executors who are respondents here, were not on opposite sides in the former proceeding, but were in that proceeding on the same side, and therefore the appellant cannot here invoke the principle of estoppel. Section 1910, Code Civ. Proc. The court found, upon sufficient evidence, that all the property ordered to be sold is unproductive property, except a tract of land in Tulare county of the value of $7,680; and appellant contends that the order is erroneous because the product of the sale of the Tulare land, as said land is not unproductive, cannot be applied to the payment of the debt of the testator here sought to be discharged. But the sale was not ordered for the payment of the debt alone. It includes also large expenses of administration, taxes, etc. If the order should have provided that the proceeds of the sale of the Tulare land should be applied to the expenses of administration alone, and that only the proceeds of the unproductive property should be applied to the debt, the only result would be a modification of the order here directing that the proceeds of the sales of the property be thus segregated. It is not to be presumed, however, that the court below will not make a proper distribution of the proceeds of the sales; and as it is fairly contended that the appellant and other persons interested in the estate have heretofore received unproductive property, and the proceeds thereof, which should have been applied to the payment of the said mortgage indebtedness, we do not feel called upon to embarrass the court below by any specific directions in the premises. The order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

127 Cal. 489

In re WARD. (Cr. 612.)

(Supreme Court of California. Jan. 29, 1900.)

BAIL—ILL HEALTH OF DEFENDANT.

The fact that a defendant convicted of the crime of embezzlement is so afflicted with catarrh and asthma as that confinement in the county jail, under the conditions there existing, will endanger his health, and probably be attended with fatal results within a few months, is such an extraordinary circumstance as to make it a proper exercise of discretion to admit him to bail pending an appeal.

In bank. Petition of Bernard Ward for a writ of habeas corpus, for the purpose of obtaining an order that he be allowed to give bail pending his appeal from a conviction of the crime of embezzlement. Writ allowed, and release of petitioner on giving bail ordered.

F. M. Gowan, for petitioner.

PER CURIAM. The petitioner was on the 2d day of December, 1899, convicted of a felony in the superior court of the city and county of San Francisco, to wit, of embezzlement. A judgment was rendered against him that he be imprisoned in the state's prison at San Quentin for the term of seven years. From this judgment he has taken an appeal, and a certificate of probable cause was granted him by the judge of the court in which he was convicted. He made application to said court to be allowed to give bail pending the appeal, and the application was by said court denied. He is now before this court on habeas corpus for the purpose of being allowed to give such bail. Upon the hearing he produced the certificates and affidavits of three respectable physicians, in all of which it is stated that he is suffering with chronic catarrh and asthma, and that confinement in jail would be injurious to his health, and in one of which it is stated that "confinement in jail is injurious to his health and endangers his life." At the hearing there was the additional testimony of Dr. James H. O'Connor, a reputable physician, who testified very fully as to the condition of the petitioner, and stated very positively that, from his frequent examinations of the petitioner, his opinion was that confinement in the jail under the conditions there existing would, if continued two or three months, result fatally. At this hearing, which was on January 13, 1900, it was stated by an attorney who represented the district attorney's office that petitioner and his counsel had refused to allow any physician selected by the district attorney to examine petitioner. As this statement was not denied (the main counsel for the petitioner being absent), it was suggested by the court that the case would be continued to allow an examination of the petitioner by some physician selected by the district attorney. Afterwards a stipulation was entered into by the district attorney and the attorney for petitioner that Dr. J. G. Morrissey was a physician satisfactory to both parties, and that said physician "may make and file his affidavits herein showing the physical condition of Bernard Ward, petitioner herein." Such an examination was afterwards made by Dr. Morrissey, and his affidavit has this day been presented to the court, and is as follows: "I am now, and during all the times hereinafter mentioned was, the city physician in and for the city and county of San Francisco, state of California. I made a physical examination of Bernard Ward, the defendant in the above-entitled matter, at the county jail in the said city and county, on the 19th day of January, 1900. I find said defendant to be suffering from asthma, and his lungs are involved; and the physical conditions now existing at said county jail, where said Ward is now incarcerated, are such that further confinement of said Ward at said jail is fraught with serious impending danger to his health. The balance of chances is that, if said Ward shall continue to be confined for a period of three months or more in said county jail, a fatal result will ensue." We think that in this case circumstances of an extraordinary character appear, within the meaning of former decisions of this court, and that it is a proper exercise of discretion to admit petitioner to bail pending the appeal. It is therefore ordered that the petitioner be admitted to bail, pending his appeal, in the sum of $7,000, the undertaking to be approved by the judge of the superior court in which he was convicted, and that upon the giving of such an undertaking, approved by said judge, the petitioner be discharged from custody.

(127 Cal. 471)

OTTO v. LONG et al. (Sac. 609.)[1]

(Supreme Court of California. Jan. 24, 1900.)

MORTGAGES—ALLOWANCE AGAINST MORTGAGEE'S ESTATE—CONSIDERATION—EQUITY—MISTAKE—COMPROMISE.

1. A mortgage on real estate was executed and accepted, by mutual mistake, under the supposition that the mortgagor was the owner of the property therein described, when in fact he never had any interest whatever therein. On the death of the mortgagor the mortgagee filed a claim against his estate for the amount of the mortgage debt, without referring to the mortgage, and the same was allowed as an unsecured claim. *Held* that, since there was in fact no mortgage, the allowance was not void under Code Civ. Proc. § 726, providing that there can be but one action for recovering any debt secured by mortgage upon real estate, which must be by foreclosure proceedings.

2. Where a note and mortgage are executed by devisees for the debt of their testator, pursuant to an agreement that the mortgagee shall accept the same in lieu of his "claim and demand" against the estate of the testator, represented by a note and mortgage, which, being lost, are canceled by delivery of a receipt to the devisees reciting that the amount of the new note and mortgage is received as full satisfaction of the original note and mortgage, there is a sufficient consideration to support the note and mortgage made by the devisees.

3. Equity will not grant relief against a note and mortgage made by devisees for the debt of their ancestor, on the ground of mutual mistake, in that the same were made under the mutual belief that the creditor was remitting $400 justly due him, whereas the amount of the note was more than the creditor was entitled to, when both parties have equal opportunity to ascertain the exact amount due, and their ignorance of the truth is the result of gross negligence.

Department 2. Appeal from superior court, Lassen county.

Action by A. Otto against Mary E. Long, administratrix, and others, to recover upon a note and mortgage. From a judgment for plaintiff, defendants appeal. Affirmed.

Goodwin & Goodwin, for appellants. Spencer & Raker, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage given by the decedent in her lifetime, and by the other defendants. The important facts are these: Allen Wood, who was then the husband of the intestate, Mary Wood, in 1888 gave to plaintiff, to secure an indebtedness due from himself to plaintiff, his promissory note, and what purported to be a mortgage upon land in which he had no estate, title, or interest of any kind or character, and which was then, and has ever since been, owned and occupied by the defendants Mary E. Long and W. B. Long as and for their homestead. Allen Wood died in 1890, testate. The purport of his will is not made to appear, but counsel on both sides assume that his widow, Mary Wood, and Mary E. Long, who was his daughter and only child, were interested in his estate. He left a solvent estate, and among his assets were (1) a tract of land which was a declared homestead; and (2) 80 acres not included in his homestead. Mary Wood, then his widow, was appointed administratrix with the will annexed, and duly qualified. Notice to creditors was published, and in due time, August 7, 1891, plaintiff presented for allowance his claim founded upon the note, but made no mention of the mortgage. It was duly allowed both by the administratrix and by the judge, and was filed. On the 1st day of December, 1893, the said Mary Wood and the defendants Long executed to plaintiff the mortgage upon which this suit was brought, which was given to secure the debt due from the estate of Allen Wood, and there was no further or other consideration for the same than the indebtedness of the estate of Allen Wood to plaintiff. All parties at the time of the transaction believed that the land covered by the mortgage belonged to Allen Wood when the first mortgage was given, and constituted a part of his estate at the time the note in suit was given; also, that the claim had been properly presented to his administratrix, and was properly allowed, and was a valid claim against the estate, both as to the note and the mortgage. All parties also believed that there was then due upon the original note about $2,900, and that, in accepting the new note and mortgage in lieu of the old one, plaintiff remitted about $400 of the indebtedness to them. As a matter of fact, the amount due plaintiff was then only $2,321. Defendants did not discover any of these mistakes until after this action was commenced. It is not found that Otto believed at the time the new note was given that the land described in the mortgage of Allen Wood belonged to the estate; but he certainly knew that Mary Wood and the defendants were acting under that belief, and he did not inform them of their mistake. In his receipt given in discharge of the old debt, he describes it as a claim secured by mortgage. It is probable that when the first mortgage was accepted by Otto he supposed that the land was the property of Wood, but it is possible that when he presented his claim to the administratrix he had discovered the truth, and therefore did not present the mortgage.

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[1] Rehearing denied February 22, 1900.

Practically the only defense which the defendants make is that there was no consideration for the new note and mortgage, and this is based upon the proposition that as the obligation of Allen Wood was secured by mortgage, and the mortgage was not described in the claim as the statute directs that it should be, the allowance is absolutely void; and it has been decided in this state that a wife is not even morally bound for the debts of her husband, and that her note for his debt, where there is no new consideration, is void. Rosenberg v. Ford, 85 Cal. 610, 24 Pac. 779; Sullivan v. Sullivan, 99 Cal. 193, 33 Pac. 862; Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028. Appellants concede that if Otto had a valid claim against Allen Wood's estate, and the claim was paid by the new note and mortgage, there was a valid consideration; but they deny both propositions. Respondent accepts these as the true issues involved, subject to his contention that the court found that there was an adequate consideration, and did not find that there was a mutual mistake. Respondent contends, however, that the debt of Allen Wood to plaintiff was not secured by a mortgage, and therefore it was properly presented and allowed.

Section 726 of the Code of Civil Procedure provides, "There can be but one action for recovering any debt, or the enforcement of any right secured by mortgage upon real estate, which must be in accordance with the provisions of this section," etc. Admittedly, Otto could not waive his security, if security he had, and bring a personal action to recover his debt; and it is also admitted that, if the debt was so secured, it was not presented as required by section 1496 of the Code of Civil Procedure. It is also agreed that Allen Wood had neither title nor possession to the mortgaged premises when he gave the mortgage, and that he acquired none subsequently. In reality, it never did amount to security, and yet the instrument was not wholly void. Had Allen Wood acquired any interest in the mortgaged premises during the natural life of the contract, the lien of the mortgage would at once have attached to it. And after-acquired title feeds the security. The policy which led to the enactment of section 726 has been often stated. The matter is discussed in Toby v. Railroad Co., 98 Cal. 490, 33 Pac. 550, where attention is called to some actions which could formerly have been maintained by a mortgagee after breach of the contract on the part of the mortgagor. The ends accomplished by the section, it is said, are (1) to confine the mortgagee to one action; (2) to make the security the primary fund from which satisfaction is to be made; and (3) to give plaintiff a judgment for the deficiency, if any, remaining after exhausting the security. Appellants rely almost entirely upon a remark found in Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086, as follows: "The proper construction of the language of the statute is that, if the mortgage on its face purports to be a security to the plaintiff, then he must bring his action for foreclosure. This word has reference to the purport of the mortgage as it appears upon its face. The interpretation is not proper when its meaning is sought in something outside of the mortgage instrument." In that case the plaintiff held a third mortgage, and brought a personal action to recover his debt, and claimed the right to disregard the mortgage because, as he contended, the amount due on the prior mortgages exceeded the value of the security. The ruling was to the effect that, so long as he had a lien on real property given as security, he must foreclose. In effect, this is saying that a foreclosure and sale is the special mode provided for determining whether there is anything for a particular mortgagee in the property subject to the lien. This position seems to follow from Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609, and other cases which hold that the liability of a mortgagor is only to pay any deficiency which there may be after foreclosure and sale of the mortgaged premises; that is to say, so long as there is an unexecuted lien on property to secure the debt, a personal action cannot be maintained. To inquire whether there is such property as that which the mortgage purports to cover, or whether for any reason it failed to create a lien, is not to violate the rule announced in Barbieri v. Ramelli, nor the policy of the statute. If it can be made to appear that there is no such property as that which the mortgage purports to describe, it would demonstrate that there was no lien, and the debt would not be one secured by mortgage upon real estate. If, when the mortgagor executed the mortgage, he had neither possession, nor any estate, title, or interest of any kind or character in the mortgaged premises, and never at any time acquired any, it is equally evident that the debt is not one secured by a lien upon real estate. One cannot by his contract create a lien upon property which he does not possess, and to which he has no title of any character whatever. If the mortgagor was in good faith asserting a claim to the property, or had color of title, or was asserting an equity in reference to it, perhaps the mortgagee would be compelled to foreclose. Here, confessedly, the mortgagor had no claim of title. Nor was the mistake, if there was one, such as could be corrected in a court of equity. Wood did not, so far as appears, describe the wrong tract of land. He was apparently under the impression that he had acquired title to the land from the United States, whereas his daughter and son-in-law had applied for and had received a patent for the land. It does not appear that there was any misrepresentation or fraud, or any mistake other than that above stated. And, strange as it may appear, the widow, the daughter, and son-in-law thought the land belonged to the estate of Allen Wood when they gave the second mortgage, and supposed they were creating a lien upon property to which they had succeeded as devisees or heirs of Allen Wood, and not upon their own property acquired by purchase. Under such circumstances, it does not violate the policy established by section 726 to allow a personal action upon the note. It is not altogether or literally true, as declared in some of the cases, that the mortgagor only undertakes to pay the deficiency which may remain after the return is made of the result of the sale on foreclosure. He undertakes to pay the debt, but, if there exists a valid lien to secure its payment, the result is the same as though his contract had been only to pay the deficiency. If, however, without fault on the part of the mortgagee, the lien be lost, he may be held for the entire debt. Savings Bank of San Diego Co. v. Central Market Co., 122 Cal. 28, 54 Pac. 273. And if, by some mistake, he does not get a lien upon anything, the rule should be the same. Why should he go through the senseless form of foreclosure, when confessedly he does not really have a lien? It may even be doubted whether he could or would be permitted formally to foreclose, and, in pursuance of a decree, offer for sale land belonging to a third party, when his mortgagor neither had nor asserted any title or claim, in law or equity, with reference to the property. Such a proceeding would tend to cloud land titles, and surely the policy of the law cannot require it.

The claim as presented and allowed being a valid claim against the estate of Allen Wood, deceased, it is admitted that it was a sufficient consideration for the new note and mortgage, provided it was surrendered and given up as paid by the new note. It is contended that there was no express agreement that the acceptance of the new note should operate as payment of the old note. It is averred in the answer, and found, that plaintiff importuned Mrs. Mary Wood for a new note in lieu of the old, and threatened to bring suit upon his note and mortgage, and put the estate to great expense; that, to prevent this, Mrs. Wood proposed to execute the new mortgage "in lieu of the claim and demand of said Otto against the estate of Allen Wood, deceased, if said Otto would forego the foreclosure of said mortgage and surrender the note," etc.; and that Otto accepted said proposition, and "pursuant thereto the note and mortgage described in the complaint herein were executed and delivered to plaintiff." It is also found that, before the new note and mortgage were delivered, Mrs. Mary Wood was informed that the old note had been lost, and therefore could not be given up, and thereupon Otto gave a receipt as follows: "Law Office of Goodwin & Goodwin. Susanville, Cal., March 26, 1894. Received of Mrs. Allen Wood, administratrix of the estate of Allen Wood, deceased, the sum of twenty-eight hundred sixty-two dollars, being payment full and complete satisfaction and discharge of claim of undersigned against said estate for promissory note and mortgage dated the 18th day of December, 1888, for $4,230^{30}/_{100}$, and recorded December 18, 1888, in Vol. E of Mortgages, pages 332–3 and 4, Lassen county records. [Signed] Anthony Otto." The point is that the receipt specifies that it is received in payment of the claim, but not of the note, which, it is said, left him free to foreclose the mortgage, which he might do though the claim against the estate were not presented or allowed. There is nothing in this. Satisfaction and discharge of the claim on the note is payment of the note, unless it is otherwise expressed.

Appellants contend that there was a mutual mistake as to other matters, and that the contract was based upon mutual misapprehension. The main point is that in the compromise all parties understood that Otto was remitting $400 justly due him, and one inducement for the defendants to give new security for the debt was their conviction that thereby they were gaining $400. They thought Otto was paying them $400 as an inducement. Unless Otto could have made his money out of the estate, there was no foundation for such belief. Otto's claim had been filed. It included a copy of the note and the credits. In Otto's affidavit it was stated that the amount due was $2,295.23, which, it seems, was about $50 too much. The misapprehension or mistake made by Otto was in regard to matters in reference to which Mrs. Wood and her attorney were as well informed as Otto was. Their ignorance of the truth was the result of gross negligence. The court rendered judgment only for the sum actually due. The failure of Mrs. Wood and her attorneys to compute the interest shows that they did not consider that a matter of much consequence in the compromise. As it is found that the estate was solvent, and it is assumed here, as it must have been in making the compromise, that Mrs. Wood and the defendants were the only persons interested in the estate of Allen Wood, they were practically getting an extension of credit for their own debt. Under the circumstances, I think defendants should not be relieved from their obligation. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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127 Cal. 464

WHITNEY v. AMERICAN INS. CO. et al.

(S. F. 840.)

(Supreme Court of California. Jan. 22, 1900.)

INSURANCE—CHANGE OF TITLE—NOTICE—REINSURANCE—PROFIT AND LOSS.

1. B. procured S. to transfer certain insured premises to T., in anticipation that the latter would accept the same in satisfaction of a debt due him from B. The deed from S. was handed to B., and recorded by him; but, before T. had accepted the conveyance, the building on the premises was burned, and thereupon T. refused to accept, and B. reconveyed to S. *Held*, that

there was no change of ownership in the property which necessitated notice to the insurer, under a mortgage clause in the policy requiring the mortgagee to notify the insured of any such change.

2. A contract by which a fire insurance company undertakes to adjust and pay losses under the policies of another company, thereby reinsured by it, as it would under its own policies if issued direct to the said assured, in pursuance of which it assumes the management of the business of the latter company, when assented to by the creditors of the retiring company, makes the latter and the reinsuring company jointly liable for a loss under a risk thus reinsured.

3. Where the risks of a fire insurance company are reinsured in another company, under a contract whereby the latter assumes the management and control of the business of the original insurer, and agrees to make adjustment and prompt payment of its losses, proofs of loss under a policy issued by said original insurer may be made to the reinsuring company.

Temple, J., dissenting.

In bank. Affirmed.

For opinion in department, see 56 Pac. 50.

VAN DYKE, J. This action is brought jointly against the two companies defendant upon a fire insurance policy issued by defendant the American Insurance Company September 6, 1893. The plaintiff is mortgagee of the land upon which the building insured was situated. Judgment went in his favor in the court below, and the appeal is taken from the judgment, and an order denying a new trial.

At the date of the issuance of the policy the legal title to the land was in James E. Gordon, who had purchased it from J. F. Sullivan, who, prior to the sale to Gordon, had executed a mortgage to the plaintiff to secure the sum of over $1,100. The amount of the policy was $1,000, and the loss, if any should occur, was made payable to the mortgagee. The mortgage clause accompanying the policy provided "that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: * * * provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy." In December, 1893, Gordon reconveyed the premises back to Sullivan, and assigned the policy to him, and this transfer and assignment were approved by the company. The premises insured were located in the city of Los Angeles, and the policy of insurance was issued by J. K. Mulkey, the agent of the American Insurance Company residing there at that time. On May 9, 1894, one W. W. Beach, a tenant occupying the premises insured, had some negotiations with Sullivan, the owner, in San Francisco, looking to an exchange of some of his property for the insured property at Los Angeles; and, as a result of such negotiations, Beach requested Sullivan to make a deed of the insured premises to one C. S. Taylor. It seems that Beach expected that Taylor would accept the deed in satisfaction of certain claims which Taylor held against him (Beach). The deed, after being executed by Sullivan and his wife, was handed to Beach, who had it recorded in Los Angeles. Taylor, however, repudiated the transaction, and refused to accept the deed. The building insured was destroyed by fire on May 19th, 10 days after the date of the deed from Sullivan and wife to Taylor; and a short time thereafter Beach, who held a general power of attorney from Taylor, as such attorney executed a deed back to Sullivan.

It is claimed on the part of the appellants (and this is really the main ground of defense) that the execution of the deed by Sullivan, as stated, amounted to a change of ownership of the property, and that the defendants did not receive the notice thereof as required by the conditions of the mortgage clause. But the transaction in question did not amount to a change of ownership of the property, and the finding of the court accordingly is abundantly supported by the testimony. The paper executed by Sullivan and wife never took effect as a deed to Taylor. "A grant takes effect, so as to vest the interest intended to be transferred only upon its delivery by the grantor." Civ. Code, § 1054. In Hastings v. Vaughn, 5 Cal. 316, it was said: "Delivery is a question of fact, depending more upon intention than upon the mode of fulfilling the intention." In Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, and 8 Pac. 46, it was said: "The act, solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall operate. The intent with which it is delivered is important. This restricts or enlarges the effect of the instrument." Even where the grantee is in possession of the deed, though that may raise a presumption of delivery, still "it may be shown by parol evidence that a deed in possession of the grantee was not delivered." Devl. Deeds, §§ 294, 295. The intention as well on the part of the grantee as the grantor is the controlling element in the question of delivery. Black v. Sharkey, 104 Cal. 279, 37 Pac. 939. Beach testifies that he proposed to Taylor to secure the building by a trade with Sullivan, if possible, and turn it over to Taylor to call certain accounts square, and that he agreed to it; and after getting the property he says he had it deeded to Taylor, but that it burned down before he heard from him, and that he declined to take it. "Q. Did you deliver the deed to him? A. I did not. Q. Was there ever any delivery of the deed to him? A. I simply sent it to the recorder, and it was recorded.

at my request. He refused to receive it, and I turned it over to Dr. Sullivan when I got the property back." He further testifies that the object in reconveying it to Sullivan was to take the record title out of Mr. Taylor; that the consideration for the deed from Sullivan was Beach's, entirely. Taylor paid nothing for the property. The transaction was entirely in the interest of Beach, and, in handing the paper over to Beach under such circumstances, there was no delivery of the grant to Taylor. An agent or trustee cannot transact business entirely for his own interest, and bind the principal or cestui que trust, without his knowledge or consent at the time, or subsequent acquiescence and ratification. There being no change of ownership resulting from the transaction referred to, it follows that there was no necessity for any notice.

In March, 1894, a written contract was entered into between the American and Northwestern, by which, in consideration of certain money and property given by the former to the latter, and payment by the American to the Northwestern of a certain pro rata of unearned premiums, the Northwestern assumed all the liabilities of the American upon all its policies, among which, it is admitted, the policy in question in this action was included. In the contract between the companies the Northwestern covenanted that it "will make as prompt adjustments and payments of loss, if any, under any and all of its policies of the said American Insurance Company hereby reinsured," as it would under its own policies if issued direct to said assured. Thereafter all the agencies of the American Company in California were revoked, and the Northwestern took the entire control and management of all matters arising out of said policies, and the adjustment of losses in cases of fire, and the American Company practically disappeared from business. Some years prior to this agreement the American Company had filed in the office of the insurance commissioner of this state a designation of one Ed. E. Potter as its agent; but, a few days after the fire, Sullivan went to see Potter, who informed him that he was no longer the agent of the American, except perhaps for the purpose of settling with the Northwestern Company. The proofs of loss were made within five days after the fire, and were directed formally to the American Company, but were sent to George W. Turner, at San Francisco, who was the general agent of the Northwestern. The day after the fire, however, the plaintiff, as the mortgagee, called on Mulkey, as the agent of the American Company, and informed him of the fire. Thereupon, for the first time, Mulkey stated that he was no longer agent of the said company, that said company's policies on this coast had been assumed by the Northwestern, and that Betts & Silent, of Los Angeles, were the agents. Soon afterwards Mr. T. A. Nerney called on the plaintiff, and informed him that he was the agent and adjuster of the Northwestern, and took him to the office of Betts & Silent, and there prepared and caused proof of loss to be made in due form, which proof of loss he sent to Turner, as already stated. Turner testifies that after the contract between the companies: "I had charge of the business covered by that contract, including the risk of policy sued for here, and now before this court. As to this policy sued on, I began to handle it a week or ten days after the fire. Just as soon as I received the proof of loss from Mr. Nerney, I went to work on the subject, and called on Mr. Sullivan." He further testified that Mr. Potter had called in all the agencies of the American Insurance Company, and that the Northwestern, "through its agents and under my general agency, had been attending to all the affairs under the policies of insurance issued by the American Insurance Company's agents under this agreement since about April 1, 1894, and it was under that agreement, and in pursuance of the duties which were assumed under that agreement, that I went to see Dr. Sullivan in regard to this policy; and Mr. Nerney attended to the taking of the proofs of loss on behalf of the American Insurance Company at Los Angeles from A. L. Whitney, the plaintiff herein. I, as agent of the Northwestern National Insurance Company, had authority to receive the proofs of loss under this policy of the American Insurance Company." After Turner had learned from Sullivan that the latter had made a deed to Taylor, and supposing therefrom that there had been a change of ownership of the property, he returned the proofs of loss, on the presumption, presumably, that his company was relieved from liability for want of notice of such change of ownership. It is argued by appellants' counsel that the contract between the companies referred to, and their subsequent action in carrying it out, amounted to nothing more than a naked contract of reinsurance, under the Code, which reads as follows: "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." Civ. Code, § 2646. The facts in this case show the contract in question to be much broader than a mere technical reinsurance. In Arnold v. Lyman, 17 Mass. 400, it is said: "The promise being, not to Hutchins expressly, but general in its form, the assent of the creditors made them parties to the promise; and this assent is sufficiently proved, as respects the plaintiffs, by their bringing an action upon the contract." See, also, Morgan v. Mining Co., 37 Cal. 534; Flint v. Cadenasso, 64 Cal. 83, 28 Pac. 62; Lockwood v. Canfield, 20 Cal. 126. The finding of the court that under the said agreement between the companies defendant the Northwestern National Insurance Company assumed and undertook the care, control, and management of the business and risks of the said American Insurance Company in this state, including the policy of insurance sued on herein, is fully supported by the evidence. The holders of policies issued by the American Company in this state could avail themselves of said promise and undertaking made for their benefit by the Northwestern Company, and, as said in the cases cited, the bringing of suit is sufficient evidence of assent on the part of the plaintiff to said agreement and undertaking. The law creates the privity necessary for the maintenance of the action. The Northwestern was jointly liable with the American on said policy, and the proof of loss was sufficient.

The other objections to the findings, not being supported by the evidence, are unimportant or immaterial. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

I dissent: TEMPLE, J.

127 Cal. 484

SWAFFORD v. BOARD OF EDUCATION OF CITY OF PETALUMA et al.

(S. F. 1,961.)

(Supreme Court of California. Jan. 29, 1900.)

TRIAL—RECEPTION OF EVIDENCE—OFFER OF EVIDENCE—MOTION TO STRIKE.

1. Where an offer of evidence includes many different propositions, grouped together, one of which is incompetent, irrelevant, or immaterial, an obligation to the whole as inadmissible on such ground must be sustained.

2. A motion to strike evidence, which is so framed as to include competent testimony, and also the moving party's own evidence, should be overruled.

3. Where plaintiff, a school teacher, sues on an express contract made in 1894 for a designated sum per month for six months, evidence of a contract made with a different party in 1890 is irrelevant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by C. C. Swafford against the board of education of the city of Petaluma and others to recover damages for breach of contract. There was a judgment for defendants, and plaintiff appeals. Affirmed.

H. G. Walker, for appellant. J. P. Rogers and F. A. Meyer, for respondents.

COOPER, C. This is an appeal from a judgment, and an order denying motion for new trial. The complaint alleges that in the month of December, 1894, the defendant, as a corporation, "by a resolution, duly elected and employed the said plaintiff as teacher of the Petaluma High School" for the term of six months, commencing on the 1st day of January, 1895; "that the salary and compensation attached to the position of teacher of said school, and which the said plaintiff was to receive, according to the terms of said resolution and contract of employment, was one hundred and sixty-five dollars per month for said term of six months"; that plaintiff entered upon his duties as such teacher, and taught said school up to February 20, 1895, when defendant paid him $247.50, being his salary in full up to said time; and that the defendant then wrongfully discharged him, and refused to allow him to complete his term under his contract. Damages are asked in the sum of $742.50; being the amount that it is claimed plaintiff would have earned, at the rate agreed upon, if allowed to complete his term according to contract. The case was tried without a jury. The learned judge of the court below, after hearing the evidence, found that the defendant never, by resolution or otherwise, employed the plaintiff for the term specified, or for any other term, and that no fixed salary or compensation was attached to the position of such teacher; that the defendant never, wrongfully or in any manner, prevented plaintiff from performing any services or duties; and that plaintiff has not been damaged by defendants in any sum or at all. Judgment was accordingly entered against plaintiff March 7, 1898. The notice of appeal from the judgment was not served or filed till April 11, 1899; and counsel for defendants object to the appeal from the judgment being considered, because not taken within the time prescribed by statute. The plaintiff's attorney concedes that the appeal was not taken in time, and therefore the appeal from the judgment will not be considered. This leaves for consideration the appeal from the order denying the motion for a new trial. The attorney for plaintiff, in his opening brief, says that he "will not touch upon matters respecting the judgment, in so far as a reviewing of the evidence is concerned, but will direct attention to errors of law upon which appellant relies." It will therefore be assumed that the findings are supported by the evidence, and that the judgment is the legal conclusion from the facts found.

It is urged as the principal ground for reversal of the order denying the new trial that the plaintiff offered to prove that by resolution of defendant passed on the 30th day of June, 1890, the salary of the principal of the said high school was fixed at $165 per month, and that the court erred in refusing to hear such proof. The record illustrates the position in which counsel are often placed by offering to prove certain facts in order to save exceptions, instead of asking the questions and taking a ruling upon the questions so asked. In this case it appears that after the close of defendants' evidence the plaintiff was called in rebuttal. After some discussion as to whether or not the offered evidence was in rebuttal, the court, in the exercise of its discretion, allowed the plaintiff's attorney to offer it as part of his evidence in chief. The offer covers some five folios of the transcript, and it is not necessary here to give it in full. Among other things, counsel for plaintiff "offered to prove" that on the 30th day of June, 1890, I. S. Crawford was principal of the Petaluma High School, and continued as such until the 29th day of June, 1891; that by resolution passed on the 30th day of June, 1890, the salary of the principal of said school was fixed at $165 per month; that Prof. Crawford continued to teach until June 29, 1891, when his resignation was received, and on motion accepted; that the board then proceeded to ballot for his successor; that the names of several candidates were proposed, and, upon ballot being taken, plaintiff was elected as successor of said Crawford; that plaintiff thereupon entered upon his duties as teacher, and continued to teach up to the 16th day of February, 1895, receiving $165 per month during all that time; that the salary of plaintiff was paid by warrants drawn by the board of education upon the treasurer of the city of Petaluma. Counsel for plaintiff offered to prove all the above facts "by the minutes of the board of education and other testimony." The offer was objected to as being incompetent, irrelevant, and immaterial. The objection was sustained, and plaintiff's counsel excepted. We think the ruling correct. The offer included many different propositions, grouped together; and if the proof of any one proposition was incompetent, irrelevant, or immaterial, the ruling should be sustained. It certainly does not appear to us that evidence as to one Crawford being principal of the high school in June, 1890; that he continued to teach until June, 1891, and then resigned; that the resignation was accepted; that several candidates were proposed to fill the vacancy; that the salary of the plaintiff was paid by warrants drawn on the treasurer, —would have been material or relevant to any issue before the court. Plaintiff had alleged an express contract, made in December, 1894, under and by the terms of which he was to receive $165 per month for six months. There was no issue as to the amount of plaintiff's salary. He received $165 per month for the time he was employed. He claimed employment under an express contract made in December, 1894. A contract made with a different party in June, 1890, would not tend to prove the express contract alleged.

There is evidence in the record as to a special meeting of the board of education of Petaluma on February 16, 1895, for the purpose of investigating certain charges of unprofessional conduct preferred against plaintiff as principal of said high school. It is claimed that the court erred in refusing to strike from the record all evidence as to such special meeting, for the reason that the same was illegal and called without proper notice. We fail to find in the record any motion to strike out such evidence. After the counsel for defendants had examined one Haskell in regard to various matters, including the said special meeting, counsel for plaintiff moved "to strike out the testimony thus far introduced, partially upon the ground that it appears that no notice had been given to this member of the board of education." It does not appear that any motion was made to strike out the evidence as to the special meeting. The motion was broad enough to include all the evidence in the case, including that of plaintiff. The motion was correctly denied. We find no error in the record, and advise that the order be affirmed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reason given in the foregoing opinion, the order is affirmed.

(127 Cal. 480)

GILLON v. NORTHERN ASSUR. CO. OF LONDON & ABERDEEN. (Sac. 635.)

(Supreme Court of California. Jan. 29, 1900.)

INSURANCE—TRANSFER OF INSURED PROPERTY CONTRARY TO PROVISIONS OF POLICY—COMMENCEMENT OF ACTION—WAIVER—PROOFS OF LOSS.

1. An owner of insured property conveyed the same to her brother, to avoid the expense of probate, and died a few days thereafter. Before her death the agent of the insurance company was notified of the deed. Shortly after her death the property was destroyed by fire. The policy contained the usual provisions avoiding the insurance on change of title. *Held* that, as there was no title in insured or her estate at the time of the loss, the notice could in no way avail in recovering the insurance by the estate.

2. A suit commenced within the 60 days given by a policy of insurance for payment of the loss, after proofs are made, is prematurely brought.

3. Where plaintiff, in his complaint on an insurance policy, alleges that proofs of loss were furnished defendant, he cannot urge that proofs of loss were waived.

Commissioners' decision. Department 2. Appeal from superior court, Solano county.

Action by P. Gillon, as administrator of the estate of Mary McNulty, deceased, against the Northern Assurance Company of London & Aberdeen. Judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

John M. Gregory, for appellant. Van Ness & Redman, for respondent.

GRAY, C. This is an action on a fire insurance policy. The defendant had judgment, and the plaintiff appeals from an order denying him a new trial. The policy was issued to Mary McNulty, and by it her two frame houses and one shed were insured for $1,025, and her household furniture and wearing apparel for $300. Thereafter Mary McNulty, by deed, conveyed the said houses and shed, and land on which they were situated, to her brother, P. Gillon, to avoid the expense of probating her estate. A few days later, Mary McNulty died; and thereupon her said brother took possession of said real property, and held the same for nearly two months, when the whole of said personal property and two of the buildings were destroyed, and the other building was badly damaged, by fire. Before the death of his sister, Gillon notified defendant's Vallejo agent of the transfer of the buildings to himself, but no transfer of the policy was ever effected. The personal property belonged to Mary McNulty at her death, and when destroyed was a part of her estate. Immediately after the fire, Gillon notified defendant thereof, and an adjuster was sent to ascertain the amount of the loss. During his investigations the adjuster obtained knowledge of the said transfer to Gillon, and reported the same to defendant. The next thing of importance in reference to the matter occurred between the attorneys for the respective parties. Forty-one days after the fire the attorneys of defendant wrote to the attorneys of plaintiff, saying that defendant was not liable for the injury to the buildings, giving reasons therefor; and as to the personal property they said, "We will endeavor to reach a settlement with you in regard to the loss of the personal property as soon as a representative of the estate has been appointed." Nothing further was done until upward of seven months thereafter, when the plaintiff, as administrator, made a demand in writing for the whole amount of the insurance; and to this demand the attorneys for defendant replied by letter, the material part of which is as follows: "We stated to your attorney, Mr. Hall, as far back as last August, that we were ready to take up for adjustment the loss on the second and third items of the policy—the personal property—as soon as an administrator of her estate had been appointed. Why you have delayed taking any action in the matter for this long period of time, we do not know, and your failure to present the statement and proof required by the policy within sixty days after the loss has probably worked a forfeiture of all rights under the policy. But, without regard to this failure on your part to comply with the terms of the policy, the company is now, as it always has been, ready to settle and pay the loss on the personal property. In order that it may be advised as to the extent and nature of this loss, it will be necessary for you to furnish to the company the verified statement called for by the policy; giving, among other things, an itemized list of the insured furniture and wearing apparel claimed to have been damaged or destroyed by the fire, the cash value of each item thereof and the amount of loss thereon." Eighty-five days subsequent to the date of this letter, and one year, lacking seven days, after the fire, the plaintiff for the first time furnished defendant with a proof of loss, and three days thereafter this suit was begun. The policy contained the usual provisions voiding the contract of insurance in case of any change of title in the property insured; requiring proof of loss within sixty days after a fire, and that nothing should be payable until sixty days after such proof of loss had been received by the company. The complaint alleged that "more than sixty days prior to the commencement of this action the defendant was furnished with due proofs of said loss for and on behalf of said estate," and no effort was made to amend such complaint.

1. The conveyance of the buildings by the insured operated to transfer the title in the property to Gillon either at the date of the deed, or at the time of the grantor's death. It is unnecessary to consider at which of these dates the title vested in Gillon, for both occurred before the fire. It is not contended that this deed was invalid, or that it did not transfer the property to Gillon, but all that appellant says about the clause as to a transfer of title is this: "We claim that the notice to defendant's Vallejo agent before the fire was sufficient to relieve us from the operation of this clause; the transfer being in the best of faith, and the risk becoming no greater by the transfer." The appellant evidently forgets that this suit is brought on behalf of the estate of Mrs. McNulty, and not on behalf of Gillon. The notice of the transfer could in no way assist Mrs. McNulty or her estate in recovering insurance on property, the title to which she had parted with contrary to the provisions of the policy. Good faith in the transaction could not alter its effect as a violation of such provisions.

2. The appellant was not entitled to recover for the personal property, for the following reasons: It has been held by this court in two well-considered cases that a complaint in an action on a policy of fire insurance which failed to show that proofs had been made, in accordance with the provisions of the policy, 60 days before action begun, did not state a cause of action on such policy. Doyle v. Insurance Co., 44 Cal. 264; Cowan v. Same, 78 Cal. 181, 20 Pac. 408. In another case it is held that a nonsuit was properly granted in an action on a policy similar to this, where the evidence showed that the suit was commenced before proofs were made. McCormack v. Insurance Co., 78 Cal. 469, 21 Pac. 14. It is undoubtedly the settled law that a suit commenced within the 60 days given by the policy for payment of the loss, after proofs are made, is prematurely brought. This rule is recognized by appellant in his complaint when he states that due proofs of loss were furnished more than 60 days before the commencement of this action, but the evidence and findings are against him on this proposition. Of course, this proof of loss may, like any condition in a contract, be waived. But here, again, both the evidence and the findings as to the waiver are against appellant's contention. The denial of liability as to the real property, and, coupled with it, the express admission of liability as to the personal property, could only be treated as a waiver as to such real property. It surely could not be treated as a waiver of proof of loss as to the personal property. Insurance Co. v. Winfield (Kan. App.) 51 Pac. 567. Section 1486, Civ. Code, cited by appellant, has no application to this subject. The letters in evidence show a waiver only as to the time

within which proofs of loss as to the personal property may be furnished. They show no waiver of the making of the proofs, but, on the contrary, it is insisted in one of them, at least, that such proofs be thereafter made, even though the time for making them under the policy had expired. There being no waiver of the requirement of proofs of loss as to the personal property, and certainly no waiver of the provision of the policy that the loss was not payable until 60 days after its ascertainment and proof, we think the trial court was right in its conclusions, and that the action as to the personal property was prematurely brought. If the appellant were correct in his contentions as to a waiver being disclosed by the evidence, it is still difficult to see how we could be justified in disturbing the findings and judgment in the case, when appellant nowhere in his complaint counts on such waiver, but alleges the actual furnishing of proofs, and that they were furnished 60 days before action begun. Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648. We advise that the order appealed from be affirmed.

We concur: COOPER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

127 Cal. 520

FERRIS v. BAKER et al. (L. A. 811.)

(Supreme Court of California. Feb. 3, 1900.)

MINING PARTNERSHIP—AGENCY—EVIDENCE—APPEAL—FINAL JUDGMENT.

1. On appeal from a judgment of nonsuit, the court will regard as proven whatever relevant facts plaintiff's evidence tended to prove.

2. Where plaintiff alleged a mining partnership with a wife, based on an agreement with her husband as her agent, evidence of statements by the husband that he was his wife's agent was inadmissible.

3. In an action for dissolution of an alleged mining partnership, plaintiff having shown that he purchased a one-half interest therein from the former owner, through a husband, who caused the other one-half to be deeded to his wife, and that plaintiff and the husband, who claimed to act as agent for his wife, worked on the mine, extracting mineral, and that the wife had made statements to third parties that she owned an interest in the mine and that her husband was her agent, it was error to nonsuit plaintiff on the grounds that he had shown no partnership, since the jury might have found that a partnership existed, within the meaning of Civ. Code, §§ 2511, 2512, providing that a mining partnership exists when persons own a mine for the purpose of working it, and actually do work the mine, though no express agreement of partnership exists.

4. An order granting a nonsuit, entered on the minutes, merely reciting that the motion was made and granted, but not purporting to be a dismissal of the action or a judgment, was not a final judgment, within Code Civ. Proc. § 939 (amended by St. 1897, p. 55), limiting the time that appeals may be taken from final judgments to six months; and hence an appeal taken from a formal judgment of nonsuit entered afterwards was allowable, though not taken until more than six months after the entry of the first order.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by C. E. Ferris against Bliek Baker and others. On a judgment of nonsuit, plaintiff appeals. Reversed.

Brown & Newby, for appellant. Brown & Miller, for respondents.

BUTT, C. Action to obtain the dissolution of an alleged mining partnership, an accounting, a sale of the mining property owned by the alleged partners, and the repayment to plaintiff of money contributed by him in excess of his proper share in the business of working the mine. The court below was of opinion that plaintiff failed at the trial to prove the existence of a mining partnership, and rendered judgment of nonsuit against him.

"A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same." Civ. Code, § 2511. "An express agreement to become partners * * * is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting the minerals therefrom." Id. § 2512. The property in question here, called the Philadelphia Mine or Mining Claim, was owned by the plaintiff and the defendant Bliek Baker in equal shares,—each one-half. Said Bliek is a married woman, the wife of one E. N. Baker. Work on said mining claim, for the purpose of extracting the mineral therefrom, was begun in the month of June, 1897, and was continued until December following. The business thus prosecuted comprises the transactions of which plaintiff prays an accounting. The question is whether said Bliek Baker engaged in said business jointly with the plaintiff. If she did, then, under the law expressed in said sections of the Civil Code, the mining partnership existed; otherwise, it did not. The evidence produced by plaintiff upon that point was, in substance, as follows: Early in June, 1897, the purchase of said mining claim from the former owner was effected through the instrumentality of said E. N. Baker. As to a one-half interest, such purchase was on behalf of the plaintiff, and E. N. Baker caused the deed of the property to be made to plaintiff and said Bliek Baker as grantees, he representing to plaintiff that he was the agent of his wife. Said E. N. Baker and the plaintiff then agreed that they would develop the mine and extract ore therefrom. The work aforesaid proceeded pursuant to this agreement. On July 20, 1897, said E. N. and Bliek Baker jointly executed a written contract with one I. N. Inskeep, whereby they agreed to sell and convey to said Inskeep an undivided one-eighth interest in the said mining claim. This contract contained a clause by which the vendors agreed that Inskeep should "be at no expense for assessment or development work" on the mine up to the time the same should "begin to produce," and that they would pay all such expenses. A witness for plaintiff testified that he heard a conversation between Mrs. Baker and one Pepper in August, 1897, "relative to the Philadelphia mine"; that Pepper "asked her if Mr. Baker owned the property, or if she owned it, and she remarked that the property was hers individually, but that Mr. Baker did her business for her,—was her agent in the matter." Defendants admitted that said Pepper, if present in court, would testify to the same effect.

In reviewing the action of the court on the motion for nonsuit, we must regard as proved whatever facts, relevant to the issue, the evidence for the plaintiff tended to prove. Dow v. Mining Co., 31 Cal. 629. Plaintiff is entitled to the benefit of the facts in testimony, "and the presumptions which might reasonably be drawn from them." De Ro v. Cordes, 4 Cal. 117; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737. We leave out of view any declarations of E. N. Baker as to his agency for his wife. They were incompetent, as the court below rightly held, to establish the fact of agency against her, though competent for the purpose of showing that plaintiff dealt with E. N. Baker as agent, and not as a principal. But we have seen that there was evidence that Mrs. Baker joined her husband in a contract to sell an interest in the mining claim to Inskeep. By the same instrument she agreed with Inskeep that she would pay all expenses of development work on the mine until it should "begin to produce"; and later she declared, in reference to the mine, that she owned the property, "but her husband was her agent in the matter." From these circumstances, it seems to us that a jury, or the court sitting to determine the fact, might reasonably deduce the inferences that Mrs. Baker ratified the acquisition of the mining claim by E. N. Baker as her agent; that the work she promised Inskeep she would pay for was the work then in progress on the mine, rather than work to be done in the indefinite future; and, this work having been authorized by her husband, that she was cognizant of what he had done, and adopted it as done on her behalf. Perhaps none of these are necessary inferences from the facts proved, but, as the evidence tended to justify them, they are to be regarded for present purposes as facts established. As such, they tend to show the relation of mining partners between plaintiff and Mrs. Baker. It was error, therefore, to order a nonsuit.

Defendants make the point that the appeal was taken too late and for that reason can not be considered. The order, such as it was, granting the motion for nonsuit, was made and entered in the minutes of the court, and noted in the clerk's register of actions, on December 6, 1898. Formal judgment of nonsuit against the plaintiff, directing that he take nothing and that defendants recover costs, was entered May 3, 1899. The appeal was taken July 21, 1899. It is provided by section 581, Code Civ. Proc., as amended in 1897 (St. 1897, p. 98), that the dismissal of an action, or a judgment of nonsuit, for failure by the plaintiff to prove a sufficient case for the jury, "shall be made by order of the court entered upon the minutes thereof, and shall be effective for all purposes when so entered." Section 939, Code Civ. Proc., amended by St. 1897, p. 55, provides that an appeal may be taken from a final judgment within six months after the entry thereof. Defendants urge that the appeal should have been taken within six months after the order allowing the motion for nonsuit was entered in the minutes of the court. The order in this case was a mere narration by the clerk as follows: "Defendants move the court for nonsuit on the grounds stated. Said motion is argued, and thereupon granted." The order did not show what were the grounds of the motion. It did not purport to be a dismissal of the action, nor a judgment of any kind, and was in fact but a memorandum affording data from which a judgment or proper order might be drafted, similar to the minute made when final judgment is announced, directing that it pass for one party or the other. Obviously, no execution could have issued on such an order. We are not called upon to say what would have been its effect under said section 581, as regards the time limited for appeal, if it had purported to make final disposition of the action. There was no such disposition until the entry of the judgment on May 3, 1899, and the appeal was in time. One or two other points made by defendants have had our careful consideration. They do not seem sufficiently important to require special notice. The judgment should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

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127 Cal. 515

FOX v. SUTTON et al. (S. F. 1,881.)

(Supreme Court of California. Feb. 3, 1900.)

INTERPLEADER—EXECUTORS—CLAIMS BY ALLEGED HEIRS.

1. Under Code Civ. Proc. § 386, as amended in 1881, providing that, when there are conflicting claims made on a person in relation to personal property, he may bring an action to compel conflicting claimants to interplead, an executor having certain money in his hands as assets of the estate, to which there are conflicting claims, may bring an action without depositing in court the money in controversy.

2. Where a decree ordering distribution by an executor has been rendered, the executor, as against the distributees and third parties, who are not bound by the decree of distribution, but are claiming the estate, can file a bill of interpleader, both as executor and individually.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles N. Fox, individually and as executor of Stephen Powell, against A. M. Sutton and others. Judgment for plaintiff, and defendants Alice H. Burdick and Henry C. Ross, Jr., appeal. Affirmed.

J. H. McKune and Henry C. Ross, Jr., for appellants. R. S. Gray, for respondent Fox. J. H. Craddock, for respondents Sutton and others.

VAN DYKE, J. On the death of Stephen Powell Burdick there was on deposit in the First National Bank of Oakland some $5,281.64, standing in the name of "S. P. Burdick, Atty." This money was claimed by the plaintiff, as executor, as belonging to and being part of the estate of said Stephen Powell Burdick, and was also claimed by the defendants A. M. Sutton and Arthur W. Burdick, as alleged trustees, by title adverse to said estate. Under these circumstances, the bank refused to pay over the money to either the executor or the trustees unless the claims of such respective parties were first adjudicated. In order to save expense, and in view of the uncertainty of litigation, the claimants agreed by stipulation that the money should be paid over to the executor, subject only to such claim as the said trustees might have to the residue after administration. Upon this stipulation being entered into, the money was turned over to the executor, and in his final account it is stated that the balance of said money remaining in his hands amounted to $1,657.90. Upon the settlement of the executor's final account, Alice H. Burdick, surviving widow of the deceased, petitioned the court for distribution of the one-half of said sum to her, on the ground that the whole of said money so received by the executor was community property, and belonged to the estate of her deceased husband. The defendants Sutton and Arthur W. Burdick, as said trustees, opposed said petition of distribution, and asked that the money be turned over to them under the terms of their trust deed. The court denied the petition of the defendants Sutton and Arthur W. Burdick, and also denied their motion for an order staying distribution until they could, by action in a court of competent jurisdiction, have their respective claims to said money adjudicated and determined, and thereupon ordered distribution according to the prayer of the petitioner, Alice H. Burdick. This court dismissed the appeal of said Sutton and Arthur W. Burdick as trustees, and of said Burdick in his own right, saying: "They are not named in the will, and claim no rights under it, and have presented no claim against the estate. They are not, and could not have been, aggrieved persons. The order refusing to postpone the decree of final distribution was not appealable." In re Burdick's Estate, 112 Cal. 396, 44 Pac. 734. While said appeal was pending and undetermined, said Sutton and Arthur W. Burdick commenced an action in the superior court in the city and county of San Francisco against the plaintiff herein, individually and as executor of said estate, for the recovery of said $828.97 which had been so ordered distributed to said Alice H. Burdick. After the dismissal of said appeal, the appellants herein, Alice H. Burdick and Henry C. Ross, Jr., her attorney, applied to the superior court of Alameda county, in which the settlement of the estate was pending, for an order on the plaintiff, Fox, as such executor, to pay over the money which had been ordered to be distributed, or show cause why he should not be punished for contempt in failing to do so. The plaintiff, Fox, thereupon, as such executor and individually, brought this action. In his complaint the facts, some of which have been referred to, are fully stated; and it is averred in said complaint that the plaintiff has no interest in the said $828.97, only as to which of the defendants shall receive the same, and is ready to deliver the same to the person entitled thereto, and prays that said defendants may be required to interplead together for the purpose of determining their respective claims to the said $828.97, and upon delivering the same to the party adjudged by the court to be entitled thereto, or upon paying the same under and in obedience to any determination that may be had in the cause, the plaintiff may be discharged from all liability in the premises. Upon filing his complaint the plaintiff obtained an order to show cause why an injunction pendente lite should not issue, restraining the defendants (appellants here) from enforcing or attempting to enforce said decree of distribution. The defendants appeared and answered, and, as recited in the injunction order, "thereupon all of the parties being present and represented by counsel in open court, upon the records, files, and matters heretofore submitted to the court under and in connection with said orders, and upon the records, files, and minutes of said court, at this time, for good cause shown, and no sufficient cause to the contrary being shown, and it appearing that there has been a trial in this action of the issues of fact raised by the pleadings of all the parties in this action as to the right of the plaintiff to maintain this action, and it satisfactorily appearing to the court from the papers, records, and files in this action presented and considered in connection with and upon the hearing of said orders to show cause that it is a proper case for such injunction, and that sufficient grounds exist therefor," it was ordered that upon filing a suitable bond, as provided by law, and approved by the court, the defendants (appellants herein) be enjoined from undertaking in any way whatever to enforce said decree of distribution pending this action. From which order this appeal is taken.

The first point made by the appellants is that the plaintiff does not show the right of interpleader, because he did not bring the money into court, or offer to do so, at the time of instituting this proceeding. The provision of the Code in reference to interpleader, as the section originally stood, provided that a defendant "against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavits that a party to the action makes against him, and, without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct." Code Civ. Proc. § 386. By way of amendment, in 1881, the following material provision has been added to this section: "And whenever conflicting claims are, or may be, made upon a person for or relating to personal property, or the performance of an obligation, or any part thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another." This added provision of the Code, it appears, authorizes such a proceeding as the one under consideration. And it would seem that this does not require, as a condition precedent to bringing said action, that the party should deposit or pay into the court the money or property in controversy. The record, however, shows that the court, in granting the injunction, ordered that the plaintiff deposit in court and pay to the clerk in that behalf the said amount in controversy.

It is further contended by the appellants that the order of distribution is final and conclusive, and estops plaintiff from maintaining this action. The plaintiff, however, it appears, does not dispute the claim of the appellants, but seeks protection from the demands and claim of the other defendants for the same money, and who are not bound by the decree. Under such circumstances, it would seem but just that the plaintiff, as executor, should not be compelled to defend said action, and subject himself perhaps to liability, not only to pay said money a second time, but also the costs of litigation. Besides, the plaintiff files his bill, not only as executor, but individually, whereas the decree of distribution runs against him, of course, only as executor.

The other points made by the appellants are not sufficiently important to require special notice or consideration under the facts disclosed by the record. We think the court below justified in granting the injunction as prayed, and the order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

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6 Cal. Unrep. 382

MORAN et al. v. LENNON. (S. F. 1,534.)

(Supreme Court of California. Feb. 2, 1900.)

REPLEVIN—EVIDENCE—SUFFICIENCY.

Plaintiff purchased defendant's property at execution sale, which defendant refused to deliver, claiming that he furnished plaintiff the money to purchase the property for him. Plaintiff's testimony showed that she never had a conversation with defendant about purchasing the property, and that she obtained the money from her daughter, who borrowed it for the purpose, and that defendant held the property after the sale under a lease from plaintiff. *Held*, the evidence was sufficient to support a finding that plaintiff was the owner and entitled to the possession.

Commissioners' decision. Department 1. Appeal from superior court, San Mateo county.

Action by Margaret Moran and another against John Lennon. From a judgment for plaintiffs, and an order overruling a motion for a new trial, defendant appeals. Affirmed.

I. S. Thompson, for appellant. E. F. Fitzpatrick, for respondents.

COOPER, C. This action was brought to recover the possession, or, in case a delivery cannot be had, the value of certain personal property, consisting of hotel furniture, dishes, bedding, etc., described in the complaint. The case was tried before the court without a jury, and findings filed, upon which judgment was ordered and entered for plaintiffs. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order.

It is not claimed that the judgment is not supported by the findings, and it is therefore not necessary to consider any question as to the appeal from the judgment. The court found that the plaintiffs were the owners and entitled to the possession of the property, and the principal point urged here is that this finding is not supported by the evidence. The evidence shows without conflict that prior to September 10, 1895, the defendant was the proprietor of the Villa Hotel, at Colma, in San Mateo county, and was the owner of the property in controversy, using the same in said hotel. The sheriff of the county, by virtue of an execution in his hands against the defendant, had levied upon the said property, and advertised that on said day, at 10 o'clock a. m., in front of said hotel, he would sell the same at public sale to the highest bidder to satisfy the said execution. Accordingly at said sale the plaintiff Margaret Moran being the highest bidder, the property was sold to her by the said sheriff for $425.25, which amount she paid, receiving the usual certificate of sale from the sheriff. No question is made as to the execution or the regularity of the sale. Neither is it claimed that the certificate of sale did not convey the legal title to said plaintiff Margaret Moran. Plaintiff James Moran is the husband of Margaret. It is claimed by defendant that he furnished the money with which the property was so purchased, and that the property was in fact purchased in trust for him, and at his instance and request. The plaintiff Margaret Moran testified that she did not get the money from defendant with which to purchase the property, and that she never had any conversation with him about purchasing it; that she got the money from her daughter, and with the money bought the property in her own name and for herself. The daughter of the plaintiffs testified that she borrowed the money for her mother from the Bank of San Mateo County, and gave the bank her note and mortgage for it. This evidence supports the finding of the court. In fact, in view of the testimony in the record and of the fact that the defendant held the property after it was so purchased by the plaintiff Margaret Moran under a written lease from her which he had never surrendered, we do not see how the court could have found any other way. There was no error in the refusal of the court to admit in evidence the agreement between defendant and his wife dated June 23, 1896. It was made long after the execution sale, and had no reference thereto. Neither did the subject-matter of the said contract in any way tend to show that defendant furnished the money to plaintiff Margaret with which to purchase the property. There is no other point in the record worthy of discussion. The judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(127 Cal. 510)

PEOPLE v. STEGENBERG. (Cr. 506.)[1]

(Supreme Court of California. Feb. 1, 1900.)

CRIMINAL LAW—ROBBERY—EVIDENCE—CREDIBILITY OF WITNESSES—INSTRUCTIONS.

1. Where the prosecuting witness testified that he left a saloon in defendant's company, and that, soon after, the defendant seized and robbed him, while defendant testified that he remained in the saloon, which statement was corroborated by a woman who worked there, a verdict of guilty will not be set aside, the jury not being bound to decide in conformity with the testimony of the greater number of witnesses.

2. The evidence against the defendant being direct, it was not error to modify an instruction to the jury that they must consider the danger of convicting innocent persons by adding that they must also consider the danger to society of acquitting the guilty.

Department 1. Appeal from superior court, city and county of San Francisco.

Oscar Stegenberg was convicted of robbery, and from the judgment, and from an order denying a new trial, he appeals. Affirmed.

H. N. Brandenstein, for appellant. Atty. Gen. Ford, for the People.

VAN DYKE, J. The defendant was informed against by the district attorney of the city and county of San Francisco of the crime of robbery. He was tried, convicted, and sentenced to a term of 20 years in the state prison. He appeals from the final judgment of conviction and from the order denying his motion for a new trial.

1. The first point of contention on the part of the appellant is that the verdict is against law by reason of the insufficiency of the evidence upon which the defendant was convicted. Johnson, the person robbed, testified that on February 21, 1898, he was, with several others, including the defendant, drinking in a saloon in the city and county of San Francisco, called the "City of Gottenberg"; that he (Johnson), the defendant, and a party unknown to him (Johnson), left the saloon together, and started for the bay shore, and while on the way the defendant threw his arm around the neck of the complaining witness, Johnson, at the same time holding his hand over his mouth, and with the other hand took from the pockets of the complaining witness $25. Johnson was positive not only as to the robbery, but as to the identity of the person who robbed him, to wit, the defendant. The defendant testified that he did not leave the saloon with Johnson, and did not commit the robbery, and he was corroborated on the point of not leaving the saloon with Johnson by a woman employed in the saloon. The jury are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence, satisfying their minds. As said in People v. Vance, 21 Cal. 400: "We do not interfere with the province of the jury. There must be such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion, or prejudice, or bias of some kind, to justify any interference on our part with the action of the jury." In People v. Williams, 59 Cal. 674, it is said: "It is a cardinal principle in the administration of criminal law that the province of weighing the evidence belongs exclusively to the jury; and if this court can find, from an inspection of the record, that there was in the whole evidence of the case enough to justify the conclusion arrived at by the jury, the judgment of the court below will not be disturbed." This doctrine has been announced so frequently, and in so many cases, that it is quite unnecessary to review them here.

2. The second contention of the appellant is that the court erred in modifying the fifth instruction requested by the defendant. The fifth instruction, as requested, reads as follows: "You are instructed that you must consider that innocent persons have been convicted, and you must further consider the danger of convicting an innocent person in weighing the testimony to determine whether there is a reasonable doubt of the defendant's guilt." The court gave the instruction as asked, and added: "That is true, gentlemen; but you are also instructed that you must consider that guilty persons have sometimes been acquitted, and you must consider the danger to society of acquitting a guilty person." The court proceeded further to state that the jury must decide the case upon the testimony, without being deterred from doing their duty according to law. It is, however, the quoted portions of the judge's comment upon the instruction that the appellant takes exception to, stating that it neutralizes or nullifies the effect of the instruction given. Neither the instruction asked nor the comment of the judge upon giving the same, which is complained of, constitutes a proposition of law. They simply state what is common knowledge, to wit, that in the history of jurisprudence it appears that innocent persons have sometimes been convicted; also that guilty persons have more frequently escaped conviction. In certain cases it might not be amiss to call the attention of the jury to the danger of convicting innocent persons by way of reminding them to examine and weigh the evidence with more caution, if possible, than in ordinary cases. People v. Travers, 88 Cal. 233, 26 Pac. 88, was a case of circumstantial evidence, as well as People v.

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[1] Rehearing denied March 3, 1900.

Cronin, 34 Cal. 191, referred to in that case. The court say in People v. Travers: "In the Cronin Case the court, in its instruction on this point, after stating the fact that counsel for defendant had, as in the case at bar, alluded to cases where, upon circumstantial evidence, innocent men had been convicted, told the jury, among other things, that 'the quotation of such cases is proper in order to make the jury careful in arriving at the proper conclusion from such [circumstantial] evidence.' But in the case at bar the court told the jury, 'You are not justified in considering such matters.'" This case is relied upon by appellant. There the court refused to allow the suggestion in the instruction that innocent men had been convicted, although the case depended upon circumstantial evidence. Here the testimony is direct, and is not circumstantial. Besides, the court gave the instruction with the qualification and comment already stated. The two cases, therefore, are altogether different. In the later case of People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269, the defendant asked the court to give the following instructions: "The jury are instructed that, if there is any one single fact proved to the satisfaction of the jury by a preponderance of evidence, which is inconsistent with the guilt of the defendant, it raises a reasonable doubt, and the jury should acquit the defendant." "You are instructed that it is the settled policy of the law that a person charged with a crime must be acquitted unless the evidence in the case establishes his guilt beyond all reasonable doubt; and it is better that a hundred guilty persons escape punishment than that one who is innocent be punished." The court refused both said instructions, and on appeal to this court, in its opinion in bank, says: "The meaning of the first of these instructions is involved in doubt, and the final clause of the second instruction is uncalled for;" and the court called attention to the fact that the whole doctrine of reasonable doubt had been fully and properly laid before the jury by the court in its instructions, adding, "The instructions, taken as a whole, are quite as favorable to the defendant as the facts and law will warrant," and affirmed the judgment.

3. It is further contended on the part of appellant that the court erred in modifying the fourth instruction requested by the defendant, which reads as follows: "You are instructed that a witness false in one part of testimony is to be distrusted in others. If, therefore, the prosecuting witness, John Johnson, is false in any part of his testimony, the other parts of his testimony are to be distrusted by you." The transcript does not show that this instruction was modified, but it contains remarks by way of explanation as to what is meant when it is said "that a witness false in one part of his testimony is to be distrusted in others." There is nothing in such remarks contrary to law or prejudicial to the defendant. The instructions given by the court were quite full, and the court repeated, in closing: "Now, you are not to convict the defendant of any offense unless you are satisfied that he is guilty of that offense,—satisfied of it to a moral certainty and beyond all reasonable doubt." The instructions, taken as a whole, are quite as favorable to the defendant as the facts and law warranted. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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6 Cal. Unrep. 380

BATES et al. v. ESCOT et al. (S. F. 1,845.)

(Supreme Court of California. Jan. 30, 1900.)

EQUITY—DEMAND FOR JURY—SPECIFIC ISSUES.

Where defendant's answer raises issues of fact on which he is entitled to a jury, but the principal features of his defense are equitable, a demand for a jury must relate to the specific issues on which he is entitled to the same.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county.

Proceedings by George E. Bates and E. O. Miller against Joseph Escot and another. From a judgment for plaintiffs, and from an order denying a new trial, defendant Escot appeals. Affirmed.

Lyman I. Mowry, for appellant. M. K. Harris, for respondents.

CHIPMAN, C. Foreclosure. Defendant Alferitz disclaimed any interest in the land. Defendant Escot, maker of the mortgage, answered and set up want of consideration for the mortgage debt, and also pleaded fraud and undue influence by plaintiffs in securing the execution of the notes and mortgage. The court gave judgment of foreclosure against Escot, from which, and from the order denying his motion for a new trial, he alone appeals. Escot alleged in his answer, and the court found, that on March 9, 1892, he and plaintiff entered into a contract by which plaintiffs, as agents of defendant, undertook to procure title from the state to certain 2,401.95 acres of land, situated in Merced county, for $4 per acre; and defendant paid at the time $1,000 on account of said purchase, and later $1,000 more. It is not claimed by defendant that there was anything unconscionable or fraudulent in this contract. The evidence tends to show that the contract of the parties was changed by substituting for it a deed of the land from plaintiffs to defendant, the transfer to him of the certificates of purchase, which had been taken in plaintiffs' names, and a mortgage back to plaintiffs for the unpaid balance, defendant assuming in the deed the payment of an unpaid balance of one dollar per acre to the state; that this change was made to accommodate defendant, and place in him the legal title, so that he could the better control the land and protect it from trespassers; that the amount to be paid was figured at $3 per acre, instead of $4, from which was deducted the $2,000 already paid, leaving due $5,205.85, for which the notes and mortgage were given, less 1 cent (the two notes being for $2,602.92 each, and defendant was to pay the other $1 per acre to the state); that the change in the agreement did not increase the price to be paid by defendant, but only changed the form of his obligations, and relieved the plaintiffs from further attention to payments of principal or interest to the state. In short, it was a natural and simple adjustment of the matter, and on its face bears no earmarks of overreaching or unconscionable advantage by plaintiffs; and the fact that the mortgage included lands other than those being secured from the state is in no wise inconsistent with perfectly fair dealing. Counsel devote much attention to the law governing principals and agents, and to the fiduciary relation of agents, which they claim arose under the original contract. We have carefully examined all the evidence, and are of the opinion that it amply supports the finding that defendant's allegations of fraud and undue influence were untrue. We do not, therefore, find it necessary to notice further this portion of defendant's brief.

Defendant demanded a jury to try the cause, which the court refused, and the ruling is assigned as error. The action was equitable in its character, and so were the principal features of the defense. Defendant was not entitled to a jury upon these issues. If there was an issue of fact presented by the answer which defendant was entitled to have tried by a jury, the demand should have been more specific. We see no error in refusing the demand made. Finding no error in the other assignments mentioned in defendant's brief, it is advised that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(127 Cal. 506)

DRANGA et al. v. ROWE et al. (L. A. 582.)[1]

(Supreme Court of California. Jan. 30, 1900.)

TAXATION—RECOVERY OF TAXES—LIMITATION—MUNICIPAL CORPORATIONS—CLASSES—REINCORPORATION—TAX LEVY—VALIDITY—QUIETING TITLE—VOID TAXES—PAYMENT.

1. An action to recover city taxes is barred by Code Civ. Proc. § 338, limiting actions to enforce a liability created by statute, other than a penalty or forfeiture, to three years.

2. Act 1883 requires that the assessment of city taxes in cities of the fourth class shall be made between January 1st and April 1st of each year, and that the levy shall be made on the first Monday in May of each year. *Held*, that where a city of the fifth class was reincorporated as a city of the fourth class on April 18, 1887, and made its assessment for that year between May 1st and August 1st, and its levy on October 16th as a city of the fifth class, such levy was void, and the taxes uncollectible.

3. An action to quiet title to land under Code Civ. Proc. § 738, authorizing an action against any person claiming an interest in land adverse to plaintiff to determine such adverse claim, is not the same as the equity suit to remove a cloud on title, and hence plaintiff was not required in such action, in which a city appeared and alleged a void tax levy as a lien on the land, to pay such taxes as a condition to relief on the principle that he who seeks equity must do equity.

Department 1. Appeal from superior court, San Diego county.

Action by Mary T. Dranga and others against Jane L. Rowe, the city of San Diego, and others, to quiet title to land. From a judgment in favor of plaintiff, defendant city appeals. Affirmed.

H. E. Doolittle, City Atty., and T. L. Lewis, Dep. City Atty., for appellant. Withington & Carter, for respondents Dranga and others.

VAN DYKE, J. This is an action to quiet title to certain lots in the city of San Diego. The defendants other than the city defaulted. In the amended answer of the city it is alleged that on April 18, 1887, the said city was reincorporated as a city of the fourth class, under the provisions of the act of 1883, providing for the incorporation and government of municipal corporations, and that prior to that date had been a city of the fifth class; that between the 1st day of May, 1887, and the 1st day of August of said year the assessor of said city made an assessment for the fiscal year 1887 on the property in said city, including the lots in suit, and the same were assessed to one George M. Wetherly, who was then the owner thereof, and was such owner during the whole of said year; that on the 18th of October, 1887, the board of equalization of said city equalized said assessment made by the assessor aforesaid, and that the board of trustees of said city thereupon, on said date, fixed the rate and levied the taxes in said city for municipal purposes for said fiscal year, and that said taxes so levied on the said lots, including improvements, amounted to the sum of $165.99, which taxes, together with interest and penalties, it is alleged, have not been paid, or any part thereof; and it is asked in said answer that no decree be rendered quieting the title of plaintiffs to said property except on condition that all said city taxes assessed against said property for the year 1887 be paid. Demurrer was interposed to said amended answer on the grounds: First, that it does not state facts sufficient to constitute a defense to plaintiffs' cause of action; and, secondly, that the defense is barred by the provisions of the Code of Civil Procedure (referring to sections 336, 338–340, 343). The court sustained the demurrer, and, said defendant having elected to stand upon said amended answer, the court gave judgment for plaintiffs, from which judgment this appeal is taken.

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[1] Rehearing denied March 2.

In City of San Diego v. Higgins, 115 Cal. 170, 46 Pac. 923, it is held that an action to recover municipal taxes or enforce the lien thereof is subject to the limitations respecting an action upon a liability created by statute, and is barred in three years after the right of action accrues. It is stated in the respondents' brief, although it does not appear in the record, that the case referred to involved, among other property, that claimed by the plaintiffs in this action, which then belonged to said Higgins. However that may be, it seems clear that under the rule laid down in said case the taxes in question, if valid when levied, could not now be enforced by said city. The act of 1883, in reference to municipal corporations, requires that as to the fourth class the assessment shall be made between January 1st and April 1st in each year, whereas the answer shows that the assessment was made between May 1 and August 1, 1887. The law also requires, as to cities of the fourth class, that the levy shall be made on the first Monday in May of each year, whereas the answer shows that it was made on October 16, 1887; in other words, it appears that the assessment, equalization, and levy were all made under the law pertaining to cities of the fifth class, instead of cities of the fourth class. To be valid, the assessment and levy must be made strictly as provided by law. "All proceedings in the nature of assessing property for the purpose of taxation, and in levying and collecting taxes thereof, are in invitum, and must be stricti juris." Weyse v. Crawford, 85 Cal. 196, 24 Pac. 735. "A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract. It does not establish the relation of debtor and creditor between the taxpayer and state. * * * It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer." Perry v. Washburn, 20 Cal. 318. The record in this case shows that the assessment and levy made by the city of San Diego for the year 1887 were not made as directed by law, and hence such assessment and levy are invalid and void.

It is claimed on behalf of appellants that this action is in the nature of a bill in equity, and it is therefore claimed that, although no action will lie to recover the taxes on plaintiff's property for the year 1887, still there is a moral obligation resting upon the plaintiff to pay such taxes, and that upon the maxim that "he who seeks equity must do equity" the plaintiff should pay such taxes before a court of equity will grant relief. The cases cited by appellant are generally in the line of proceedings in equity to restrain the sale of illegal taxes or to cancel a void tax deed. In such case no relief is necessary, for the reason that the proceedings complained of would not amount to a cloud upon the title. An action under the Code, as this is, is something more than the old proceeding in chancery to remove a cloud or to quiet title, although such action is frequently, and perhaps commonly, referred to as an action to quiet title. The Code declares: "An action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Code Civ. Proc. § 738. The action may be brought by one out of possession as well as in possession, and in the former case the action would be in the nature of an action at law in ejectment; and hence (by an amendment to the same section) it is provided that a party has "the right to a jury trial in any case where, by the law, such right is now given." In such action the plaintiff is entitled to judgment although the defendant make a disclaimer, but without costs; the same as in case of default. It would be strange, indeed, if the plaintiff were entitled to judgment on a disclaimer, and not entitled to judgment where the answer shows no legal defense. In Kittle v. Bellegarde, 86 Cal. 564, 25 Pac. 58, the court say: "It is contended that the complaint does not warrant any relief, because it shows that the adverse claims of defendants rest upon proceedings which are void upon their face. But this objection is not available in an action to determine an adverse claim, under section 738 of the Code of Civil Procedure. Such an action may be maintained against a person who claims under a void tax deed. Harper v. Rowe, 53 Cal. 234; Hearst v. Egglestone, 55 Cal. 365; Pearson v. Creed, 78 Cal. 144, 20 Pac. 302; Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134." The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(127 Cal. 491)

GIRVIN et al. v. SIMON. (Sac. 574.)

(Supreme Court of California. Jan. 30, 1900.)

MUNICIPAL CORPORATIONS — STREET ASSESSMENTS—OBJECTIONS—APPEAL—EFFECT—REMONSTRANCE.

1. Act 1885, § 3, as amended by St. 1889, p. 158, authorizes lot owners liable to assessment for city work, who feel aggrieved or have objections to the performance of the work, to file "a petition of remonstrance" with the city clerk, specifying their objections, before the issuance of the assessment roll; and St. 1885, p. 156, § 11, provides that owners claiming city work has not been properly performed, etc., shall, within 30 days after the date of the warrant, appeal to the city council, by briefly stating their objections in writing, etc. *Held*, that a communication filed with the city clerk, after a street assessment had been levied, stating that the signer "remonstrated" against the acceptance of the contract, and setting out his objections to the work, was a sufficient appeal to require the council to act thereon as such, though it was styled a "remonstrance" only.

2. St. 1885, p. 156, § 11, provides that owners liable to assessment for city work, claiming it has not been properly performed, may appeal to the city council, and, on such appeal being

taken, requires the city to publish notice thereof, and of the time and place of hearing, and declares that all decisions of the city council on such notice and hearing shall be final and conclusive on all persons entitled to appeal, and as to all informalities which might have been avoided. *Held*, that where a city council failed to entertain an appeal properly taken by one property owner, urging fatal objections to an entire improvement, no assessment for such improvement against other owners could be collected while such appeal remained undetermined.

3. St. 1885, p. 156, § 11, authorizes property owners objecting to city work to file an appeal with the city council, and, on such filing, requires the city to publish notice thereof, and of the time and place of hearing. *Held*, that on the filing of such appeal it was the imperative duty of the city council to set a time for hearing, and publish notice thereof, without any request for such action from appellant.

Commissioners' decision. Department 1.

Appeal from superior court, San Joaquin county.

Action by one Girvin and others against J. Simon. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

James A. Louttit, for appellants. Budd & Thompson and Dudley & Buck, for respondent.

HAYNES, C. Action to foreclose an assessment for street improvements in the city of Stockton. The defendant had judgment, and plaintiffs appeal therefrom on the judgment roll, and their contention is that the conclusions of law are not correctly drawn from the findings of fact.

Among other persons affected by said improvements and assessment was one H. M. Fanning, who was the owner of certain premises which were assessed, but said Fanning had no interest in the lot involved in this case. The court also found "that the defendant, J. Simon, and other holders of property affected by said work and assessment, requested said Fanning to see that an appeal was put in to the city council"; that, within 30 days after the warrant mentioned in the complaint was issued, said Fanning delivered to and filed with the city clerk his written objections to said work, of which, and the indorsements thereon, the following is a copy: "Stockton, January 10, 1893. To the City Council of the City of Stockton—Gentlemen: The undersigned hereby respectfully remonstrate against the acceptance of contract for the paving of Channel street between Hunter and California streets, as I claim said contract has not been done according to specifications on file in the office of the street superintendent. My claim includes all curbing, bituminous rock paving, basalt-block paving, concrete work, filling under sidewalks, and relaying of the same. Respectfully, yours, H. M. Fanning. [Indorsed] Filed January 10, 1893. January 23, 1893, referred back to Mr. Fanning; the city attorney deciding it to be only a remonstrance, and not an appeal." The court further found that no notice has ever been given by the city council of the hearing of said objections; that the city council has not heard the same, or passed on the merits thereof, or confirmed said assessment; and that Fanning has not made any further application in the matter. On these facts, two questions arise: (1) Were the said written objections filed by Fanning sufficient in form and substance to constitute an appeal from the assessment? (2) If sufficient as an appeal, the city council not having given any notice of a hearing, and not having heard said appeal, is it available as a defense by other property owners whose property is separately sought to be charged for the same improvements, made under the same contract, and embraced in the same assessment?

1. Were the objections filed by Fanning sufficient as an appeal? Appellants refer us to section 3 of the act of 1885, as amended in 1889 (St. 1889, p. 158), which provides that, at any time before the issuance of the assessment roll, owners of lots liable to assessments who may feel aggrieved, or who may have objections to any of the subsequent proceedings of the council in relation to the performance of the work, "shall file with the clerk a petition of remonstrance," specifying in what respect they feel aggrieved; and their argument seems to be that the written objections filed by Fanning, and in which he uses the word "remonstrate," was "a petition of remonstrance" under that section, and not "an appeal," under section 11 of the act of 1885 (St. 1885, p. 156), which was then in force, and which provides as follows: "The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work provided for in this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, by briefly stating their objections in writing and filing the same with the clerk of said council. Notice of the time and place of hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days." The distinction between a remonstrance and an appeal is clear. The former is made to the acts or proceedings of the council, and is made before the assessment. The latter is made after the assessment, and relates to the acts of the superintendent of streets in accepting work not done as required by the contract, or other acts of his specified in the statute. We think the objections filed by Fanning good as an appeal to the city council, both in form and substance. Though the word "remonstrate" was used, it was not so far inappropriate as to be misleading. Its first definition, as given by Webster,

is "to present and urge reasons in opposition to an act, measure, or any course of proceeding." Besides, the body of the paper distinctly pointed his objections to the acts of the superintendent of streets in accepting work not done according to the specifications of the contract. No one could be misled as to the intention with which the paper was filed. While it is always desirable to use the proper technical or statutory designation of a paper or proceeding, the law will determine its sufficiency from its substance and evident purpose. That Fanning's appeal was sufficient in form and substance, see Barber v. Board, 42 Cal. 630, and Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312.

2. Did the failure of the city council to entertain the appeal of Mr. Fanning, and to give notice of the hearing of it as required by the statute, operate to stay proceedings against others to collect assessments for the same improvements made under the same contract, and included in the same assessment roll? We think it did so operate. The objection did not go to some error in the assessment of Mr. Fanning's separate property, and which affected no one else, but the objection went to the whole work. If these objections had been heard and sustained, it is clear that the contractors could not recover against any of the parties assessed. If only the party appealing and the contractor were affected, it would be quite sufficient to give to each personal notice of the time of hearing; but the statute requires notice of the time and place of hearing, and the subject of appeal, to be published for five days, and the statute specially provides that "all the decisions of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities and irregularities which said city council might have remedied and avoided." The court found that the defendant and other property owners affected by said work requested said Fanning to see that an appeal was made, and if the appeal had been entertained, and notice given, each could have been heard, and each would have been concluded by the result, whether they appeared and were heard or not. Thus, it is clear that the appeal, when filed, though by one only, suspends all proceedings to collect any of the assessments until that appeal has been heard, after the statutory notice has been given, and it is only such hearing upon notice that binds any of the parties assessed. They were not bound by the action of the council in deciding, without notice or a hearing, that the appeal was insufficient. But it is urged that it was the duty of Fanning to request action by the council. It is not so written. He had done all that was required. The statutory direction to the city council was imperative, and the appellant, and all other parties assessed might safely rest until due notice was given. In People v. O'Neil, 51 Cal. 91, the appeal to the board of supervisors was taken regularly and in proper time. The court said: "The board had no power to dismiss this appeal, and it must be regarded as still pending. It results that the assessment has not become a finality, and the action was prematurely instituted." In Mahoney v. Braverman, 54 Cal. 569, cited by appellant, the court pointed out the distinction between that case and People v. O'Neil, and approved the latter case. The judgment appealed from should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

6 Cal. Unrep. 384

HOUSER & HAINES MFG. CO. v. HARGROVE. (Sac. 738.)[1]

(Supreme Court of California. Feb. 3, 1900.)

APPEAL — JUDGMENT — NEW TRIAL — SALES — RESERVATION OF TITLE — TAXATION — ASSESSMENT—NAME OF OWNER—REAL PROPERTY.

1. An appeal may be taken from an order denying a motion for new trial, when made within proper time after the denial, though the time limited for appeal from the final judgment has expired.

2. On appeal from an order denying a motion for a new trial, the court will consider the sufficiency of the evidence, and the errors of law, if any, occurring during trial.

3. Plaintiff delivered a harvester to R. under contract that it did not part with title until notes given therefor were fully paid, and in case of default it was, if it wished, to take possession of the harvester, and all payments thereon were to be retained as compensation for its use prior to the default. After default in payment, R. sold the harvester to defendant for a valuable consideration. *Held*, that R. having no title, but only a right to secure title, could convey none to defendant, and that plaintiff was the owner, and entitled to possession.

4. Plaintiff delivered a harvester to R., retaining title until payment made. The tax thereon, together with the tax on several other items of personal property belonging to R. alone, was assessed to "R. and wife and H." (the plaintiff), and the harvester was sold to defendant for delinquent taxes. *Held* that, under Pol. Code, §§ 3628, 3636, providing that the assessor shall ascertain the name of the owner, and assess the property to him, and, if unable to ascertain the name, shall assess it to the "unknown owner," the assessment was invalid.

5. A sale of the personal property of H. for taxes due, not by him alone, nor upon the property alone, but for taxes on property not owned by H., and given to the assessor as the property of R., is void, under Pol. Code, §§ 3820, 3821, providing for a collection of the personal property tax by seizure and sale of any personalty owned by the person against whom the tax is assessed.

6. Pol. Code, § 3628, providing that a mistake in the name of the owner of real property shall not invalidate the assessment for taxes, has no application to an assessment of personal property, and hence an assessment of H.'s personal property to "R. and wife and H." cannot be held valid thereunder.

Commissioners' decision. Department 1. Appeal from superior court, Madera county.

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[1] Reversed in banc. See 61 Pac. 660, 129 Cal. 90.

Action by Houser & Haines Manufacturing Company against R. L. Hargrove. From a judgment in favor of defendant, and from an order denying new trial, plaintiff appeals. Order reversed.

Louttit & Middlecoff, for appellant. R. L. Hargrove, in pro. per.

COOPER, C. Judgment was entered in the court below in favor of defendant. Plaintiff has appealed from the judgment, and from an order denying its motion for a new trial. The judgment was entered on the 12th day of August, 1897, and the notice of appeal therefrom served August 2, 1899; therefore this court will not entertain the appeal from the judgment. The order denying plaintiff's motion for a new trial was made and entered June 6, 1899, and notice of appeal from this order served August 2, 1899. The appeal from the order denying the motion for a new trial was taken within 60 days after the order, and it makes no difference that the time for appealing from the judgment has elapsed. The motion for a new trial, under our Code and practice, is a proceeding independent of the judgment, and the motion may be granted, even after the judgment has been affirmed on appeal. Brison v. Brison, 90 Cal. 327, 27 Pac. 186. Upon an appeal from an order denying a motion for a new trial, we may consider whether the evidence is sufficient to sustain the findings, and errors of law, if any, occurring during the trial. Brison v. Brison, 90 Cal. 329, 27 Pac. 186; Water Co. v. Gage, 108 Cal. 243, 41 Pac. 299.

The complaint alleges that on the 6th day of June, 1896, the plaintiff was, and ever since has been, the owner and entitled to the possession of "One Haines-Houser Improved Combined Harvester," of the value of $1,000; that the defendant on said date wrongfully took the said property into his possession, and ever since has unlawfully withheld and detained the same. Judgment is asked for the recovery of the possession of the said harvester, or the value thereof, in case a delivery cannot be had. The answer denied that plaintiff ever was the owner or entitled to the possession of the harvester, and alleged that the defendant was, on the 2d day of June, 1896, "ever since has been, and now is, the owner and entitled to the possession of said property." The case was tried before the court without a jury, and findings filed. The court found that the plaintiff was not, at the time of the commencement of the action, the owner, or entitled to the possession, of the harvester; and further found that the defendant was, at the time the action was commenced, and still is, the owner and entitled to the possession thereof; that the value thereof was $1,000; and that defendant is entitled to judgment. The findings are quite voluminous, and cover some 67 folios of the transcript. The greater part of them consists of probative facts, recitals of evidence, and copies of documents that properly should have no place therein. The main and material findings are those herein stated as to ownership of the property, and we do not think the evidence set forth in other parts of the findings, or in the record, supports them. There is little, if any, conflict as to the facts, and we must determine from them as to whether the plaintiff or defendant was the owner of the harvester at the time the action was commenced. On June 10, 1893, one Rowe gave an order in writing to Houser, Haines & Knight for the harvester, for which he was to pay $1,400, according to the terms of certain notes to be executed by him. This order contained the following clause: "If upon one week's trial the machine should not work well, the purchaser shall give immediate notice to said Houser, Haines & Knight, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work to the entire satisfaction of the purchaser, he shall return it at once to the agent of whom he received it, and his payment, if any has been made, will be refunded." The harvester was, in pursuance of the said written order, delivered to Rowe, and, after being tried and tested, on the 4th day of August, 1893, an agreement of sale was entered into and signed by said Rowe and the Houser & Haines Manufacturing Company, a corporation, under the terms of which the said corporation agreed to sell to said Rowe the said harvester for $1,400, the same to be paid for in three notes to Houser, Haines & Knight,—one for $500, due September 1, 1893; one for $500, due September 1, 1894; and one for $400, due September 1, 1895. This agreement contained the following clause: "And it is agreed that said Houser, Haines & Knight do not part with the title to said harvester until all said deferred payments or notes are fully paid; that time is of the essence of the agreement; that, should the undersigned make default in any of said payments, then said Houser, Haines & Knight shall, at their option, and without notice, terminate this agreement, and with or without legal process take and retain said harvester, wherever it may be situated, and all moneys paid by the undersigned prior to such default shall be compensation for the privilege of using said harvester prior to such default." The promissory notes were executed by Rowe according to the agreement, and delivered to said Houser, Haines & Knight. The said Rowe paid the sum of $750 upon account of said notes and the purchase price of said harvester, and no more, and the balance of the $1,400, with interest, according to the terms of said notes, remains due and unpaid. During the year 1894, the said Houser, Haines & Knight sold and assigned the said contract and the said notes to plaintiff. The contract was a conditional sale, and the title was not devested as long as the notes remained unpaid. This principle of law was decided in the early case of Kohler v. Hayes, 41 Cal. 455, and has since been followed in many cases. Hegler v. Eddy, 53 Cal. 597; Rodgers v. Bachman, 109 Cal. 556, 42 Pac. 448; Perkins v. Mettler (Sept. 15, 1899) 58 Pac. 384. It is the rule followed in the United States supreme court. Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285.

It follows that plaintiff was the owner of the property at the time of the commencement of the action, unless it had in some manner been devested of the title. Defendant claims title by virtue of a bill of sale for a valuable consideration made to him by said Rowe on June 2, 1896. Rowe had no title at the time he made the bill of sale, but only the right to procure the title upon paying the balance of the purchase price. He conveyed that right to defendant, but neither Rowe nor defendant has paid the balance of the purchase price which Rowe agreed to pay. Hence the transfer by Rowe to defendant did not clothe him with the legal title. On June 6, 1896, the plaintiff served a notice in writing upon said Rowe, notifying him of his default in the payment of the balance of the note for the purchase price of the harvester, and of its election to terminate the contract and take possession thereof. The said written notice also tendered said Rowe the unpaid notes. Defendant further claims by virtue of having paid the assessor of Madera county $28 for said property at a public sale for delinquent taxes made June 2, 1896. The title through this source depends upon the validity of the assessment and proceedings leading up to the sale. It appears, from page 44 of the assessment roll of Madera county for the year 1896, that under the heading "Taxpayers' Name" is the following: "Rowe, I. M., et ux., and Houser and Haines Mfg. Co., and Houser, Haines & Knight;" and under the head of "Description of Property" is the following: "Furniture, $15; sewing machine, $5; farm utensils, $50; machinery (harvester), $350; wagon, $20; harness, $5; 10 horses, $20; 5 colts, $50; 1 cow, $20; 1 dozen poultry, $3; 3 hogs, $8." On the same page the total valuation of all of the above property so assessed to the parties therein stated is given as $726." At the bottom of the page, under the head of "Remarks," is the following: "Harvester seized for taxes and sold to R. L. Hargrove, June 2, 1896, for twenty-eight dollars, including road and poll tax." No part of the property so entered upon said assessment roll going to make up the valuation of $726, other than the harvester, belonged to plaintiff. It was all given in to the assessor by I. M. Rowe in a sworn statement made by him April 9, 1896. After the list was so given in, the assessor, of his own volition, inserted the names, "I. M. Rowe et ux., Houser and Haines Mfg. Co., and Houser, Haines & Knight," instead of the words, "I. M. Rowe et al."

The tax due upon all the said property so assessed was $16.70, to which was added $2 for road tax and $2 for poll tax, making $20.70. To this was added $7 costs of advertising and sale, but the assessor sold for $28, in round figures. The tax rate for said county for the year 1896 was $2.30 per hundred, and the taxes due upon the harvester at this rate, and according to its assessed valuation, was $8.05. The assessment was void, and the sale thereunder conveyed no title. Personal property must be assessed to the owner or the person claiming it, or in whose possession or control it was, at 12 o'clock m. on the first Monday of March next preceding the assessment. Pol. Code, § 3628. Without a valid assessment, all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. An assessment of personal property to a named person other than the owner is absolutely void. Kelsey v. Abbott, 13 Cal. 609; Smith v. Davis, 30 Cal. 537; Blatner v. Davis, 32 Cal. 328; People v. Whipple, 47 Cal. 591; Crawford v. Schmidt, Id. 618; Lake Co. v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 21, 4 Pac. 965; City of San Luis Obispo v. Pettit, 87 Cal. 503, 25 Pac. 694. In certain cases where taxes on personal property are not, in the opinion of the tax collector, a lien upon real property sufficient to secure the same, the tax collector may collect them "by seizure and sale of any personal property owned by the person against whom the tax is assessed." Pol. Code, §§ 3820, 3821. In this case the personal property sold was owned by plaintiff. The taxes upon the property, with the taxes upon several other items of property, were assessed against "Rowe, I. M., et ux., and Houser and Haines Mfg. Co., and Houser, Haines & Knight." The property was not sold for taxes due upon it alone, nor for taxes due by plaintiff alone, but it was sold for taxes due upon property not owned or claimed by plaintiff, and given in to the assessor as the property of Rowe. It was also sold for $2 road tax and $2 poll tax. The corporation plaintiff certainly did not owe a poll tax. The duty of the assessor is to ascertain the name of the owner of property, and assess it to him, and, if the name of the owner is unknown to the assessor, and not of record, to assess it to "unknown owners." Pol. Code, §§ 3628, 3636. And, if it is not so assessed, the assessment is void. Grotefend v. Ultz, 53 Cal. 666; Weinreich v. Hensley, 121 Cal. 659, 54 Pac. 254.

It is urged that the rule heretofore existing in this state has been changed by section 3628 of the Political Code, and that a mistake in the name of the owner will not invalidate an assessment. The section, so far as claimed to be in point here, is: "But no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." Nothing is said about a mistake as to personal property, and the section has no application in such case. Lake Co. v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 21, 4 Pac. 965; City of San Luis Obispo

v. Pettit, 87 Cal. 502, 25 Pac. 694. Under this appeal, we have no power to order judgment for plaintiff on the findings, if they were such as to authorize such judgment. The order should be reversed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

127 Cal. 496

In re KASSON'S ESTATE.

LINDY v. McCHESNEY et al. (Sac. 700.)

(Supreme Court of California. Jan. 30, 1900.)

HEIRSHIP — ESTABLISHMENT — WITNESSES — CROSS-EXAMINATION—IMPEACHMENT — PARTICULAR ACTS OF IMMORALITY—STATEMENT.

1. In a proceeding by plaintiff claiming to be the sole heir of a testator against devisees under the will to determine his heirship, M. filed an answer denying plaintiff's heirship, and alleging that she was the testator's sole heir, and both plaintiff and M. claimed to be the only issue of a certain marriage between testator and H. On the trial devisees produced a witness who testified that she was the woman claimed by plaintiff and M. to have married testator, and that she had no issue of the marriage. She was also a hostile witness to both plaintiff and M. *Held*, that it was prejudicial error to refuse to allow M. to cross-examine such witness at length concerning her alleged marriage with testator, etc., though plaintiff had cross-examined her on such matters, since in such proceedings, authorized by Code Civ. Proc. § 1664, each person who appears, either by complaint or answer, and claims heirship, is an independent party to the action.

2. It was error to allow a witness to be asked over objection, on cross-examination, if the house she was keeping in a certain place was not a house of prostitution.

Department 2. Appeal from superior court, San Joaquin county.

Action by George W. Lindy against Martha E. McChesney and others to establish plaintiff's rights as an heir of George M. Kasson, deceased, in which Mary E. Mann filed an answer claiming heirship of such decedent. From a judgment in favor of defendants, and from an order denying a new trial, Mary E. Mann appeals. Reversed.

Woods & Levinsky, for appellant, Mann. Denson, Oatman & Denson and L. S. Church, for respondent Lindy. John A. Percy, Nicoll & Orr, Budd & Thompson, and Gould & Bogue, for respondent defendant. Cowdray, Loutitt & Middlecoff and H. R. McNoble, for respondents McChesney and others.

McFARLAND, J. The deceased, George M. Kasson, died testate at Stockton, Cal., in September, 1895. By his will he left all of his property to certain persons, most of whom were his nieces and nephews, and who may be designated here for convenience as "Martha E. McChesney and others," and are the respondents in this appeal. The will was admitted to probate during the year 1895, and letters testamentary were issued to Clark McChesney, who was named in the will as an executor, and duly qualified and entered upon the discharge of his duties as such executor. Within the statutory time George W. Lindy filed his petition, and afterwards a complaint, under section 1664 of the Code of Civil Procedure, to have the rights of all persons to the estate of Kasson and all interests therein ascertained and declared. He averred in his complaint that he was the legitimate son and the only child and heir of the said George M. Kasson, and that as no provision is made for him in the will, and as it does not appear that the omission to provide for him in the will was intentional, therefore he is entitled to the whole estate. Martha E. McChesney and others filed answers in which they denied that plaintiff was the son of the testator, and claimed that they, as legatees and devisees, were entitled to have the estate distributed to them. Mary E. Mann filed an answer on her own behalf in which she denied that the plaintiff was the son of the testator, and set up that she was the daughter and only child of said George M. Kasson, and that as no provision was made for her in the will, and as it did not appear that the omission to provide for her was intentional, therefore she was entitled, as the only heir, to have the entire estate distributed to her. After a hearing, the court rendered judgment in which it was declared and decreed that neither the plaintiff, Lindy, nor the claimant, Mary E. Mann, was a child or heir of the said Kasson, deceased, and that neither of them was entitled to any part of the estate, and that Martha E. McChesney and others were entitled to have the estate distributed to them as legatees and devisees under the will. From this judgment, and from an order denying a motion for a new trial, the claimant, Mary E. Mann, appeals. No appeal has been taken by the plaintiff, George W. Lindy.

Appellant contends that the evidence was not sufficient to warrant the findings of the court; but as, in our opinion, the judgment and order appealed from must be reversed for errors of law hereinafter noticed, it is not necessary for us to pass upon the sufficiency of the evidence, although it may be said that it was quite contradictory and conflicting. Appellant contends that the court committed a great many errors in ruling upon the admissibility of evidence; the main points, under this head, being that the court erred in sustaining objections to questions asked by appellant's counsel in cross-examination of witnesses of the respondents. These points are presented by something over 100 exceptions. We cannot be expected to notice each, or any considerable number, of these exceptions. We will pass upon them, mainly, as a whole, specifying a few of them for the purpose of showing the general character of the exceptions; and, in order to do this, it is necessary to notice briefly the nature of the claims made by the different parties, and the general character of the evidence introduced.

The plaintiff, Lindy, claimed that the deceased, George M. Kasson, was married to one Mary Hayden, in St. Louis, Mo., on the 28th day of February, 1845, and introduced a certificate of marriage by a justice of the peace given on that date, and certifying that he had married George M. Kasson and Mary Hayden, and claimed that plaintiff was the son and only child of said parties, and was born on the 30th day of April, 1847. The appellant, Mary E. Mann, denies that said certificate of the justice of the peace was of the marriage of the parents of plaintiff, Lindy, but claims that it was a certificate of the marriage of her parents, and that she is the daughter and only child of said George M. Kasson and Mary Hayden, and that she was born at said city of St. Louis on the 15th day of March, 1849. She claims that her father, the said Kasson, deceased, removed from St. Louis to the state of California in about the year 1850, and that a few years afterwards, when she was 6 or 7 years old, she removed with her mother to the state of Arkansas; that she, appellant, went to live with a family named Flint, on a ranch near a little town called Loanoke, and lived there about 12 years; that in 1869 the Flints moved to Hot Springs, Ark., and she went with them, and that her mother, whom she calls Mary Kasson, was then living at Hot Springs at a hotel called the "Earle House," and frequently visited her at the home of the Flints; that about three or four months afterwards she (appellant) left Hot Springs; that she returned to Hot Springs in a few months, and lived there until about 1872, but that when she returned to Hot Springs her mother had left, and that she had not seen her since, and supposed she was dead. The respondents, Martha E. McChesney and others, contend that the claims of the plaintiff and the appellant are both unfounded; that the woman who was married to Kasson in 1845 was not the woman who went to Hot Springs, and whom appellant claims to have been her mother; that the woman who actually married Kasson was a Mrs. Mary Hayden, whose maiden name was Mary Ann Mize; that she lived with Kasson until some time in the year 1850, when he went to California, and that he returned to St. Louis, and lived with her awhile as husband and wife, in 1852; that she is not the mother of either plaintiff or appellant, and never had any child by the said Kasson; that she lived in St. Louis until 1876, and then came to California; that she was divorced from Kasson, and was afterwards married to one Stansbury; that after his death, and after coming to California, she was married to a man by the name of Molloy; that she is still living, and that her present name is Mary Ann Molloy. Respondents claim that they produced this identical woman at the trial, and they did produce a woman calling herself Mary Ann Molloy, who testified, among other things, that she was the woman who was married to Kasson in 1845, in St. Louis, and that the facts as to her life and history alleged in the contention of respondents, as above stated, are true.

Many of the exceptions upon which the appellant relies were to rulings of the court sustaining objections to questions asked by her of the witness Molloy on cross-examination, and we think that many of these rulings were prejudicially erroneous. The testimony of this witness, whether true or not, was certainly in many respects quite remarkable, and presented an instance where a wide range of cross-examination should have been allowed. She testified to material matters occurring during a period of from 50 to 60 years, and a liberal latitude should have been given appellant, on cross-examination, to test her intelligence, knowledge, accuracy of memory, disposition to tell the truth, bias, relation to the parties, interest, motive, etc. In such a case, a refusal to allow a reasonable cross-examination is a ground of reversal. Neal v. Neal, 58 Cal. 287; Sternburg v. Meany, 53 Cal. 425; Wixom v. Goodcell, 90 Cal. 622, 27 Pac. 419. See, also, McFadden v. Railway Co., 87 Cal. 464, 25 Pac. 681; People v. Benson, 52 Cal. 380; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; Greenl. Ev. § 446. The importance of the testimony of this witness is accentuated by the fact that the court expressly found, in accordance with her statements, that she is the woman who intermarried with Kasson at St. Louis on the 28th day of February, 1845; that she continued to be his wife "until about the year 1862"; and that "no child or children were ever born to said George M. Kasson and Mary A. Kasson"; and from this finding all the other findings necessarily follow.

In order to understand the pertinency of questions which were not allowed to be asked the witness Molloy on cross-examination by appellant, it is necessary to state briefly some of her testimony in chief and on cross-examination by plaintiff. She testified, among other things, that she was born in Illinois in December, 1824, and moved to St. Louis in 1843; that she married Hayden, her first husband, when she was about 14 years old, but could not remember the month or the year of her marriage to him, and that she heard—but did not know—that he got a divorce from her; that she married Kasson, as before stated, in 1845, and that after he went to California she received many letters from him, and that she thought she got a divorce from him, but did not know the year of the divorce, or how long it was after he went to California, but that it was obtained in St. Louis, and that she never bore either a son or a daughter to Kasson;

that in 1863 she was married to Stansbury, who afterwards died, although she did not remember the year of his death, but thought it was about 2½ years after the marriage; that in 1876 she moved to California, and lived between Los Angeles and Santa Monica, and afterwards in Los Angeles; and that in 1877 she was married in Los Angeles to Charles Pinckney Molloy, and lived with him about two years, when he died. The marriage license and certificate of marriage were introduced, showing that the witness was married to Molloy on January 3, 1877, from which it appeared that she was a native of Kentucky, aged 40 years. She testified that this marriage record was correct. She further testified that in 1847 she had a child living with her at St. Louis named Fannie Patterson, who stayed with her until she was about 10 years old; that a day or two before she left St. Louis for California she got from an orphan asylum a child 2 or 3 days old, whom she wanted for a companion, and brought her to California; that she went by the name of Althea May, and afterwards married James Simmons, of Los Angeles; that during her whole life she had never been without children, not her own, living with her; that after she went to Los Angeles she wrote a letter to Kasson, addressing it to him at Stockton, and received a reply; that when Kasson returned to California, in 1852, he did not want her to go with him, but told her that when two families named West and Dibble, whom she knew, should go to California, he would be glad to have her go with them, but that when these families went she did not go with them. She further testified that in May, 1897, she went from Los Angeles to Oakland, Cal., and had since lived there in a house on Seventh avenue, and that on July 4, 1897, she was joined there by a man named Wilson and his stepdaughter, Miss Milliken, and a niece of the witness Mrs. Goldman, all of whom came at that time from the East for the purpose of being witnesses for respondents, and who remained with her in that house until the trial of this cause commenced, which was not until March, 1898, and testified at the trial, and that she left Los Angeles for Oakland a few days after Clark McChesney, one of the respondents, had first visited her at Los Angeles. She also testified that she bore one child to Hayden, which was the only child she ever bore.

The foregoing summary of parts of her testimony is sufficient for an understanding of the exceptions to rulings made on her cross-examination. It would require too much space to state here all the questions asked of the witness Molloy by appellant to which objections were sustained; it will be sufficient to state enough of them to show the general nature of the rulings made on cross-examination. She was asked, among other questions, the following: "Question. How long had you known James Hayden before you were married to him?" "Q. Under what circumstances did you meet Mr. Hayden?" "Q. How old were you when you married James Hayden?" "Q. How long did you live with James Hayden as his wife?" "Q. In what court, and in what city and county and state, and when, did you obtain the decree of divorce, if any, from James Hayden?" "Q. Did you and the man you say was your husband, Mr. Kasson, ever board in the house of Mrs. Milliken?" "Q. What year was the last letter written by Mr. Kasson that you received from him while he was in California and you were in St. Louis?" "Q. Tell me the name of the court and the place where it was located and the time when you obtained the divorce from Mr. Kasson." "Q. Is it not true, then, that you were desirous of coming to California, and your husband would not allow you to?" "Q. When did you first ascertain that a letter addressed to him at Stockton would reach him?" "Q. Do you remember how you signed the letter you say was sent to Mr. Kasson from Los Angeles?" "Q. State, if you know, whether Mr. Stansbury was in the habit of or did communicate with your husband, George W. Kasson, while he was living in California." "Q. When and where did you first meet Mr. Charles Molloy?" "Q. How long had you known Mr. Molloy before you married him?" "Q. Was he engaged in the same business prior to your marriage that he was at the time of his death?" "Q. How long had you known Mr. Stansbury before you married him?" "Q. Do you notice a discrepancy there (referring to the certificate of her marriage with Molloy) of fourteen years in your age?" "Q. Could you tell me whether it was the early, middle, or latter part of year 1875 when you got this little girl?" "Q. What means had you, who had never had but one child, and that when you were about sixteen years of age, of giving this little infant nourishment?" "Q. Was the institution from which you took this child conducted by sisters of mercy or charity, or was it a public institution?" "Q. Was it an institution of a public or private nature?" "Q. Was this little girl ever christened while in your charge?" "Q. Why did she attend the public schools under the name of Molloy, and marry under the name of Stansbury?" "Q. Please describe this girl who you say was not your daughter and who married Mr. Simmons." "Q. How old was this girl when she married Mr. Simmons?" "Q. You say you have always been in the habit of having babies or children with you?" "Q. What was the cause of habit on your part of having babies or children at your home that did not belong to you?" "Q. What has become of the various children or babies who have been taken into your home on these various occasions,—have they all married or all died? What has become of them?" "Q. Please state the name of the two children who lived with you at your place between Santa Monica and Los Angeles, and who their parents were." "Q. When did you first meet Mrs. Peltier in California?" Witness, having testified that Mrs. Peltier had recently written in the memorandum book of witness the name of the justice who married her to Kasson, was asked: "Why did she write it?" "Q. Do you know where Mr. Wilson and his stepdaughter, Sara Milliken, and Mrs. Goldman, came from when they arrived at your place in Oakland, for the purpose of being witnesses in this case?" "Q. Who paid the rent for the house you occupied with these other witnesses in Oakland?" "Q. How long did you know the people to whom you gave your key to your house in Los Angeles when you came to Oakland?" "Q. Why did you not deliver the key to Mrs. Simmons, whom you brought from the East with you?" "Q. Have you made any arrangements for the future as to where you will go to live?" "Q. Who was the man who came to you in Los Angeles and asked you about your having lived in St. Louis?" To each of the foregoing questions respondents objected, the court sustained the objection, and appellant took an exception to the ruling; and, as was said in People v. Benson, supra, "it is difficult to see on what ground this evidence was excluded." Many of the objections were on the general ground that the question was incompetent, irrelevant, not proper cross-examination, etc.; but one of the grounds of objection to quite a number of questions was that "counsel for plaintiff had cross-examined as to that matter,"—the fact being that after the witness had testified in chief she had to some extent been interrogated by counsel for the plaintiff, Lindy, before the cross-examination by appellant began. Even if, under the law of evidence, appellant had no right to cross-examine as to a matter about which plaintiff had examined the witness, still the rulings would not be justified because the record does not show that to any considerable extent there has been such examination by plaintiff; certainly the greater part of the questions asked by appellant would not be within such a rule. It is evident, however, that the court erroneously proceeded upon the theory that there is such a rule of evidence as above indicated. The record shows that, after a question had been asked by counsel for appellant, the following occurred: "Counsel for defendants objected to the question upon the ground that counsel for plaintiff has cross-examined in regard to this matter. The Court: She has been examined as to that. Mr. Levinsky: I beg to differ, not by me. The Court: She has been examined by Mr. Denson, counsel for the plaintiff. Mr. Levinsky: Your honor, please, do I understand that you will not permit me to cross-examine this or other witnesses upon any matter that Mr. Denson, counsel for plaintiff, may have cross-examined upon? The Court: That is exactly it." After some argument of the point by the counsel for appellant, the court said: "I will sustain the objection."

It is not true, as a legal proposition, that in a proceeding under section 1664 one party can be rightfully precluded from cross-examining a hostile witness as to a certain matter, upon the ground that another party had previously examined him as to that matter. Under this section each person who appears, and, either by complaint or answer, sets up a claim of heirship, etc., peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to ask proper questions of witnesses of hostile parties. After the parties have been brought into court by petition, notice, etc., the one who chooses first to file a complaint is called, for convenience, the "plaintiff," and the others are called "defendants," and their pleadings are called "answers"; but the requirement as to each pleading is substantially the same,—that is, it must set forth "the facts constituting his claim to heirship," etc. The averments of the pleadings show which parties are hostile to each other, and each has a right to cross-examine the witnesses of a hostile party. In the case at bar the attitude of appellant was adverse to that of all the other parties. She had her own theory of her case, and her counsel could not be compelled to yield his judgment as to cross-examination of a witness to that of counsel for plaintiff. Of course, in a proceeding under section 1664, when there are numerous parties, a court could, in its discretion, prevent frequent and apparently useless repetitions of the same questions by different parties; but the rulings of the court in the case at bar, above set forth, as presented by the record, cannot be justified on that ground.

There are many other exceptions relied on by appellant, but many of them may not arise on another trial, and they are too numerous to be separately discussed here. It is necessary to say, however, that it was error to overrule the objection of appellant's counsel to this question asked her when a witness on cross-examination: "Is it not a fact that the house you were keeping in Marysville was a house of prostitution?" People v. Crandall (Cal.) 57 Pac. 785; In re James' Estate, 124 Cal. 653, 57 Pac. 578, 1008, and cases cited on page 657, 124 Cal., and page 580, 57 Pac. It may be stated, generally, that appellant was too much restricted in her cross-examination of many of respondents' witnesses, and particularly in the cross-examination of respondents' witnesses Goldman, Clark, McChesney, Robin, and Portier. The judgment and order appealed from are reversed, and the appellant, Mary E. Mann, is granted a new trial.

We concur: HENSHAW, J.; TEMPLE, J.

127 Cal. 554

SUNKLER v. McKENZIE. (S. F. 1,309)

(Supreme Court of California. Feb. 10, 1900.)

INSOLVENCY—JUDGMENT—RES JUDICATA.

Plaintiff was adjudged insolvent, and petitioned the court to have a homestead in certain farm land set apart to him. While this proceeding was pending, the court entered an order directing the assignee to sell all the grapes growing on the land, which he did, and plaintiff filed a petition to require the assignee to pay the proceeds of the sale to him, which was denied. *Held*, that since the order denying such relief was a final order, and appealable to the supreme court, under Insolvent Act 1895, §§ 64, 71, authorizing appeals from an order for or against an insolvent on a petition to set aside property claimed to be exempt, no appeal having been taken, such order was res judicata in a subsequent independent action by such insolvent for the same relief.

Commissioners' decision. Department 1. Appeal from superior court, Napa county.

Action by Henry Sunkler against George S. McKenzie. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. H. Barrows, for appellant. C. J. Beerstecher, for respondent.

CHIPMAN, C. Action to recover the value of a certain crop of grapes grown upon land claimed by plaintiff to be a homestead. On June 19, 1895, plaintiff recorded his declaration of homestead upon certain farm land in Napa county. June 28th he was adjudged insolvent upon his own petition. August 19th he petitioned to have a homestead set apart to him in the insolvency proceedings. On September 23d the petition was heard, and the court found that the premises were of greater value than $5,000, and that Sunkler was entitled to have a homestead set apart to him of value no greater than $5,000, and three appraisers were appointed to appraise and admeasure the premises. They made report November 26th, setting apart certain 200 acres, including the dwelling, valued by them at $5,000, but "the crop had been removed, and did not enter as a factor in such valuation"; and on December 30th the court entered its decree confirming said report, "awarding and setting apart to said insolvent, as a homestead, the land and premises thus admeasured." On June 28th aforesaid, "a crop of grapes had just formed and commenced to grow on the grapevines then growing on said homestead property." They thereafter grew and matured about September 28th. On September 13th, and "while said proceedings were pending to set aside the homestead above recited, an order was made by the * * * court, in the matter of said * * * insolvency," directing the assignee therein (defendant in this action) to sell all the grapes growing on said land, pursuant to which he sold the crop, realizing $600 for the grapes grown on the portion of the land awarded Sunkler as a homestead. The court made the following finding: "That on the 11th day of January, 1896, plaintiff, said insolvent, filed in said court and matter his petition praying that said assignee be directed to pay over to petitioner said sum of six hundred dollars, in which petition the plaintiff submitted to the court all the matters and things in his complaint herein set out, and sought an adjudication of the rights and all thereof in this action asserted by him. An answer was filed therein by the assignee objecting to the making of such an order, and said matter was duly set for hearing, the respective counsel appearing therein; whereupon testimony, oral and documentary, was offered by the respective parties, and the merits of said cause were fully argued and considered, and the cause submitted on briefs to be filed. Thereafter, and on March 7, 1896, the court made and rendered its decision therein, finding upon all the issues framed by such petition and answer thereto, and adjudging that petitioner was not entitled to recover said sum or any part thereof. Judgment was thereupon entered accordingly, and thereafter, and on the 15th day of April, 1896, written notice of such decision was duly served by defendant's attorney on the attorney for plaintiff, and no exception to or appeal from said decision or judgment was ever taken, nor has the same been sought to be modified or set aside, but still stands as made and entered in said matter." After the insolvent had failed to recover upon his petition in the insolvency proceeding, he commenced this independent action, in which judgment went against him, and hence this appeal from the order denying his motion for a new trial and from the judgment.

Section 64 of the insolvency act of 1895 provides that "it shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of said insolvent, such real and personal property as is exempt from execution," and the section provides that there shall be notice of the hearing of the application. Section 71 of the act provides that an appeal may be taken to the supreme court "(5) from an order against or in favor of setting apart homestead or other property claimed as exempt from execution." Appellant claims that the judgment entered denying his petition of January 11, 1896, and adjudging that the funds in the assignee's hands belonged to the creditors of the insolvent, was merely an interlocutory order made upon motion, and that he was not precluded thereby from bringing a separate action to recover the property. Mr. Freeman says: "The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as res judicata, though the decision is the determination of a motion or summary proceeding, and not an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon issues of law or fact or both, and these issues, or some of them, were necessarily decided by the court as the basis of the order which it finally entered granting or denying the relief sought." Freem. Judgm. § 326, and cases cited. Appellant concedes that the court had the power to give or withhold the relief sought, at its pleasure; but he contends that the order was not final nor appealable, and therefore was not a bar to this action. Some of the cases place importance upon the fact that the order is appealable where it is pleaded in bar. If the statute did not make the order in the present case one from which an appeal may be taken, a different question might arise, upon which we express no opinion. But we think the order here was appealable. The relief asked by the insolvent in his petition rested on the claim that the property was exempt from execution. It could have no other foundation, and the court must have so regarded the issues, for it found that the money was not exempt. The subject-matter of the petition was identical with that in controversy here. The parties were the same, and in the same right, and the petition was presented to a court of competent jurisdiction. The fact that defendant here was not sued in his capacity as assignee can make no difference. He held the money in that capacity, and defended in that capacity, and the identity of the two actions cannot be destroyed by making him a defendant in the present action in his individual capacity. The identities demanded by the law to make the matter res judicata were fully supplied. Id. § 252. It is familiar law, as well as manifest justice, that a man should not be vexed twice with the same litigation. This rule is not without its exceptions. But when, as here, a question has once been fully litigated, and every opportunity given to either party to present his case, and to have any supposed errors in the lower court corrected by review in the highest court, it would be an abuse of the rights of a litigant to compel him to enter upon a second trial of the same question. In this case the insolvent presented a formal petition in writing, in the proceeding which he himself had instituted. The assignee answered. The cause was tried upon evidence submitted, documentary and oral. The case was argued upon briefs, and submitted for decision. The court made full findings, and entered judgment thereon, and no steps were taken to renew the motion, to set aside or vacate the judgment, or appeal therefrom. This judgment, in our opinion, became an adjudication of the matter in controversy and final as to the facts then litigated. See the subject discussed and the cases cited in Commissioners v. McIntosh, 30 Kan. 234, 1 Pac. 572.

It becomes immaterial whether the court erred in finding that plaintiff did not reside upon the premises when he filed his declaration of homestead, and it is also immaterial by what right he claimed the proceeds of the grapes as property exempt from execution. Whatever was the basis of his right, the right itself was litigated, and the judgment is a bar to the present action. The judgment and order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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127 Cal. 545

PEOPLE v. COLE. (Cr. 452.)

(Supreme Court of California. Feb. 8, 1900.)

CRIMINAL LAW—HOMICIDE—EVIDENCE—RECORD ON APPEAL.

1. Where error is admitted by the state on appeal, as to material portions of the charge, the court will not consider certified copies of instructions alleged to have been given at the request of defendant, similar to those of the state, when such instructions do not bear the signature of the trial judge, nor purport to have been requested by any one.

2. Where the charge of the court, and requests to charge, are inserted in the record on appeal as part of the judgment roll, it is unnecessary to reinsert them as part of the bill of exceptions.

3. On a trial for murder, there was evidence that deceased, a woman, was subject to epileptic fits, particularly when under the influence of alcohol; that defendant and deceased were out driving together while intoxicated, and that defendant drove home about 3 o'clock in the morning with the dead body of deceased by his side, her head against his breast, and partly covered by a buggy robe, while her clothing was torn, indicating a struggle on the ground; that an autopsy revealed appearances which, according to some of the medical testimony, indicated strangulation, but which other experts claimed were not inconsistent with the theory that she died from the effects of an epileptic fit, or from slow suffocation by the buggy robe. *Held*, that there was sufficient evidence to support a verdict of murder in the second degree.

4. Before the indictment of defendant, his wife made a long, unsworn statement to the district attorney, part of which was hearsay, about the circumstances of the death of deceased, and of her own troubles with defendant. At the trial the wife was a witness for defendant, and some of her testimony was at variance with her previous statements to the district attorney. *Held*, that only so much of such statement should be allowed to go to the jury as was in conflict with her testimony at the trial on material points.

In bank. Appeal from superior court, Monterey county.

Joseph S. Cole was indicted for murder, and from a judgment of conviction for murder in the second degree he appeals. Reversed.

Atty. Gen. Ford, for the People.

BEATTY, C. J. Defendant was convicted of murder in the second degree, and appeals from the judgment and from an order denying his motion for a new trial. The assignments of error upon the rulings of the trial court are very numerous, and the attorney general confesses that several of them are well founded. In view of this confession of error, we deem it unnecessary to enter upon a particular discussion of many of the points presented in the brief and argument on the part of the appellant. We will, however, advert briefly to some matters involved in the further proceedings to be taken in the case.

The attorney general, among other things, admits that the trial judge, in his charge to the jury, misstated the law applicable to the case in several particulars. In consequence of this admission, the district attorney of the county where the conviction was had asked leave to amend the record here by filing certified copies of certain instructions alleged to have been given at the request of the defendant, and which, it is suggested, contain the same propositions which are complained of in the charge of the court. We do not find that this suggestion is borne out by a comparison of the two sets of instructions, but if it were we could not take notice of the fact, for the reason that these alleged requests to charge are not authenticated in any manner that would entitle them to be treated as a part of the record. They are not included in any bill of exceptions. Not one of them bears the signature of the trial judge, and they do not purport to have been requested by any one. The provisions of the Penal Code (sections 1127, 1176, 1207), and the numerous decisions of this court construing them, and the corresponding sections of the old criminal practice act, point out very plainly the mode of authenticating the charge of the court and the requests to charge, with the rulings thereon, so as to make them a part of the record. These directions of the statute should be observed, for otherwise the charge of the court, and the requests to charge, whether allowed or refused, can only become a part of the record by being incorporated in a bill of exceptions. In this case the alleged requests to charge are not authenticated in either of the methods prescribed by the statute.

The condition of this record gives occasion to advert to a fault of practice, by no means uncommon, which is productive of unnecessary expense and inconvenience. It very frequently happens that the entire charge of the court—both that which the court has given of its own motion and the requests to charge—is inserted in the record twice, once as a part of the judgment roll, under section 1207 of the Penal Code, and again as a part of the defendant's bill of exceptions. We would suggest that if the charges are properly authenticated, as they should be, and thus become a part of the judgment roll, there is no more propriety in setting them out again at large in the bill of exceptions than there would be in putting the indictment or information, minutes of the plea and of the trial, and judgment in the bill of exceptions. When anything is properly in the record once, it is worse than useless to repeat it in a bill of exceptions; for the only result is to cumber the transcript with useless matter, making it more inconvenient to examine, and imposing an unnecessary expense upon the counties for printing. In this case the charge of the court, which is very lengthy, is printed in the transcript no less than three times,—once as a part of the judgment roll, where, for lack of authentication, it was not entitled to be placed, and twice in the bill of exceptions, where one insertion would seem to have been sufficient.

Returning from this digression to the matters urged by the appellant as grounds for reversal of the judgment, it will be sufficient, for the purposes of this opinion, to make a very general statement of the facts of the case. The defendant was accused of the murder of his wife's sister. The deceased was an epileptic, and subject to very violent attacks, followed by several hours of stupor or insensibility, and was peculiarly liable to such attacks when under the influence of alcohol, a condition in which she was not infrequently found. About 10 o'clock in the evening, after drinking more or less whisky, she and the defendant, who was also partially intoxicated, entered a buggy, and drove to a saloon, where they obtained another bottle of whisky, with which they departed. At 3 o'clock next morning the defendant drove up to his house with the dead body of the deceased by his side, her head being against his breast, and partly covered by a buggy robe. Her clothes were torn and disarranged, and there were evidences that she had been in a struggle on the ground. To his wife and others who were then present, the defendant at that time offered no particular explanation of what had occurred, merely insisting that the woman was drunk, and not dead. Subsequently he stated that, after procuring the whisky at the saloon, his sister-in-law had proposed a moonlight drive; that she held the reins, and was driving along a country road, when she suddenly fell out of the buggy. He got out, and attempted to lift her back into her seat, but she struggled and resisted, and he was unable to do so. Becoming exhausted, he fell asleep. When he woke up he made another effort, succeeding in getting the woman back in the buggy, and, the night being cold, drew the buggy robe over her. The theory of the defense was that deceased fell from the buggy in an epileptic fit brought on by intoxication, and that she died in consequence of the fit, or was perhaps suffocated by the buggy robe while in the condition of stupor following the convulsion. The theory of the prosecution seems to have been that she was strangled by defendant while making a felonious assault upon her. An autopsy revealed appearances which, according to some of the medical testimony, indicated strangulation. Other experts testified, in effect, that there was nothing in such appearances inconsistent with the theory that she died from the effects of the epileptic fit, or from slow suffocation by the buggy robe. Aside from the medical testimony, there were several circumstances, some of which may have had a tendency to sustain the theory of the prosecution, while others were of an opposite tendency. Many witnesses testified to the good reputation of the defendant for peace and quiet, honesty, and integrity.

Such being the case, we cannot sustain the contention of the defendant that the evidence was wholly insufficient in law to support the verdict. The case was one proper to be submitted to the jury, and if the rulings of the court in other respects had been free from error the judgment would have to be affirmed.

Neither did the court err in overruling the motions of defendant to set aside the information and in arrest of judgment. The ground upon which these motions were based was the alleged fact that the district attorney, upon whose sworn complaint the defendant was arrested and examined before the committing magistrate, had no personal knowledge of the facts of the homicide. The case of Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619, is cited by appellant in support of his assignments of error respecting this matter. The decision in that case has no application to a motion to set aside an information or in arrest of judgment. When a charge of this kind has been examined by a magistrate, and the evidence taken at the examination warrants an order holding the defendant to answer, the imperfections of the complaint, if any, are cured, and the commitment is legal. As to the motion in arrest of judgment, that can be based only upon defects appearing upon the face of the indictment or information. Pen. Code, §§ 1012, 1185.

But the court did commit an error gravely prejudicial to the rights of defendant in permitting the district attorney to pursue the course of cross-examination he adopted with respect to the wife of the defendant. It seems that a few days after the death of her sister the wife of defendant visited the office of the district attorney, and made a long statement, partly hearsay, about the circumstances surrounding her sister's death and her own troubles and differences with defendant. At the trial she was a witness for the defendant, and some of her testimony was at variance with portions of her previous statements to the district attorney. It was entirely proper, of course, in laying a foundation for impeachment, to question her as to those parts of her previous statement which were in conflict with material portions of her testimony at the trial. But the court permitted the district attorney to read portions of her statement, and question her as to their correctness, which had no relation to her testimony at the trial, and several of which contained matters wholly immaterial and irrelevant, and only calculated to prejudice the jury against the defendant. It is not necessary to go into a detailed statement of the particulars in which this cross-examination exceeded proper limits. For the guidance of the court in case of a new trial, it is sufficient to say that, if the wife of defendant is again a witness in his behalf, her previous statements can be laid before the jury only so far as they are in conflict with her testimony on material points. The errors in the charge of the court being confessed, it is unnecessary to specify or review them, as they are not likely to be repeated on a new trial. The judgment and order appealed from are reversed, and cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

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127 Cal. 538

REED v. JOHNSON. (S. F. 1,328.)

(Supreme Court of California. Feb. 7, 1900.)

APPEAL — TIME—PLEADING—COUNTERCLAIM—VALIDITY—FINDINGS—FAILURE TO FIND—HARMLESS ERROR.

1. Under Code Civ. Proc. § 939, providing that an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within 60 days after the rendition of the judgment, an appeal not taken within such time must be considered and determined on the judgment roll alone.

2. The court's failure to find on the issues raised by an answer which did not constitute a valid counterclaim was not prejudicial error.

3. Plaintiff sued, as executrix, on a note made by defendant to deceased. The answer, by way of counterclaim, averred that the deceased and defendant were partners in a business which they afterwards incorporated, each owning one-half the stock; that deceased obtained and appropriated to his own use moneys of the corportion, one-half of which he owed defendant at the time of his death. For the difference between this amount and that claimed to be due on the note, defendant asked judgment. There was no averment that the claim had ever been presented to the executrix for allowance. *Held*, that the answer did not set up a valid counterclaim.

Department 1. Appeal from superior court, Santa Clara county.

Action by Abbie B. Reed, executrix of Charles W. Reed, deceased, against S. R. Johnson. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. H. Campbell and J. P. Moore, for appellant. Charles Wesley Reed and Archer & Archer, for respondent.

VAN DYKE, J. The judgment in this case was entered April 20, 1897. Subsequently defendant moved for a new trial on a bill of exceptions, which was denied. Thereupon the defendant appealed from the judgment and from said order denying a new trial, January 4, 1898. The appeal from the order was dismissed April 4, 1898, and a rehearing denied April 30, 1898. The appeal from the judgment having been taken more than 60 days after the rendition thereof, it must be considered and determined upon the judgment roll alone, without reference to the question whether the evidence was sufficient to support the findings and the judgment or not. Code Civ. Proc. § 939, subd. 1. The action is founded upon a promissory note made by the defendant to C. W. Reed, deceased, dated October 6, 1894, for the sum of $3,661.89. The complaint admits certain payments having been made on said note, and demands judgment for the balance claimed to be due in the sum of $1,884.89, together with interest and costs. The answer, by way of counterclaim, avers that said Reed and the defendant were partners in business, and that on or about the 1st day of January, 1894, they organized, under the laws of this state, a corporation known and designated as the C. W. Reed Company; that C. W. Reed, at divers times between August, 1894, and the 1st of March, 1896, obtained and appropriated to his own use money of the C. W. Reed Company, aggregating $7,889.85, and that at the death of Reed, March 19, 1896, he was indebted to the said company in the sum of $5,755.50, and to the defendant in the sum of $2,877.75; that the said Reed and the defendant were equal partners in the former partnership firm, and also in the C. W. Reed Company; and it is asked that the amount alleged to be due the C. W. Reed Company and the defendant from the late C. W. Reed "be allowed as a counterclaim herein, and that this defendant have judgment for the balance in his favor." There is no averment in the counterclaim that either the alleged demand due the C. W. Reed Company or the defendant was ever presented for allowance to the executrix of the estate of said Reed, deceased. The court found in accordance with the allegations of the complaint, and judgment was ordered and entered for the sum of $2,081.29, the balance due on the note in question; and "further finds that the answer of defendant constitutes no defense or counterclaim in this action." The main contention on the part of the appellant is that the court failed to find on the issues raised by the affirmative matter contained in the answer. The statement of new matter constituting the alleged counterclaim on the trial was deemed controverted by plaintiff (Code Civ. Proc. § 462), and the burden was, therefore, upon the defendant to prove such affirmative matter. The appellant is not prejudiced unless the court has failed to make such findings in his behalf as would countervail the other findings in favor of the plaintiff; and, as error in the court below is not to be presumed, but must be shown by the appellant, if the omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize reversal. Hutchings v. Castle, 48 Cal. 156; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214. The point under consideration, therefore, must be determined adversely to the appellant. If, however, findings had been made in accordance with the allegations of the counterclaim, they would not have had any legal effect upon the right of the plaintiff to the judgment sought by her. The judgment is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

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127 Cal. 542

PEOPLE v. QUINN. (Cr. 589.)

(Supreme Court of California. Feb. 7, 1900.)

CRIMINAL LAW—INDICTMENT—GRAND JURY—WITNESSES—INDORSEMENT.

Though the indorsement on an indictment of the surname only of a witness testifying before a grand jury does not comply with the statute requiring that the names of witnesses testifying before it should be indorsed thereon, such irregularity was harmless, where accused knew the person named almost immediately after the finding of the indictment.

In bank. Appeal from superior court, Sacramento county.

David Quinn was convicted of manslaughter, and he appeals. Affirmed.

J. Charles Jones, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Defendant appeals from a judgment of manslaughter, and also from an order denying his motion for a new trial. He insists that the names of the witnesses examined by the grand jury were not indorsed upon the indictment, the statute containing such a requirement. This contention rests upon the fact that the name of a certain witness before the grand jury, to wit, G. W. Ogden, is indorsed upon the indorsement as "—— Ogden." The purpose of the aforesaid requirement of the law is to inform both the people and the defendant of the names of the witnesses upon whose testimony the indictment is based, and thereby to give them both an opportunity to secure these witnesses at the trial. People v. Northey, 77 Cal. 629, 19 Pac. 865, and 20 Pac. 129. In the case at bar there was a noncompliance with the statute, but the irregularity was harmless, as the defendant almost immediately after the finding of the indictment knew the particular person who was named as Ogden upon the indictment. People v. Crowey, 56 Cal. 36.

It is next claimed that the court committed error in refusing certain instructions offered by defendant. In this regard it is sufficient to say that all matters material and legally sound in the rejected instructions were given by the court in its charge to the jury. For the foregoing reasons, the judgment and order are affirmed.

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6 Cal. Unrep. 396

WOLFSKILL v. DOUGLAS. (Sac. 576.)

(Supreme Court of California. Feb. 7, 1900.)

TRIAL — FINDINGS — JUDGMENT — PLEADING — LIMITATIONS—STATUTE OF FRAUDS —APPEAL.

1. A finding that all the allegations of the complaint are true is sufficient to support a judgment, where the complaint states a good cause of action.

2. Where a complaint for money had and received, filed July 1, 1895, alleged that the cause of action arose "on or about January, 1894," a finding that all the allegations therein are true is an adverse finding on defendant's plea of limitations.

3. A mere reference in a plea in bar to Civ. Code, § 1624 (the statute of frauds), is insufficient as a plea of such statute.

4. A judgment supported by sufficient findings will not be reversed because of existence of immaterial findings not within the issues.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county.

Action by John Wolfskill against James A. Douglas. From a judgment for plaintiff, defendant appeals. Affirmed.

Bush & Ish, for appellant. R. Clark, for respondent.

GRAY, C. This is an action to recover $400 alleged to have been collected by defendant from one Mary A. Black in pursuance of an agreement on her part to "refund" a certain $400 previously paid out by plaintiff. On appeal no objection is made to the complaint, and it seems to be conceded that it is sufficient to support the judgment. The appeal is from the judgment alone, and the record consists of the judgment roll only, and contains no bill of exceptions. The only reason urged for a reversal of the judgment is that the findings of the court do not correspond with the allegations of the complaint, are self-contradictory, and are in "conflict with the issues" made by the pleadings. There are two findings of fact, numbered, respectively, 1 and 2. The matter set out in the transcript headed "Findings," and purporting to be findings drawn in blank, but not signed or filed, is of no significance, and will be disregarded. In finding 1 the court finds each and every allegation of plaintiff's complaint to be true. Treating the complaint as stating a cause of action,—and we think it does,—this finding alone is sufficient to support the judgment. It has long been held that a finding by reference to the complaint is sufficient. Johnson v. Klein, 70 Cal. 186, 11 Pac. 606; Gale v. Bradbury, 116 Cal. 39, 47 Pac. 778. The answer in the case consisted of denials of the allegations of the complaint and a plea of several statutes of limitations, and, inasmuch as the complaint was filed July 1, 1895, and shows that the cause of action set out arose "on or about the month of January, 1894," the finding may properly be treated as disposing of the plea of the statute of limitations. The reference in defendant's plea in bar to section 1624, Civ. Code (the statute of frauds), we think must be the result of a mistake, as we find no reference in appellant's brief to such statute. But, if the reference was intentional, it is certainly insufficient as a plea of the statute of frauds, and no finding as to it was necessary. We are inclined to agree with appellant's statement that the facts referred to in the second finding "are entirely outside of the case, and have nothing whatever to do with the case"; for thus the finding appears from an inspection of the record as it now stands. Perhaps, if the evidence had been brought up, it would have shown the connection. But, be that as it may, there is nothing in the second finding contradictory of the complaint or of the first finding. Everything stated in the second finding may exist just as there stated and still the allegations of the complaint be true. We may, then, treat the second finding as entirely immaterial, and regard it as surplusage, and still the judgment would find support in the first finding. We advise that the judgment be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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127 Cal. 543

In re GRIFFITH'S ESTATE.

COMPODONICO v. GRIFFITH et al. (S. F. 2,119.)

(Supreme Court of California. Feb. 8, 1900.)

ADMINISTRATOR'S SALE — ADVANCED BIDS AFTER REPORT—DISCRETION OF COURT.

Under Code Civ. Proc. § 1552, giving the court a discretion, upon return being made of an administrator's sale of real estate, to accept the offer of an advanced bid, if one is made, or order a new sale, the court is not limited to the alternative of accepting the first offer that may be made or ordering a new sale, but may receive as many bids as may be made, and, upon a consideration of the whole, determine whether to accept the highest bid or order a new sale.

Department 1. Appeal from superior court, city and county of San Francisco.

Proceedings upon the return of a sale of real estate by H. M. Griffith, administrator, wherein one Compodonico made an advance offer of 10 per cent. for the property. From an order accepting a subsequent bid, made by Sarah A. Wilson, and confirming a sale to her, Compodonico appeals. Affirmed.

A. D. Splivalo, for appellant. J. O. B. Wyatt, for respondents.

PER CURIAM. At the hearing of the return of sale of certain real estate made by the administrator under an order of the court, the appellant made an offer for the property of 10 per cent. more in amount than that named in the return, whereupon the court continued the further hearing of the matter for one week. At that time the appellant asked the court that the sale be confirmed to him, but the respondent Sarah A. Wilson, who was the original purchaser at the administrator's sale, offered to pay for the property a sum in excess of that bid by the appellant, and, the appellant declining to make any further bid, the court accepted the bid of Mrs. Wilson, and confirmed the sale to her. The present appeal is from this order, and it is contended by the appellant that when he made the bid of 10 per cent. advance the court, under section 1552, Code Civ. Proc., had no option except to confirm the sale to him or to order a new sale. After the appellant had made his offer, it was within the jurisdiction of the court to postpone a further hearing upon the matter until another day, and at the hearing so postponed it had the same jurisdiction to receive additional bids as it had at the original hearing. The provision in section 1552, giving the court a discretion to accept the offer of an advanced bid or to order a new sale, does not limit its exercise of that discretion to the alternative of accepting the first offer that may be made or ordering a new sale, but it is authorized to receive as many bids as may be made, and, upon a consideration of all the bids, may then determine whether to accept the highest or to order a new sale. The object of the provision in the above section is that the court may secure as high a price for the property as possible, and, if it can accomplish this result without subjecting the estate to the expense and delay attendant upon a new sale, it would seem to be in the exercise of a wise discretion to permit a competitive bidding for the property at the hearing upon the return. The order is affirmed.

127 Cal. 525

RYLAND v. COMMERCIAL & SAVINGS BANK OF SAN JOSE. (S. F. 1,827.)

(Supreme Court of California. Feb. 6, 1900.

LIMITATION OF ACTIONS—PRINCIPAL AND SURETY—WHEN STATUTE BEGINS TO RUN.

1. Under Code Civ. Proc. § 359, providing that actions against a stockholder of a corporation, to enforce statutory liability, must be brought within three years after the liability is created, limitations begin to run, as against the demand of a surety who has been compelled to pay the debt of the corporation, from the day of such payment, and not from the date of the original obligation.

2. A surety who pays the note of a corporation before action thereon is barred as to the corporation has a right of action therefor against a stockholder of the corporation, although at the time of payment an action against the stockholder by the payee of the note would have been barred, under Code Civ. Proc. § 359, limiting actions to enforce a stockholder's liability to three years after the liability accrued.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county.

Action by John W. Ryland against the Commercial & Savings Bank of San Jose to enforce a stockholder's liability to plaintiff as surety for a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Jackson Hatch, for appellant. S. F. Leib, for respondent.

CHIPMAN, C. Action against defendant as a stockholder in the Paul O. Burns Wine Company, a corporation. Defendant pleaded the statute of limitations by demurrer, which being overruled, and defendant declining to answer, judgment passed for plaintiff, from which this appeal is prosecuted. On August 15, 1894, the wine company was indebted to defendant and others in the sum of $30,000, to pay which it on that day made to defendant three promissory notes, for $10,000 each, payable, respectively, September 25, 1894, October 15, 1894, and November 15, 1894, and they were indorsed by plaintiff and his assignors. On July 27, 1895, the wine company borrowed from one Cozzens the sum of $10,000, payable one year after date, said money being borrowed to pay the above note for $10,000 falling due September 25, 1894, and it was so paid by the wine company. Plaintiff and his assignors indorsed the note given to Cozzens. The wine company paid these several liabilities in part, and plaintiff and his assignors were compelled to pay the balance, which they did, as follows: January 21, 1897, $3,000 on the Cozzens note; January 25, 1897, $400 to defendant; January 28, 1897, $20 to defendant; April 8, 1897, $1,200 on the Cozzens note; April 8, 1897, $1,150 to defendant; April 8, 1897, $50 to defendant; February 21, 1898, $6,073.75 to defendant on the note due October 15, 1894; February 21, 1898, $2,234.75 on the Cozzens note. The complaint was filed August 23, 1898.

Appellant's contention is that the indebtedness of the wine company, amounting to $30,000 on August 15, 1894, was created on that day, within the meaning of section 359, Code Civ. Proc., and the statute of limitations commenced to run in favor of appellant as a stockholder on that day, at least as to the $20,000 represented by the two notes which were then given, maturing, respectively, October 15, 1894, and November 15, 1894, and that the statute began to run as to the remaining $10,000 note at least as early as July 27, 1895, when the $10,000 note was given to Cozzens; that unless the payment by the sureties can be held to be the creation of an entirely new indebtedness of the wine company to them, and consequently of the wine company's stockholders to them, or in some way stopped the running of the statute, the judgment was erroneous. Respondent's contention is that the action is upon an indebtedness created by the fact that a payment was made by a surety of his principal's debt; that this debt is from the principal to the surety, and is not the other debt, for which both were bound to the payee of the notes; that it is an entirely new and distinct debt, as would be the debt created had the principal borrowed the money from the surety, or from some one else, and with the money thus borrowed had paid the notes. In respondent's view of the case we concur. Plaintiff's and his assignor's primary liability was to the payee of the notes. By signing the notes they became responsible to the payee for the performance of the obligation of the wine company. Civ. Code, § 2831. When they, as sureties, paid the obligations, the wine company became bound to reimburse them (Id. 2847), and not until the sureties had discharged the obligation of the principal, or some part of it, did any liability from the principal to the sureties arise. The statute of limitations, as against the payee, began to run in favor of the stockholders of the wine company at the date of the notes (Hunt v. Ward, 99 Cal. 612, 34 Pac. 335); but, as there was as yet no liability of the stockholders to the sureties, there was nothing, so far as concerned the sureties, for the statute to operate upon. The statute could not be set in motion against the sureties until a liability to them had arisen, and no liability arose until they paid the debt of their principal or some part of it. The rule is thus stated by Mr. Wood in his work on Limitations (volume 1, p. 394): "Where a surety is compelled to pay a debt, the statute begins to run against his claim from the day of such payment, and not from the date of the original obligation" (see, also, 1 Brandt Sur. § 230; see, also, cases cited 24 Am. & Eng. Enc. Law, 792); and there can be no different rule where the principal is a corporation. It appears from the complaint that the executors of Peter O. Minor, deceased, one of the sureties, paid $6,073.75 on the note falling due October 15, 1894; and appellant claims that, this payment being made more than three years after the note was due, the debt arising from the payment was barred as to the stockholders by section 359, Code Civ. Proc., and therefore the judgment should be modified by striking from it the proportionate share of the $6,073.75 of appellant. The rule above quoted from Wood on Limitations is subject to the exception that the surety must have paid the original debt before the statute had run thereon (volume 1, p. 398); for the law will not raise a promise on the part of the principal to reimburse the surety where the surety was under no legal obligation to pay. But the surety was under obligation to the payee of the note, jointly and severally with the wine company, for four years after it became due. No liability of the corporation or its stockholders to the surety arose until he paid the note or some part of it, and as, in the present case, he paid within the time during which he was liable to the payee, the case is not within the exception above stated, and the statute as to him began to run from the date of payment by him. The liability of the corporation to the payee was not barred until after four years elapsed, although the payee could not sue the stockholders on the note after three years. But this is not the liability of the stockholders to the surety. The law implied an agreement on their part to indemnify the surety whenever he paid the obligation, and this implied agreement was distinct from their liability to the payee. The right of action upon the liability arising out of this implied agreement accrued upon payment by the surety, and not before, and it must follow that section 359 refers to this liability arising out of the agreement of the stockholders to indemnify the surety, and not out of the original obligation of the corporation to the payee. The judgment should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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6 Cal. Unrep. 390

LYON v. ROBERTSON et al. (S. F. 1,125.)

(Supreme Court of California. Feb. 5, 1900.)

BILLS AND NOTES—RENEWAL—CONSIDERATION—WIDOW'S LIABILITY.

1. The surrender of valid notes to one of the joint makers for cancellation is a good consideration for a new note given by him and the widow of the other maker in renewal thereof.

2. A widow is liable on her note given in renewal of prior notes to which her deceased husband was a party, though she gave it under misapprehension as to her liability for his debts, not induced by any misrepresentation by the payee.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county.

Action by W. P. Lyon against Aurelia Robertson and others. From a judgment for plaintiff, defendant Aurelia Robertson appeals. Affirmed.

D. W. & C. E. Herrington and H. V. Morehouse, for appellants. Nicolas Bowden, for respondent.

BRITT, C. Action on a promissory note of date August 1, 1893, by the terms whereof the appellant Aurelia Robertson, then bearing the name of Orilla Chynoweth, and two others,—one of whom was W. P. Lyon, Jr.,—jointly and severally promised to pay to plaintiff the sum of $3,699.50. Mrs. Robertson and her present husband, who is joined with her pro forma, defend on the ground that she executed the note without consideration. Plaintiff had judgment.

At the trial there was evidence tending to show that said Aurelia, or Orilla, as she was formerly called, was the wife of one Louis Chynoweth, who died May 10, 1893. Louis Chynoweth, at the time of his death, and said W. P. Lyon, Jr., were jointly indebted to the plaintiff on three certain promissory notes, by them executed, for the aggregate principal sum of $3,500, bearing interest. Said Louis and certain other persons together owned a farm and carried on the business thereof. Mrs. Robertson testified: "After his death, the partners of Louis in the business spoke of it, and treated me as if I had succeeded to his interest in the premises, and was liable for his debts as his successor, so that I believed I was liable for his debts." She executed the note in suit, and plaintiff accepted the same, upon the mutual understanding that it was "to take the place" of the said prior notes to which said deceased had been a party, and plaintiff thereupon surrendered the old notes to said W. P. Lyon, Jr., who canceled them. The court below held that the new note was supported by sufficient consideration, and we are of the same opinion. Prejudice suffered by the promisee, as well as benefit conferred on the promisor, may be the consideration for a contract. Civ. Code, § 1605. There is no doubt that the relinquishment by a creditor of a prior valid demand is a sufficient consideration for a new promise in his favor. There was such relinquishment in this case. That the old notes were delivered to W. P. Lyon, Jr., and not to the appellant Aurelia, can make no difference. Lyon, Jr., being a joint maker, both of the old notes and the new one, was entitled to receive the former when they were replaced by the latter. Nor is it of any moment that appellant may have been mistaken as to her legal relation to her deceased husband's estate or to his debts. It does not appear that plaintiff in any way contributed to her misapprehension, or even had knowledge thereof. The cases cited for appellant—Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028, Rosenberg v. Ford, 85 Cal. 610, 24 Pac. 779, and Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862—do not support her contention. In none of them did it appear that the creditor incurred any detriment, beyond what he was already legally bound to suffer, in consequence of the wife's promise to pay the husband's debt. The judgment and order denying a new trial should be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

127 Cal. 532

BENSON et al. v. BUNTING et al. (S. F. 1,972.)

(Supreme Court of California. Feb. 7, 1900.)

MORTGAGES — FORECLOSURE — REDEMPTION — FRAUD — MISTAKE OF LAW — PRICE — INADEQUACY — APPEAL — DISMISSAL — FICTITIOUS DEFENDANT — NOTICE.

1. A mortgagor's bill to redeem alleged that defendant had employed plaintiffs' attorneys to deceive them, and lead them to believe that they had a full year to redeem; that the representations made by said attorneys were false, and made in a manner not warranted by the information of the defendant or his attorneys, and made with intent to deceive plaintiffs. *Held*, that such averment was a sufficient allegation of fraud, within Civ. Code, § 1572, declaring fraud to consist in the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

2. Where all parties to a foreclosure of a mortgage misunderstood the law to permit a redemption at any time within one year, and an offer to redeem was made within that period, and refused, there was such a mistake of law as would justify a judgment permitting a mortgagor to redeem after the legal period of redemption had expired.

3. Inadequacy of the price paid at foreclosure sale is a proper allegation in a bill in equity to redeem after expiration of statutory period of redemption, since it shows that the equity is valuable and important.

4. An appeal from a judgment sustaining a demurrer to bill in equity will not be dismissed on the ground that fictitious defendants named in the bill have not been served with notice of the appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by F. R. Benson and others against William L. Bunting and others. From a judgment dismissing the complaint on demurrer, plaintiff appeals. Reversed.

B. B. Haskell, for appellants. Ed. C. Harrison, for respondents.

HAYNES, C. In 1892, Margaret Reese and Mary E. Dever, two of the plaintiffs in the action, executed to one William M. Iburg a mortgage upon the real estate described in the complaint herein, to secure the payment of money. In a proceeding to foreclose said mortgage, a decree for the sale of the mortgaged premises was entered, on April 13, 1897, and on June 1, 1897, the mortgaged premises were sold to defendant Bunting for the sum of $950, and on February 1, 1898, the commissioner who made the sale conveyed said premises to the purchaser. In January, 1898, the defendants in the foreclosure case offered to redeem said premises from said sale, and tendered to Bunting the full amount required to effect such redemption, which was refused, and this action is prosecuted to obtain a decree permitting them to redeem, notwithstanding the statutory period for redemption had expired before their offer to redeem was made. The other defendants were fictitious persons, who were not served, and Bunting will be regarded as the sole defendant.

The complaint contains two counts or causes of action,—the first alleging that plaintiffs were induced, through the fraud of the defendant, to believe that they had, under the statute, 12 months within which to redeem the premises sold; and the second count was based upon the alleged mutual mistake of all the parties, all believing and agreeing that the mortgagors had 12 months within which to redeem, when in fact the law gave them but six months. The defendant demurred to each count upon the ground that the facts stated did not constitute a cause of action. The demurrers were sustained, and judgment of dismissal entered, and plaintiffs appeal.

In 1892, when the mortgage was executed, the statute provided that redemption might be made at any time "within six months after the sale." Code Civ. Proc. § 702. This section was amended February 26, 1897, by extending the time for redemption to "twelve months," the amendment to take immediate effect; and in the second count it was alleged, in substance, that all the parties understood and agreed that said amendment, which was passed and took effect before the decree was entered in the foreclosure case, controlled, and that under it the time for redemption was extended to twelve months. It is conceded by plaintiffs that the statutory time within which redemption must be effected is fixed by the statute in force at the time the mortgage was executed, and not by one subsequently enacted, and that, under the statute, they should have redeemed within six months from the date of the sale.

It is alleged in the first cause of action that at the time of the sale, and repeatedly thereafter, until the last of January, 1898, the defendant represented to the plaintiffs that they had a full year in which to redeem; that prior to the sale the plaintiffs employed certain attorneys, who continued in their employment until the 29th of March, 1898; that on June 1, 1897 (the day of the foreclosure sale), Bunting employed the same attorneys, ostensibly to act for him in bidding for said property at said sale, but in reality to deceive the plaintiffs, and lead them to believe that they had a full year in which to redeem said property; that they, as well as defendant Bunting, then, and repeatedly afterwards, until January 31, 1898, knowing that plaintiffs reposed full confidence in them, and intending to cheat and defraud the plaintiffs in the interest and for the benefit of defendant Bunting, informed them that they had a full year in which to redeem; that these representations were false, and were so made in a manner not warranted by the information of the defendant or of his said attorneys, and were so made with intent to deceive the plaintiffs.

Respondent insists that this mode of alleging actual fraud applies only to cases of contract, as specified in section 1572 of the Civil Code; and also insists that the allegations of fraud are not sufficiently specific; that the alleged misrepresentation was of a matter of law, and not of fact, and after all was a mere matter of opinion; that there was no confidential or fiduciary relation between the plaintiffs and defendant; and that plaintiffs had no right to rely upon his representations. I think, however, that the allegations touching defendant's employment of plaintiffs' attorneys, and the allegations touching their intention in making the alleged representations, are sufficient, as tested by general demurrer; but if it be conceded that the representations made by the defendant and by the attorneys, who, it would seem from the allegations, were acting for both parties, were honestly made, and without any intention to deceive or mislead, enough is alleged to entitle plaintiffs to relief; that if upon the trial the court should find that these representations were honestly made, and without any intention to mislead or deceive the plaintiffs, and that relying upon the correctness of the representations so made they failed to redeem within six months, as they would otherwise have done, and within the twelve months, which they were assured they had under the law, they offered to redeem, and tendered the redemption money due at the date of the tender, they would be entitled to relief. It is alleged that, if they had not been informed and believed that they had a year in which to redeem their property, they would have redeemed it within the six months; that the property was of the value of $5,000, and was sold to defendant for $950. If, therefore, it be conceded that the representations touching the time for redemption were made with an honest, though erroneous, belief that they were true, no injustice would be done the defendant in permitting the plaintiffs now to redeem. Upon that supposition the defendant made his bid upon the basis of a twelve-month period for redemption, and he should have accepted their offer to redeem, made within that time, and his refusal to do so operated as a fraud upon them, and entitled them to relief in equity.

Upon this subject the supreme court of the United States said: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that, before the time had expired to redeem the property, the plaintiff was told by defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances, the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing, and were made without consideration, upon the ground that the debtor was lulled into a false security. Guinn v. Locke, 1 Head, 110; Combs v. Little, 4 N. J. Eq. 310; Griffin v. Coffey, 9 B. Mon. 452; Martin v. Martin, 16 B. Mon. 8; Butt v. Butt, 91 Ind. 305; Turner v. King, 37 N. C. 132; Lucas v. Nichols, 66 Ill. 41; McMakin v. Schenck, 98 Ind. 264. In Southard v. Pope's Ex'r, 9 B. Mon. 261, 264, it is said that 'a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defendant in execution, and authorize an application by him to a court of equity for relief.'" Schroeder v. Young, 161 U. S. 334, 344, 16 Sup. Ct. 512, 516, 40 L. Ed. 721, 726.

2. As to the second count, we think it clearly sufficient to justify a judgment permitting the plaintiff to redeem. Section 1578 of the Civil Code defines a mistake of law to be: "(1) A misapprehension of the law by all parties, all supposing they knew and understood it, and all making substantially the same mistake as to the law." The mistake as to which statute governed the right of redemption in that particular case was one which might be readily made. The redemptioners might well rely upon the statements of the defendant and of counsel, and have adopted their views as to the time given by law for redemption. The mistake was one which related to rights which the redemptioners had in the property sold under the decree of foreclosure, and was solely in regard to the time within which an undisputed and well-understood legal right might be exercised. All understood the law alike, all making the same mistake; and where, as in this case, the mistake operates to deprive one of the parties of a valuable right, and to give the other a material advantage not contemplated by either, a court of equity will adjust their property rights as though the law relating thereto was, in fact, as the parties supposed it to be, if that becomes necessary to do justice between them. In Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 215, 5 L. Ed. 589, 600, Chief Justice Marshall said: "Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity."

In view of our conclusions hereinbefore stated, it is not necessary to consider the question of inadequacy of the price paid for the property by the defendant, further than to say that the inadequacy here alleged, conceding that it was not so gross as to constitute a ground for vacating the sale where the statute gives a right of redemption, is a proper allegation in a bill in equity to redeem, as it shows that the equity involved is valuable and important.

Respondent contends that the appeal should be dismissed upon the ground that the two fictitious defendants named in the complaint should have been served with the notice of appeal. It is sufficient to say that no service of process was made upon them, or upon any person intended to be represented by these names, nor was there any appearance by them, or by any person other than defendant Bunting. These fictitious persons could not be affected by any judgment this court or the court below might render. I advise that the judgment appealed from be reversed, with directions to the court below to overrule the demurrer to each cause of action.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court below to overrule the demurrer to each cause of action.

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6 Cal. Unrep. 392

In re DOYLE & SON'S ESTATE. (L. A. 693.)

(Supreme Court of California. Feb. 5, 1900.)

INSOLVENCY—ASSETS—SURRENDER—CREDITORS' RIGHTS.

Where, prior to insolvency proceedings against a firm, the wife of a member, who was also a creditor, received a draft belonging to the firm in good faith, without intending to defraud other creditors, but to keep the money from being wasted by attachments, her surrender of the principal part of the money to the assignee after an action was brought by him against her therefor, but before judgment, was in time to entitle her to share in the dividends, as a creditor free from fraud, though she contested the assignee's right to the balance of the proceeds of the draft, which she had used for family purposes.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Judicial accounting of Gregory Perkins, assignee of the firm of D. M. Doyle & Son, insolvents. From an order allowing the claim of Lizzie R. Doyle, and from an order settling the assignee's account, he appeals. Affirmed.

Dillon & Dunning, for appellant. Dyer & Potter, for respondent.

CHIPMAN, C. Appeal of the assignee from an order allowing respondent's claim against the insolvents' estate, and an order settling the assignee's account. It appears that Doyle & Son borrowed from the wife of Doyle, Sr., the sum of $1,500 in January, 1897, part of which the firm invested in starting a grocery business in Los Angeles. The firm sold the entire stock and fixtures March 10, 1898, for $948.90; receiving at the time $200, and on March 17th the balance, $748.90. They paid to creditors the $200, and deposited in bank, to the credit of Doyle & Son, the $748.90. Within 30 days after the sale they drew out this money, and took a New York draft for the amount, payable to the order of Mrs. Doyle, and delivered it to her. The evidence is, to some extent, directed to the intention of the parties in this transaction. Without quoting from the testimony, it appears reasonably clear therefrom that the purpose of Doyle and wife was to keep the money from being wasted by attachment suits, and to hold it for an equitable distribution among all the creditors. This is apparently the view taken by the trial court in making the orders complained of, and finds support in the evidence. After Mrs. Doyle had secured possession of the draft, the creditors, March 24, 1898, began proceedings against Doyle & Son in involuntary insolvency, in which a receiver was appointed; and on the same day he brought an action against Mrs. Doyle and her husband, D. M. Doyle, to enjoin Mrs. Doyle from converting said draft into money, and for judgment against her for the delivery of the draft or its proceeds to the receiver. The court made the order enjoining Mrs Doyle from transferring or negotiating the draft. A stipulation was entered into by the attorneys of the respective parties agreeing that the draft should be cashed, and the proceeds be deposited with the clerk of the court, "less the sum of one hundred and fifty dollars, * * to be paid to the said Lizzie R. Doyle; * * * it being understood that the payment of the said one hundred and fifty dollars, * * * and the payment of the balance of said money into court, shall not prejudice any rights of the plaintiff herein, or her proceeding in this case, or any motion heretofore made or to be hereafter made in this case." This stipulation is not dated, but must have been entered into between March 26, 1898, and May 10, 1898. The $598.90 were accordingly deposited with the clerk. On May 10th Mrs. Doyle's attorneys served and filed notice that she relinquished all right to the fund represented by the draft "heretofore placed in her hands by D. M. Doyle, in the form of a New York draft, to wit, the sum of $748.90, for the purpose of retaining or holding until settlement with creditors of said D. M. Doyle & Son could be had,—said money now being in the hands of the clerk of this court, less the sum of one hundred and fifty dollars heretofore paid over to Lizzie R. Doyle for the purpose of defraying funeral expenses, according to a certain stipulation heretofore filed,—and hereby surrender the same to the receiver, Gregory Perkins, now assignee of estate of D. M. Doyle & Son." The court on May 28th indorsed on this notice the following order: "Upon foregoing stipulation, the clerk is hereby directed to pay over to the assignee or his attorney in said action the balance of the fund in his hands in said case." Again, on May 24, 1898, Mrs. Doyle's attorneys served and filed a notice, referring to the previous notice of renunciation, offering to surrender to the assignee all her right to the fund deposited with the clerk, to wit, "the sum of $598.48, or thereabouts, or any interest in any other property belonging to said insolvents." It also appeared that on the 8th day of June, 1898, the court entered judgment in the action brought by the receiver against Mrs. Doyle and her husband. In this judgment the court recited that Mrs. Doyle had turned over the $598.90, and that defendants had offered to confess judgment for $150 "on condition that plaintiff would amend his complaint by striking out certain portions thereof," and recited that plaintiff had accordingly so amended his complaint; but these stricken-out portions are not stated or identified so as to enable us to point them out. Findings were waived, and the court adjudged that plaintiff recover $150 from defendant Lizzie R. Doyle, and costs, taxed at $25.50. The evidence adduced at that trial is not brought up. Mrs. Doyle filed her claim with the assignee for $1,634.46, which the assignee disallowed in his final report, and excluded it from his account on the ground that Mrs. Doyle had obtained a preference on account of said claim within 30 days prior to the insolvency proceedings, in violation of section 50 of the insolvency act. At the hearing the evidence referred to in the early part of this opinion, relating to the money loaned by Mrs. Doyle to the firm, was submitted, and also the proceedings above set forth; and the court ordered the assignee to amend his account by allowing Mrs. Doyle's claim for $1,310.21, and directing that, from the dividend to be paid her, the assignee deduct the amount of the judgment and costs ($175.50) theretofore entered against her.

Appellant's contention is that respondent received a preference in violation of the insolvent act, and that she, as a creditor, could not surrender the money received by her, and receive a dividend, unless such surrender was voluntarily made, and not as the result of adversary proceedings instituted by the assignee, and prosecuted to final judgment; citing numerous cases, and Bump on Bankruptcy. The evidence justified the court in holding that respondents acted in good faith in taking the draft, and without any intention of defrauding the other creditors. Shortly after the receiver brought his action, and some time before judgment, she surrendered all the money received by her, except $150, which the evidence tends to show she used for family purposes. In that action, however, the court gave judgment against her for this $150, reciting therein that she had turned over to the clerk the balance received by her. The court evidently, in view of the stipulations and notices already referred to, and probably in view of evidence at the trial of that action not now before us, acquitted respondent of all actual fraud in the matter, but held her liable under the insolvent act for constructive fraud alone as to the money appropriated by her. Having turned over the money to the clerk, and he to the assignee, some time before judgment, the court rightly, we think, held her entitled to share as a creditor in the dividends; first deducting from her share this $150. Respondent was entitled, under the circumstances, to avail herself of the locus pœnitentiæ at the time she did so, and she did not lose her right to share in the dividends because she contested the assignee's claim to the $150. We so understand the law, as stated by Mr. Bump at the page of this author's book referred to by appellant, and we find nothing to the contrary in the cases cited by appellant. In view of all the facts, we think the orders of the trial court were supported by the evidence. They certainly were fair and just, and we advise their affirmance.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the orders appealed from are affirmed.

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127 Cal. 550

CLARKE v. POLICE LIFE & HEALTH INS. BOARD. (S. F. 1,478.)

(Supreme Court of California. Feb. 8, 1900.)

MUNICIPAL CORPORATIONS—POLICE FORCE—RETIREMENT—PENSIONS.

Act March 2, 1897, amending Act 1889, § 3, provides that where a person has served in the regularly constituted police department of a city and county subject to the provisions of the act relating to the police life and health insurance board for 20 years or more in the aggregate, such board may direct that, after becoming 60 years of age, he be retired on pension. *Held*, that where relator resigned from the police force of the city of San Francisco in 1887, after having served more than 20 years in the aggregate, the board not having any control over him at the time the act took effect, he was not entitled to a pension thereunder.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Alfred Clarke against the Police Life & Health Insurance Board. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Alfred Clarke, in pro. per. H. T. Cresswell, for respondent.

BEATTY, C. J. The appellant filed his petition in the superior court for a writ of mandamus to the Police Life & Health Insurance Board, compelling that body to grant him a pension out of the fund arising under the provisions of the act of March 4, 1889, entitled "An act to create a police relief, health and life insurance and pension fund," etc. (St. 1889, p. 56). A general demurrer to his petition was sustained, and judgment passed in favor of the board. This is an appeal from the judgment, and the sole question to be determined is whether, on the facts stated in the petition, the appellant is, by the terms of the law, as amended March 2, 1897 (St. 1897, p. 52), entitled to a pension.

The petitioner was appointed and commenced his service on the police force of the city and county of San Francisco December 3, 1856. He continued to serve until September 1, 1868, when he was removed without cause. On the 1st of February, 1869, he was reappointed, and served continuously from that date until December 31, 1887, when the condition of his health compelled him to resign. Up to the date of appellant's resignation from the force the only law providing for the allowance of any pecuniary benefits to policemen, in addition to their salaries, was the act of April 1, 1878 (St. 1878, p. 879). Under the provision of that act the legal representative of a policeman dying in the service was to be paid the sum of $1,000, and to any policeman resigning on account of bad health or physical infirmity was to be paid the amount he had contributed to the "life and health insurance fund"; that is to say, he was to be paid $2 a month for the time he had been in service, that being the sum paid into the special fund from the general county funds, under the act of 1878, on account of every policeman on the rolls. As the petitioner resigned on account of ill health in 1887, while the act of 1878 was in force, it is to be presumed that he received the two dollars per month to which he was entitled, and that his claims upon the fund ended with his retirement from the force. More than a year after his resignation, the act of 1889 was passed, by which a new system was established, and the act of 1878 repealed. Pennie v. Reis, 80 Cal. 266, 22 Pac. 176; Id., 132 U. S. 470, 10 Sup. Ct. 149, 33 L. Ed. 426; Clarke v. Reis, 87 Cal. 543, 25 Pac. 759. By this act it was provided that pensions should be paid to policemen retired after 20 years' service. The petitioner makes no claim under this law as originally enacted. He seems to concede that he was not within its terms, because, and only because, his service had not been continuous for 20 years, though the aggregate of his two terms of service was 30 years. By the act of March 2, 1897, however, section 3 of the act of 1889 was amended so as to be read as follows: "Whenever any person, at the taking effect of this act or thereafter, shall have been duly appointed or selected, and sworn, and have served for twenty years, or more, in the aggregate, as a member in any capacity or any rank whatever, of the regularly constituted police department of any such county, city and county, city or town, which may hereafter be subject to the provisions of this act, said board may, if it see fit, order and direct that such person, after becoming sixty years of age, be retired from further service in such police department, and from the date of the making of such order the service of such person in such police department shall cease, and such person so retired shall thereafter, during his lifetime, be paid from such fund a yearly pension equal to one-half of the amount of salary attached to the rank which he may have held in said police department for the period of one year next preceding the date of such retirement." Under this amendment, providing for pensions to those whose service in the police department should extend in the aggregate to 20 years, petitioner claims his pension. We think it clear, from a reading of the amended section, that it has no application to one whose connection with the department was at an end before the passage of the amending act. It simply provides that in case of an officer, who is a member of the force, who is 60 years of age, and who has served 20 years in the aggregate, the board may, in its discretion, retire him on half pay, or retain him in active service at full pay. It does not apply to a person over whom the board has no power or authority whatever. The main portion of appellant's argument is directed to the alleged discrimination of the board in awarding pensions to others who, as he contends, are less deserving than himself, and no more clearly within the letter of the statute. It would make no difference, so far as this proceeding is concerned, whether this charge is true or not. The only question we are concerned with is whether, under the law, it is the duty of the board to allow a pension to the petitioner, and, since we have concluded that such is not their duty, it would not alter the result if it appeared that they had awarded pensions to others not entitled to receive them. In saying this we are not to be understood as intimating that the other pensions alluded to have been improperly allowed. Those questions are not before us for decision, and between all those cases and the present case there exists the important difference that the pensioners were in service at the date of their respective retirements and subsequent to the amendment of the act. The judgment of the superior court is affirmed.

We concur: McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.

MEMORANDUM DECISIONS.

BALDWIN v. STATE. (Sac. 526.) (Supreme Court of California. Nov. 28, 1899.) Department 1. Appeal from superior court, Sacramento county. Action by A. S. Baldwin against the state of California. Judgment for plaintiff, and defendant appeals. Reversed. Atty. Gen. Ford, for the State. J. D. Thornton and Freeman & Bates, for respondent.

PER CURIAM. This case involves the same questions considered and disposed of in Reis v. State (Sac. 525; just decided) 59 Pac. 298, and on the authority of that case the judgment and order denying a new trial herein are reversed.

MEAD v. STATE. (Sac. 527.) (Supreme Court of California. Nov. 28, 1899.) Department 1. Appeal from superior court, Sacramento county. Action by M. H. Mead against the state of California. Judgment for plaintiff, and defendant appeals. Reversed. Atty. Gen. Ford, for the State. J. D. Thornton and Freeman & Bates, for respondent.

PER CURIAM. On the authority of Reis v. State (Sac. 525) 59 Pac. 298, which involved similar questions to those presented in this case, the judgment and order denying a new trial herein are reversed.

127 Cal. 331

MILLER et al. v. CARLISLE et al. (Sac. 560.) (Supreme Court of California. Dec. 29, 1899.) Department 2. Appeal from superior court, Butte county. Action by William T. Miller and others against J. O. Carlisle and others to enforce mechanics' liens. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant Paul H. Boggs appeals. Reversed. Nicoll & Orr, for appellant. Warren Sexton, for respondents.

PER CURIAM. This appeal is by the defendant Boggs from the personal judgment in the action, rendered against him and his co-defendant, Carlisle. The facts necessary to an understanding of the case are stated in the opinion rendered on the appeal (Sac. 584; 59 Pac. 785) from the order denying the motion of Carlisle for new trial. For the reasons there given, it appears that the court below had no jurisdiction to render the judgment appealed from. The judgment is also erroneous, in that it awards a recovery in favor of the plaintiffs jointly; their demands being several. It is therefore reversed.

PECK v. ADAMS et al. (S. F. 1,927.)[1] Supreme Court of California. Nov. 9, 1899.) Department 1. Appeal from superior court, Santa Cruz county. Action by M. Elizabeth Peck, as special administratrix, etc., against E. F. Adams and others. From an order allowing defendants' motion to dismiss the action, plaintiff appeals. Modified. J. F. Utter, J. J. Scrivner, and A. H. Cohen, for appellant. Jeter & McKinney and Chas. B. Younger, for respondents.

PER CURIAM. The facts in this case are identical with the facts in the action by the same plaintiff against Agnew (S. F. 1,928; this day decided) 59 Pac. 125, except as to the description of the property involved in the suit. Upon the authority of that case the motion to dismiss the appeal is denied, and the superior court is directed to modify the judgment as therein ordered.

PEOPLE v. SPENCER. (Cr. 567.) (Supreme Court of California. Dec. 23, 1899.) Department 2. Appeal from superior court, Los Angeles county. D. C. Spencer was convicted of larceny, and he appeals. Affirmed. W. H. Shinn and S. V. Landt, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. This case is a companion case to People v. Campbell (Cr. 568) 59 Pac. 593. The parties were jointly charged, but were tried separately. The evidence was substantially the same, and, as the prosecution and defense were conducted by the same attorneys, the procedure and the exceptions are the same. The exception, if any, consists in the fact that the point is made on this appeal that the court erred in refusing to give certain instructions asked for by the defendant. The instructions refused, so far as not substantially already given, are in support of the contention of the defendant that, if the prosecuting witness was induced to part with the possession of his money through the false personation by Campbell of Davies, then the crime of larceny was not shown. This point, though not raised as to instructions, was really decided in the Campbell Case, as were all others raised on this appeal. It was held that, although the facts would have justified a prosecution for false personation, still if, under the statute, the facts bring the case within the definition of larceny it may be prosecuted as such. On the authority of People v. Campbell the judgment and order are affirmed.

PEOPLE v. WILLIAMS et al. (Cr. 533.) (Supreme Court of California. Dec. 19, 1899.) Department 1. Appeal from superior court, city and county of San Francisco. One Azhderian was convicted of extortion, and he appeals from the judgment. Reversed. Frederick McGregor and Evans & Meredith, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. The defendant Azhderian was jointly charged, tried, and convicted with the co-defendant, Elsie Williams, of the crime of extortion. He now prosecutes a separate appeal from the judgment and order denying his motion for a new trial. The two appeals are here upon one transcript, and the grounds for the appeal are substantially the same in both cases. Upon the authority of the decision in the Williams Case (this day filed) 59 Pac. 581, the judgment and order are reversed, and the cause remanded.

In re SCOTT'S ESTATE. (S. F. 1,612.) (Supreme Court of California. Nov. 7, 1899.) In bank. Appeal from superior court, city and county of San Francisco. In the matter of the estate of Kate Scott, deceased, an appeal was taken. Judgment on appeal set aside, and opinion withdrawn. D. C. Murphy, for appellant. E. Myron Wolf, H. Van Leuven, James P. Sweeney, and Jacob Samuels, for respondents.

PER CURIAM. An order having been made in department on November 6, 1899, setting aside a former submission of this cause and allowing respondents 20 days in which to file a brief, and an opinion which had been prepared before that time having been inadvertently filed on said November 6th, and judgment thereon having been inadvertently entered, now, therefore, it is ordered that said judgment be set aside, and said opinion withdrawn, and that the cause, upon the filing of respondents' brief, stand submitted in department 2.

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[1] Rehearing denied December 8, 1899.

SIEMSEN v. OAKLAND, S. L. & H. ELECTRIC RY. CO. (S. F. 1,679.) (Supreme Court of California. Feb. 12, 1900.) Department 2. Appeal from superior court, Alameda county. Action by W. Siemsen against the Oakland, San Leandro & Haywards Electric Railway Company. Judgment for defendant, and plaintiff appeals. Motion to amend record granted. Fitzgerald & Abbott, for appellant. Sam Bell McKee (Chickering, Thomas & Gregory, of counsel), for respondent.

PER CURIAM. The respondent having suggested a diminution of the record, and having made a motion to amend the same by adding thereto the affidavit of C. Gustafson, set forth in the motion, and the matter having been heretofore regularly heard and submitted, it is now ordered that said motion be granted, and that said affidavit of C. Gustafson be added to the record of this appeal, and constitute a part thereof.

WHITE v. HAYDEN. (L. A. 461.) (Supreme Court of California. Nov. 9, 1899.) Department 2. Appeal from superior court, Kern county. Action by John W. White against B. A. Hayden. Judgment for defendant. Plaintiff appeals. Affirmed. Cannon & Freeman and J. W. Ahern, for appellant. J. E. Patton, for respondent.

PER CURIAM. As the relief sought by plaintiff in this action may be obtained in cause L. A. 460 (this day decided) 59 Pac. 118, the judgment in this cause is affirmed, without costs to either party.

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